

# Driving Instructors and Assessors Fit and Proper Policy

## 1 Policy Statement

This policy is intended to assist delegated decision makers in carrying out their functions in ensuring that all persons holding a licence as a driving instructor or acting on behalf of Transport for NSW as an Assessor (or any other form of driver or rider tester) are considered 'fit and proper', of 'good repute' and of 'good character'. In this context, a person may be considered 'fit and proper' if they possess the necessary inherent characteristics, moral fibre, good repute, good character, honesty, values and reputation to enable Transport for NSW to give effect to the objects of the *Driving Instructors Act 1992* ('the Act') and to perform its functions as a government agency enabling safe and efficient journeys.

This policy notes that 'fitness and propriety', 'good repute', and 'good character' are only three of several characteristics that a decision maker is required to take into account under 'the Act' when considering whether a regulatory program participant should be refused entry, or a licence or agreement suspended or cancelled. This policy does not deal with characteristics such as competence and medical fitness which are also required to be considered.

## 2 Scope and coverage

This policy is for use by Transport for NSW staff administering any regulatory program in which a regulatory program participant:

- provides a driving instructor function,
- provides professional driver training, or
- conducts driving competency assessments on members of the public.

This includes the following regulatory programs:

- Driving Instructor Licensing Scheme,
- Heavy Vehicle Competency Based Assessment,
- Motorcycle Licence Training and Testing Scheme,
- Older Driver Assessors, and
- Safer Drivers Course.

Under Section 18 of 'the Act', Transport for NSW must refuse to grant a driving instructors licence where it is not satisfied that a person is 'fit and proper', of 'good repute' or of 'good character'. Similarly, Section 26 of 'the Act' requires Transport for NSW to cancel a Driving Instructors Licence where Transport for NSW is satisfied that the holder is no longer 'fit and proper', of 'good repute' or of 'good character'.

This policy is intended to provide guidance for assessing 'fitness and propriety', 'good repute' and 'good character' with respect to regulatory program participants, incorporating:

- Applicants - both when applying for an instructor's licence and applying for entry into the relevant regulatory program (where applicable), and;
- Participants - both when considering their 'fitness and propriety' to remain within a regulatory program and/or to hold a driving instructor's licence generally.

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This policy does not apply to interstate driving instructors in NSW working under the Automatic Mutual Recognition (AMR) scheme. AMR enables holders of occupational licences, including a driving instructor, to work in a second state or territory without the need to obtain a licence or pay fees in that second state or territory.

If a worker is eligible for AMR, they work under an Automatic Deemed Registration (ADR).

However, under Commonwealth legislation, AMR workers are not subject to NSW laws requiring attainment or possession of some qualifications or experience relating to fitness to carry on the activity. This extends to requirements for a person to be 'fit and proper', of 'good repute' or of 'good character'.

Conduct by an AMR worker which would lead to action taken under this policy if they were a NSW licence holder, should be referred by notification back to the AMR workers home state, and Legal consulted.

### 3 Purpose and intended outcomes

Transport for NSW administers third party regulatory programs in a number of areas relating to road safety, vehicle standards, licensing and registration. Under these regulatory programs, Transport for NSW accredits, authorises, licences or otherwise engages persons to perform functions which involve dealing with the public on behalf of the NSW Government. This policy is designed to reduce some of the risks associated with Transport for NSW third party regulatory programs. These risks may include harm or potential harm to members of the public, damage to property or reputation, and corrupt business practices.

Following an investigation conducted by the Independent Commission Against Corruption (ICAC) in January 2014 (Operation Nickel) and a subsequent organisational review of third party regulatory programs in NSW, Transport for NSW considers all third party regulatory program providers to be 'Public Officials'. This is based on their requirement to enter into an agreement with or obtain a statutory licence from Transport for NSW that defines both the services they provide and conditions under which they may provide these services. As a result, the importance of their fitness and propriety cannot be overstated.

This Policy, along with all supporting procedures, is not designed to be a discriminatory tool for the exclusion of specific regulatory program participants, but rather a guide to assist Transport for NSW decision makers to apply a consistent standard in ensuring that regulatory program participants do not pose a risk to the public, or to Transport for NSW in terms of its reputation or to carrying out its obligations.

