

Fit and proper test

TECHNICAL GUIDE

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Introduction

WorkSafe New Zealand (WorkSafe) has statutory powers under the Health and Safety at Work Act 2015 (the Act) to grant certain authorisations (refer to part 5, sub-part 2 of the Act). How WorkSafe discharges those powers is informed by its Authorisations Policy,¹ which aims to ensure decisions are reasonable, fair and transparent.

Two types of authorisations are:

1. the issuing of a controlled substance licence and
2. the authorisation of individuals and organisations as a compliance certifier.

The Health and Safety at Work (Hazardous Substance) Regulations 2017 (the Regulations) set out the requirements that must be met for the granting of such authorisations. This includes the requirement for a person to be fit and proper to hold these authorisations. WorkSafe will only consider information relevant to the authorisation when determining the fit and proper status of a person.

In this technical guide:

- a 'person' may be an 'individual' or an 'organisation' and
- in the case of an organisation that is a compliance certifier, an 'individual' means an officer of the organisation or an individual employed or engaged by the organisation to perform the functions of a compliance certifier.

In general terms, a fit and proper person is a person who is someone of good character who abides by the laws of New Zealand and elsewhere, and is likely to continue to do so while being the holder of an authorisation. When information may be prejudicial to a person, they will be given a reasonable opportunity to comment on the information before WorkSafe will decide if the person is fit and proper.

The purpose of these guidelines is to:

- set out how WorkSafe will apply the fit and proper person assessment to an individual or organisation
- provide applicants for an authorisation with transparency on the process followed
- support consistency of decision making when considering an application for an authorisation.

Notwithstanding these guidelines, the WorkSafe decision maker (the decision maker) has discretion in making decisions and can consider any other relevant matters not specifically mentioned in these guidelines (such as an individual's personal circumstances).

WorkSafe has an operational policy on the fit and proper person assessment, which should be read in conjunction with these guidelines.² This operational policy includes a series of policy statements that set the framework in which fit and proper person assessments are made.

Matters that define Fit and Proper Persons

The Health and Safety at Work (Hazardous Substances) Regulations 2017 lay out the criteria that WorkSafe must consider when determining whether a person is fit and proper for authorisation as a compliance certifier (Regulation 6.7) or to be issued a controlled substance license (Regulation 7.2).

¹ Authorisations: Regulatory Function Policy, February 2017. Available at: www.worksafe.govt.nz/worksafe/about/operational-policies/authorisations-regulatory-function-policy

² Fit and Proper Person Assessment Policy, 2017. Available at: www.worksafe.govt.nz

Regulation 7.2 states these criteria:

- the applicant’s criminal history (if any), in New Zealand and elsewhere
- any pending criminal proceedings against the applicant in New Zealand and elsewhere
- any protection order made against the applicant under the Domestic Violence Act 1995
- any other court order made against the applicant, in New Zealand or elsewhere, that is or may be relevant to the application
- the applicant’s history of serious behavioural problems, including any history of violence, drug abuse, or alcohol abuse
- any information collected in the course of a Police investigation that relates to the applicant’s conduct
- any matters disclosed to WorkSafe by the Police in relation to the application, including any objection to the grant of a license
- any other matters that WorkSafe considers relevant.

The Regulations provide WorkSafe the discretion to give such weighting as it considers appropriate to each of the above criteria. Weighting of these criteria may differ depending on the type of authorisation applied for and nature of the person (individual or organisation) applying.

In determining whether a person for an authorisation is fit and proper, WorkSafe will:

- undertake a Police check of the person’s criminal, infringement and behavioural history
- seek information from other agencies and organisations about the person (including Ministry of Justice) in line with the regulatory requirements listed above
- take into consideration other information or matters available to it, including any objection to the granting of an authorisation by the Police or any other regulatory authority
- take into account the person’s declaration made when applying for the authorisation.

Individuals who have previously resided in another country for a total of 12 months or more in the previous five years have to provide evidence of their criminal history (or absence of) while in that country. See also WorkSafe’s operational policy on fit and proper.³

When information may be prejudicial to a person, they will be given a reasonable opportunity to comment on the information, unless disclosing the information would endanger the safety of any person (in which case limited information will be provided).

WorkSafe will not take into account any information where there is doubt about the accuracy of information.

The person’s declaration regarding their status as a fit and proper person is subjective. WorkSafe therefore requires objective information from other sources for the fit and proper assessment.

The fit and proper person test is used in many occupational and licensing regimes, for example, registration for teachers, passenger endorsements under the Land Transport Act and fire arms licenses under the Arms Act 1983.

Each piece of authorizing legislation and/or licensing regime has its own criteria, and are determined independent of one another.

³ Fit and Proper Person Assessment Policy, 2017. Available at: www.worksafe.govt.nz

The fact that a person has been found fit and proper under one regulatory framework does not mean that they will be fit and proper under the regulations or that they are exempt from the fit and proper person assessment.

Criminal history

Criminal Records (Clean Slate) Act 2004

Individuals do not need to declare convictions covered by the Criminal Records (Clean Slate) Act 2004.

If an individual voluntarily discloses convictions that are covered by the Criminal Records (Clean Slate) Act 2004, those convictions should not be taken into account.⁴

Criminal convictions

WorkSafe will take into account the nature and severity of any criminal conviction and the circumstances surrounding that conviction.

For convictions involving a sentence, whether in New Zealand or overseas, that resulted in preventive detention, imprisonment or home detention, the person should demonstrate they have been successfully rehabilitated, and would normally be expected to have had no further convictions for a period of seven years from the date of the offence to the time of the application. A sentence includes time spent on parole or subject to recall to prison.

For convictions, whether in New Zealand or overseas, that did not result involve a sentence of imprisonment, the person should demonstrate they have been successfully rehabilitated, and would normally be expected to have had no further convictions for a period of three years from the date of the offence to the time of the application. Examples for these convictions include traffic offences such as drink driving, reckless and dangerous driving.

Where a person can demonstrate they have been successfully rehabilitated or have support systems in place and are subject to counselling/supervision, this would be counted as a positive factor to granting the authorisation.

ASSESSMENT AND EVIDENCE PROVIDED BY THE PERSON

For any criminal convictions the decision maker should consider:

- the relevance of the convictions for the authorisation being sought
- the actual events and circumstances of the offending and
- evidence that demonstrates that the offences do not bring into doubt the person's status to appropriately, safely and lawfully carry out the powers granted by the authorisation.

Where convictions relate to a behavioural issue regarding the use of drugs, alcohol or violence, evidence that the individual has successfully completed a rehabilitation programme related to the convictions will be sought by WorkSafe and taken into account.

Other evidence that may be sought by WorkSafe may include:

- a written submission from the person explaining the circumstances of the conviction and why an authorisation should be granted and

⁴ Regulation 14(3)(a) of the Criminal Records (Clean Slate) Act 2004 allows a person to voluntarily disclose information. This information must only be used for its intended purpose in line with Regulation 20(1) of the Criminal Records (Clean Slate) Act 2004.

- supporting character references (such as from the individual's employer, if available) or
- supporting character references from a person with standing in the community who has personal knowledge of the individual.

Pending criminal proceedings

If the New Zealand Police advise that criminal charges are pending or that the person is under investigation, the application should not be processed until the matter has been finalised by the Courts or the Police investigation has been completed.

If the results of the charges or investigation are unlikely to be known in the near future, a decision should be made on the facts available at the time. If this decision results in a decline of the application, the person will be advised that they are able to re-apply at a later date.

Conviction and discharge

The Court, if they consider a conviction is sufficient penalty in of itself, can convict and discharge a person. That will mean the person has a conviction but that there is no sentence imposed. In such circumstances the inquiries must centre on the nature of the offending and the person's culpability. Generally, a conviction and discharge will occur for lower level offending.

Discharge without conviction

If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction. The effect of a discharge without conviction is that the person is deemed to be acquitted. Therefore, if a person discloses that they received a discharge without conviction this should not be considered when determining whether they are fit and proper.

Youth offending

Offences committed when an individual was less than 17 years of age, and that were dealt with in the Youth Court, may be disregarded unless the offences were committed within the three year period immediately prior to the application for an authorisation.

Where offences were dealt with in the Youth Court and were committed in the three years prior to an application being made, WorkSafe will request that the individual:

- provide a written submission explaining why a license should be issued
- explain the circumstances of the offence
- provide supporting character references from a person with standing in the community who has personal knowledge of the individual.

The decision maker should consider whether the offence/s brings into doubt the individual's ability to appropriately, safely and lawfully carry out the powers granted by the authorisation.

Court orders

Generally temporary and unconfirmed protection orders will be given low weight when assessing a person's status as a fit and proper person.

Significant weight against granting an authorisation is given in circumstances where a protection order has been granted by either the Family Court under the Domestic Violence Act 1995 or the Crimes Act 1965.

Additional care must be taken when considering Family Court protection orders as they are generally on the papers without hearing evidence and the majority of them go undefended. If the order is undefended this cannot be taken as an admission of the allegations made in the application for the order. The respondent may not have the resources or inclination to defend the application, and in this instance it is important to seek the reasons why the order was not defended or what their views are regarding the order.