### 4 Policy

Transport for NSW has an obligation to members of the public receiving driving instruction to ensure that instructors and assessors are of 'good repute', 'good character' and 'fit and proper' to participate in the regulatory program. 'Good repute', 'good character' and 'fit and proper' are not terms that can be defined as they must be viewed subjectively in the context of the occupation being sought. The High Court of Australia, in the matter of the [Australian Broadcasting Tribunal vs Bond \(1990\)](#), found that in order to determine whether a person is fit and proper to hold a particular licence, reference should be made to their "conduct, character and reputation".

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In the case of driving instructors and assessors, conduct, character and reputation are scrutinised to provide assurance that instructors and assessors can participate in the regulatory program in accordance with the regulatory program objectives, which are:

- (a) to ensure that driving instructors meet minimum standards relating to competency in driving instruction, probity and character in order to protect the community and to benefit the driving instruction industry, and
- (b) to minimise the potential for corruption in the driving instruction industry and inappropriate behaviour by driving instructors, and
- (c) to promote the safety and protection of persons receiving driving instruction.

With this in mind, section 5 'Considerations' provides a list of examples which may preclude a person from being considered 'fit and proper', of 'good repute' or of 'good character'.

### 5 Considerations for refusal, suspension or cancellation or other sanction

Any person seeking to be licensed by Transport for NSW as a driving instructor or to act on behalf of Transport for NSW as an assessor or driver tester must demonstrate that they can satisfy the considerations set out in this section before they can be considered 'fit and proper', of 'good repute' or of 'good character'. Failure to meet these considerations by a regulatory program participant should ordinarily result in a refusal or a suspension or cancellation from the regulatory program in cases where the decision maker determines that the objects of 'the Act' cannot be met by the regulatory program participant.

Under the Automatic Mutual Recognition (AMR) scheme, an interstate licence cannot be refused or suspended but it can end or be cancelled. Therefore, the policy only applies to the AMR scheme with respect to ending/cancelling their Automatic Deemed Registration. However, Legal advice should be sought in any such circumstances, as the grounds for cancelling AMR are more limited, and for driving instructors, are likely to be limited to making a false or misleading application or committing (or being alleged to have committed) a criminal offence within the context of the activity of driving instruction itself.

These considerations are:

#### 5.1 Conflict of Interest

- 5.1.1 A person must not be considered 'Fit and Proper', of 'good repute' or of 'good character' if it can be demonstrated that a conflict of interest exists.

#### 5.2 Criminal Record

- 5.2.1 This part must be read in conjunction with Section 7 – 'Irrelevant Considerations' and Section 10 – 'Definitions' (specifically the definition relating to spent convictions). If there is any confusion as to whether an offence is spent or not, the matter should be referred to Legal for advice.
- 5.2.2 The fact of the existence of a criminal record is not of itself a reason to refuse or sanction. A previous offence must be looked at only in the context of whether it reasonably demonstrates that a regulatory program participant is, or is not, fit and proper to participate within a regulatory program.

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5.2.3 A regulatory program participant is not considered 'fit and proper', or of 'good repute' or of 'good character' under this policy if they have been convicted or found guilty of:

- any offence relating to making false or misleading statements or declarations, including, but not limited to, perjury, benefits by deception, forgery, and failure to declare previous convictions;
- any offence relating to tax fraud or evasion, or social security fraud;
- any offence which can be categorised as involving dishonest, corrupt or unethical practices;
- a serious driving offence including negligent, reckless or dangerous driving, driving with a prescribed concentration of alcohol, driving under the influence of alcohol or drugs, driving whilst using a mobile phone, menacing driving, a loss of traction offence, unlawful racing or a police pursuit;
- an indictable criminal offence including:
  - i. Murder and/or Manslaughter;
  - ii. Attempted murder;
  - iii. A sexual assault or indecent assault of any kind;
  - iv. An assault or affray of any kind;
  - v. Any offence related to voyeurism or child abuse material;
  - vi. Any offence which has caused reckless or negligent danger to life or has cause bodily harm (including public safety matters such as arson);
  - vii. Theft and similar offences (including larceny, motor vehicle theft or embezzlement);
  - viii. Fraud, forgery, money laundering or dealing in the proceeds of crime;
  - ix. Identity offences;
- Any interstate offence that is the equivalent of any of the above offences.

### 5.3 Current investigations and matters pending

5.3.1 A regulatory program participant is not considered 'fit and proper', or of 'good repute' or of 'good character' under this policy if they are:

- Currently under investigation by Transport for NSW or another public authority (including interstate and international) in relation to fraud or corrupt activity. This is particularly relevant where Transport for NSW is of the opinion that the applicant poses a significant risk to probity/governance.
- Currently under investigation by Transport for NSW or another public authority (including interstate) in relation to enforceable non-compliance (e.g. not delivering training in accordance with another jurisdiction or failing to keep records).
- Charged with an indictable offence that is a matter of assault of any kind, stalking or intimidating, or a matter involving any allegation of dishonesty, theft, fraud or other deception

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- Charged with any offence committed in the context of driving a motor vehicle which has as a potential maximum penalty a period of imprisonment, or any offence committed while in the act of performing duties as a driving instructor or assessor
- Reported for alleged misconduct – Section 26(2A) of ‘the Act’, if alleged misconduct on the part of the holder of a licence is reported to Transport for NSW under section 54A or 54B of ‘the Act’, Transport for NSW may suspend the person’s licence until the matter has been dealt with if of the opinion that such action is necessary due to the serious nature of the alleged misconduct. This can include complaints reported by a student or student’s family.
- Bankrupt (unless bankruptcy is discharged or annulled).

**Note:** Where a regulatory program participant is under investigation or has been charged (but not yet convicted), their fitness and propriety, good repute or good character may be assessed as temporarily under question by suspending an application, licence, accreditation or agreement pending the outcome of the investigation.

### 5.4 Justified complaints

5.4.1 A regulatory program participant is not considered ‘fit and proper’, of ‘good repute’ or of ‘good character’ under this policy if they have been the subject of repeated complaints by students or customers in relation to conduct under this, or any third party regulatory program administered by Transport for NSW, and Transport for NSW has conducted an investigation and found those complaints to be justified on the balance of probabilities.

### 5.5 Working with Children Check

5.5.1 In order to be considered ‘fit and proper’, of ‘good repute’ and of ‘good character’ a regulatory program participant who is the holder of either a Class C (car) and/or R (rider) must hold current clearance under the *Child Protection (Working with Children) Act 2012* (a Working with Children Check for employment purposes not as a volunteer).

### 5.6 Behaviour

5.6.1 A person who fails to behave with civility and proper community standards when dealing with Transport for NSW (or with a member of the public engaged under their authority) will not be considered ‘fit and proper’ or of ‘suitable character’ to hold an authority, as it may demonstrate behaviour which shows an unwillingness to meet those standards, shows a refusal to be appropriately regulated under the statutory licence, and a failure to represent Transport for NSW appropriately as its agent or licensee. This includes making personal, threatening, harassing, predatory or intimidating remarks, correspondence, or action against public servants administering the regulated scheme.

## 6 Exercising Discretion

It is particularly important when exercising discretion that action taken by Transport for NSW is seen as both consistent and fair. In considering circumstances where the regulatory program participant has not met the considerations set out in Section 5, the decision maker responsible for

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determining whether the person is 'fit and proper', of 'good repute' and of 'good character' may take into account;

- The nature, seriousness and frequency of the offence(s).
- The nature, seriousness and frequency of previous offences where the applicant or participant has been convicted or found guilty.
- The nature, seriousness and frequency of previous complaints made against the applicant/participant.
- The time lapsed since the finding of guilt.
- The severity of any sentence imposed by the Court (e.g. a dismissal or non-conviction will be an indication the offence was considered trivial or technical in nature).
- The likelihood that the person will re-offend (including time since last offence, expressions of remorse, efforts made towards rehabilitation and any other relevant changes in the applicant/participant's circumstances).
- The risk that the offence or condition poses to Transport for NSW ethical, probity and governance obligations, and to its reputation.
- Other similar cases - where another applicant/participant has been assessed as 'fit and proper', of 'good repute' and of 'good character' or not (as the case may be) in similar circumstances. Note that these must be considered, especially as an applicant might obtain details of similar decisions under the *Government Information (Public Access) Act 2009*.