Protection orders granted under the Crimes Act at sentencing are based on evidence before the Court and therefore can be considered as being reliable. The decision maker should consider the summary of facts, sentencing notes (if available) and circumstances surrounding the granting of the order.

As part of a protection order a respondent is ordered to a non-violence course. Attendance at the course and the report of the course provider may assist in determining whether or not the individual is a risk or there are on-going issues and a likelihood of a repeat of the behaviour.

Circumstances where there has been a history of breaching protection orders or reoffending while one is in place, or multiple protection orders being granted in respect of different applications may indicate not only a tendency to not follow mandatory rules but also a lack of control and judgement regarding decisions that are made.

WorkSafe may ask the individual to provide evidence to demonstrate that their actions that resulted in the making of the protection order does not bring into doubt their ability to appropriately, safely and lawfully carry out the powers granted by the authorisation. This evidence should include:

- a written submission explaining the circumstances surrounding the making of the order and why he/she (the individual) considers a license should be issued and
- supporting character references from a person with standing in the community who has personal knowledge of the individual.

Other court orders made against the person will also be taken into account. Such orders should be considered in terms of a person's overall compliance history with the Regulator.

Where the reasons for granting an order reflects on the person's ability to appropriately, lawfully, and safely perform the functions of the authorisation, the person should be given the opportunity to respond and provide an explanation and if appropriate provide evidence to support why the Court Order does not affect their status as a fit and proper person.

Behavioural history

Infringements

Infringements are not considered as part of a person's criminal history. However, they will be considered as part of their compliance history.

Infringement offences may indicate that the person has a disregard for the law. Infringement offences are matters that are dealt with by way of instant fines or demerit points on a driver's license rather than a court hearing and do not carry criminal convictions. For example traffic offences such as speeding offences, and health and safety notices issued by WorkSafe.

The decision maker will consider:

- repeat infringements of a similar nature over a recent period of time
- infringements under the Health and Safety at Work Act 2015 and its regulations
- traffic infringements, including any driver licence suspension
- any infringement offence committed by the individual that relates to the possession or use of a hazardous substance.

When considering infringement offences, the decision maker will consider:

- the relevance of the infringement offence for the authorisation being sought
- the particular circumstances of the offence and
- the particular circumstances of the individual.

As a guide, if a person has had four or more infringements of a similar type within the previous two years, these may be taken to indicate a pattern of offending that may suggest a disregard for the law.

Infringements relating to hazardous substances, whether received in New Zealand or elsewhere, will be given greater weight as this brings into doubt the person's ability to comply with the relevant controls and legislation. Two infringement notices over the previous three years may bring a person's ability into doubt to appropriately, safely and lawfully hold the authorisation and exercise its powers.

Repeated or excessive infringements over a significant period of time are a strong indicator or tendency to not follow rules and regulations.

Health and safety offences that have the potential to endanger any person or result in harm (e.g. not maintaining accurate records of equipment maintenance) will be considered in the same light as if the offence had resulted in harm.

The decision maker will exercise judgement when applying weight to the unique circumstances of a person's infringement history (e.g. frequency, seriousness of offence). In these circumstances, the person will be asked to provide an explanation why the infringements do not bring into doubt their ability to appropriately, safely and lawfully carry out the functions of the authorisation.

WorkSafe may ask the individual to:

- provide a written submission explaining why they consider an authorisation should be issued
- explain the circumstances of the infringements
- provide supporting character references (such as from the individual's employer, if available)
- provide supporting character references from a person with standing in the community who has personal knowledge of the individual.

History of violence, drug or alcohol abuse

Where an individual has a history of violence, drug or alcohol abuse, he/she will be asked to provide evidence to show that such behaviour is no longer an issue. The more recent the behaviour, the greater weight this will carry in considering whether he/she is a fit and proper person.

WorkSafe, in the interest of progressing the application and to afford the individual natural justice, will ask the individual to provide sufficient evidence to demonstrate that their history does not bring into doubt their ability to properly carry out the functions of the authorisation.

This evidence could include:

- written documentation from a suitably qualified professional, such as their doctor or support worker, which indicates that the individual has been rehabilitated and is fit to carry out the functions of the authorisation
- participation in counselling or successful attendance at an appropriate rehabilitation programme
- character references (such as from the individual's employer, if available).

The overriding consideration is whether or not the individual's history brings into doubt his/her ability to appropriately, safely, and lawfully perform the function granted by the authorisation.

Other matters

Terrorist and criminal organisations

Information received from the New Zealand Security Intelligence Service, the New Zealand Police or from another organisation must be considered on the basis of whether this brings into doubt the person's ability to appropriately, safely, and lawfully carry out the functions of the particular authorisation.

Membership of, or association with, a terrorist or criminal organisation may constitute a reason to decline an application. A decision on whether a person is fit and proper will be made on a case-by-case basis taking into account any information received from the person or disclosed to WorkSafe.

Providing false, misleading or non-disclosure of information

Any deliberate provision of false, misleading, or non-disclosure of information will be treated as an indication that the person is unlikely to be a fit and proper person. Any case where it is suspected that a person has provided false, misleading or non-disclosure of information will be considered on a case-by-case basis, when considering whether to approve the application.

In terms of a failure to supply information the decision maker must consider whether the failure would materially influence the decision of whether or not to grant the authorisation. For example, failure to declare minor infringements may have occurred out of memory lapse as opposed to any intention to mislead. Consideration should be given to the volume of omissions and whether they were known to the person at the time of applying.

The decision maker should consider whether the person:

- has an explanation for the false, misleading, or non-disclosure of information and
- could reasonably be expected to know that the information was false or misleading, or whether it should have been disclosed.

Health condition

WorkSafe recognises an individual's right for equal treatment under the United Nations Convention on the Rights of Persons with Disabilities.

The decision maker will only consider information about health conditions that would or are likely to prevent the individual from exercising proper and safe control over the functions of the particular authorisation.

The decision maker will give significant weight if the health condition is likely to endanger the safety of the individual or the safety of others while in the possession of a controlled substance or performing the function of a compliance certifier. A decision on whether an individual is fit and proper will be made on a case-by-case basis taking into account any information received from the individual.

Other authorisations

If the person held any authorisation granted by WorkSafe or a preceding regulatory agency with responsibility for health and safety or hazardous substance management, which was suspended, cancelled or revoked within the last seven years, WorkSafe will ask for an explanation of the circumstances of the suspension, cancellation or revocation.

Any information that will bring into doubt the person's ability to lawfully and appropriately perform the function granted by the authorisation will be considered on a case-by-case basis.

Organisations

Where a person that is not an individual seeks authorisation as a compliance certifier, WorkSafe will undertake a fit and proper assessment of the corporate body, each officer of the organisation and every individual engaged by the organisation to perform the functions of a compliance certifier.

The provisions of this technical guide apply equally to the corporate body and every individual, whether an officer or an individual engaged by the organisation, with appropriate modifications.

In addition, WorkSafe will consider other relevant factors relating to the corporate body. This will include, for example, compliance with health and safety laws, issues of fraud, bankruptcy or tax evasion.

Mitigating factors

Where there is information available to WorkSafe that suggests a person for an authorisation may not be fit and proper, WorkSafe will request further information from the person including a personal statement and supporting character references

Character references from employers or people of standing in the community are desirable and relevant where they demonstrate good character, such as helping others, being in a position of trust, or demonstrating reliability and honesty that is expected of a person who is fit and proper.

To assess character relating to behaviour outside of work (e.g. if the individual has domestic violence offences), a reference from a person of standing in the community who knows the individual may be preferable. Persons of standing in the community include:

- registered lawyer
- kaumatua
- minister of religion
- doctor/specialist
- elected official
- teacher.

Character references from local Police Officers will not be accepted in support of an individual's character with respect to an application that has been opposed by the New Zealand Police.

If an individual has a history involving drugs, alcohol and/or violence, the decision maker will take into account references and other evidence regarding how that behaviour has been treated, including:

- evidence of successful attendance at a rehabilitation programme or anger management course
- written supporting documentation from a suitably qualified professional, such as their doctor or support worker as relevant.

Authorisation holder to remain fit and proper

An authorisation holder must remain fit and proper for the duration of their authorisation.

If WorkSafe receives information that may bring into question the authorisation holder's fit and proper status, WorkSafe may suspend the authorisation and investigate whether the person has continued to remain fit and proper. In any investigation the authorisation holder will be given opportunity to comment on the information.

If WorkSafe concludes that the authorisation holder is no longer fit and proper, the relevant authorisation will be cancelled.

Appeals to the District Court

Any decision to decline an application for an authorisation or to cancel an authorisation may be appealed to the District Court. This is not a decision which is subject to WorkSafe's internal review requirements.

Application of these guidelines

These guidelines are written for persons seeking authorisation as a compliance certifier and for the granting of a controlled substance license.

The principles of these guidelines and the information provided also apply to:

- application for a renewal of an authorisation and
- application for variation of authorisation regarding compliance certification
- consideration for the suspension and investigation of an authorisation
- decisions on the cancellation of an authorisation.

Disclaimer

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