In addition to the above, every consideration must be assessed in the context of the services to be performed by the regulatory program participant. The relevance of the consideration to the act of performing driving instruction or assessment must be established (*for instance a minor assault matter committed in the context of a domestic dispute or a pub argument may not be as relevant or concerning to a decision maker as the same assault committed in the context of driving instruction*).

The steps taken by a decision maker in exercising their discretion to sanction (whether to refuse, exclude, suspend or cancel) a regulatory program participant (including criteria that the regulatory program participant has not met, reasoning behind the decision and any internal communications) must be documented and stored for future reference.

If necessary, the decision maker may decide that more information is required to make a decision. If so, the decision maker may request more information from the regulatory program participant. Failure by the regulatory program participant to provide requested additional information may be a factor which can be considered in determining if a person is of 'good repute', of 'good character' and/or 'fit and proper'.

## 7 Irrelevant Considerations

The following factors should not be considered when determining if a person is of 'good repute', of 'good character' or a 'fit and proper' person:

- The person's race, ethnicity, religious beliefs or any attributes that are protected under the *AntiDiscrimination Act 1977* and/or the Commonwealth *Disability Discrimination Act 1992*.



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- Spent convictions, as defined under the *Criminal Records Act 1991* (or equivalent interstate legislation), unless they are considered to be part of a pattern evidencing a disregard for the law or they may suggest the presence of a road or public safety risk.
- Minor regulatory breaches or summary offences, unless they are considered to be part of a pattern evidencing a disregard for the law or they may suggest the presence of a road or public safety risk.

### 8 Responsibilities

Directors, Customer Licensing and Customer Performance & Improvement are responsible for ensuring that this policy is considered in the scope of their respective staff's duties.

Senior Advisor, Customer Performance & Improvement is responsible for reviewing the policy at the nominated review date. It is the responsibility of the reviewing officer to seek input, from all business units using the policy and from Legal, to ensure that the policy is sound.

Senior Manager, Licence Programs is responsible to identify any operational process improvements in the application of this policy.

Licence Programs delegated staff are responsible for the application of this policy when decision making to ensure that all persons holding a licence as a driving instructor and assessor are considered 'fit and proper', of 'good repute' and of 'good character'.

### 9 Evaluation

The policy will be reviewed every two years to determine whether it still meets Transport for NSW obligations. The review should focus on including additional criteria which may identify regulatory program participants that do not meet the 'fit and proper' criteria and in evaluating the current criteria to ensure that they are still relevant.

Evaluation should also include a review of regulatory program participants who have been refused or removed from the regulatory programs relevant to this policy. These should be assessed for common themes leading to the administrative sanction taken and any such themes considered for inclusion into the policy.

### 10 Definitions

**Delegated Person** – Any Transport for NSW staff member with delegated authority, involved in the management of the above Regulatory Programs and tasked with specific roles in relation to that Regulatory Program.

**Indictable Criminal Offence** – An offence where the defendant has the right to trial by jury and are more serious offences.

**Public Official** – A regulatory program participant who enters into a service agreement with, and is appointed to exercise authority on behalf of, the NSW State Government.

**Spent Convictions** – A conviction is considered 'spent' where it meets criteria as defined under the *Criminal Records Act 1991*, or relevant interstate legislation

**Regulatory Program participant** – a person who is an applicant for, or the holder of, a Driving Instructor Licence under the *Driving Instructors Act 1992*, or who is an applicant for, or the holder

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of, an appointment or other arrangement to act as an Assessor or Driver Tester of any sort on behalf of Transport for NSW.

**Third Party Regulatory Program** – A Third Party Regulatory Program is any service administered by Transport for NSW which is then provided by an accredited or contracted regulatory program participant on behalf of Transport for NSW.

### 11 Related information

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**Contact details:** Senior Advisor, Customer Performance & Improvement

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