

October 2017

Fit and Proper Person Assessment (Health and Safety at Work (Hazardous Substances) Regulations 2017)

Introduction

The Health and Safety at Work (Hazardous Substances) Regulations 2017 (the Regulations) require that applicants for Controlled Substance Licences (CSLs) and Compliance Certifier authorisations must be fit and proper to hold these authorisations. The fit and proper person assessment provides assurance that people who hold an authorisation will perform the authorised functions, safely, legally and appropriately.

Purpose

This operational policy sets out the high-level approach that WorkSafe will take to fit and proper person assessments under the Regulations.

Scope

This operational policy applies to fit and proper person assessments under the following the parts:

- Authorisation of compliance certifiers under Part 6.
- Granting CSLs under Part 7.

Regulatory requirements

Before authorising an individual as a compliance certifier and before granting a CSL, WorkSafe must be satisfied that the person is a fit and proper person to perform the authorised functions.

In determining whether an individual is fit and proper, WorkSafe will consider the matters listed in regulations 6.7 and 7.2:

- the applicant's criminal history (if any), whether in New Zealand or elsewhere
- any pending criminal proceedings against the applicant, whether in New Zealand or elsewhere
- any protection order made against the applicant under the Domestic Violence Act 1995
- any other court order made against the applicant, whether in New Zealand or elsewhere, that is, or may be, relevant to the application
- any matters disclosed to WorkSafe by the Police in relation to the application, including any objection to the issue of a licence
- any other matters that WorkSafe considers relevant.

Any other matters may include, but are not limited to:

- advice given to WorkSafe by the Chief Executive of the New Zealand Security Intelligence Service
- relevant information about the applicant's physical or mental health, and
- the applicant's infringement history.

Regulation 7.2 provides that WorkSafe must consider the applicant's history of serious behavioural problems, including any history of violence, drug abuse, or alcohol abuse, and any information collected in the course of a Police investigation that relates to the applicant's conduct.

These matters will be considered as other matters WorkSafe considers relevant for compliance certifier authorisations.

WorkSafe has wide discretion to consider matters other than those specified in regulations 6.7 and 7.2. These other matters must be relevant to the authorisation applied for. This means the matter must have some reasonable connection with the authorisation application, and have some value in establishing a matter of fact significant to the application.

Decisions to be made on a case-by-case basis

All decisions regarding whether an individual or organisation is fit and proper will be made on a case-by-case basis, and WorkSafe will consider the following matters:

PROCEDURAL FAIRNESS IN DECISION-MAKING

Procedural fairness, or 'natural justice,' is a duty on the part of an administrative decision-maker to act fairly when exercising statutory powers that may affect a person's rights, interests or legitimate expectations.

To ensure natural justice, WorkSafe will:

- i. consider all relevant factors
- ii. disregard all irrelevant factors
- iii. avoid actual or perceived bias – the particular decision-maker will avoid pre-judgment in the matter
- iv. manage any conflict of interest via the *WorkSafe Conflicts of Interest Policy*
- v. disclose all relevant information that is being relied on to enable the applicant to make informed submissions¹
- vi. allow a reasonable opportunity to be heard whether in person or in writing as the regulations allow, and
- vii. provide a full explanation of the reasons for the decision.

THE RELEVANCE OF OFFENDING OR BEHAVIOURAL HISTORY TO THE AUTHORISATION

To be considered relevant to the fit and proper person assessment, the applicant's offending or behavioural history must have a reasonable connection to the authorisation.

The focus of the assessment is forward looking; the decision maker uses previous conduct to predict future behaviour or assess a person's ability to safely, legally and appropriately perform the functions of the authorisation. The assessment will not be used in a punitive way or be applied to hold the applicant to account for past misconduct.

The regulations give WorkSafe the discretion to give such weight as it considers appropriate to the matters making up the fit and proper person test. This reflects the fact that certain types of offending or behaviours may be more relevant depending on the authorisation.

For example, compliance certifiers are third party verifiers of regulatory compliance. As such, honesty, integrity and a law abiding approach are important considerations.

Similarly, a CSL allows a person to possess hazardous substances that can pose significant risk of harm when not used safely or for their lawful purpose. Where very hazardous substances are concerned, the public interest and safety are paramount considerations. Any evidence of disregard for the law, violent behaviour, unsafe acts and offences related to the misuse of dangerous materials are particularly relevant to the assessment.

It is very unlikely that an applicant with a criminal history that includes crimes against the person such as homicide, injuring with intent, armed or aggravated robbery will be granted an authorisation unless they can demonstrate they are rehabilitated. WorkSafe will not grant an authorisation where it considers there is any real risk to the safety of an individual or the public.

THE PATTERN AND SERIOUSNESS OF THE APPLICANT'S OFFENDING OR BEHAVIOUR

The more serious the nature of the offending or behaviour, the greater the weight it carries against finding the applicant fit and proper. A history of repeat offending may carry greater weight than a one-off minor offence.

WHEN THE OFFENDING OR BEHAVIOUR TOOK PLACE

When considering the relevance of an applicant's criminal and behavioural history, WorkSafe will consider the time that has passed since the conviction or behaviour. For example, a recent conviction or concerning behavioural incident will generally carry more weight than an historical incident where the applicant has not reoffended or relapsed. Consideration will be given to the time elapsed between each conviction and whether or not the behaviour appears to be escalating.

WorkSafe will take into account evidence that shows the applicant has successfully engaged in rehabilitation activities and has made positive changes to his or her behaviour.

¹ Unless disclosure of that information would be likely to endanger the safety of any person.

Infringements

Infringement offences that are not relevant to the nature and purpose of the authorisation will not be considered. Relevant infringement offences may be considered as part of the applicant's behavioural history.

An infringement is relevant if it has a reasonable connection with the authorisation applied for, and has some value in establishing a matter of fact significant to the application. An extensive record of infringements may indicate a disregard for the law or an indifferent attitude to compliance.

Examples of infringements that are likely to be relevant to the assessment include:

- hazardous substances infringements
- health and safety infringements
- certain traffic infringements

Physical and mental health

WorkSafe will consider relevant information about an individual's physical and mental health. In order to be considered relevant, a health condition must:

- have a reasonable connection with the authorisation applied for, and
- be likely to affect the applicant's ability to safely perform the functions of the authorisation.

If the applicant indicates that they have a physical or mental health issues relevant to the authorisation applied for, WorkSafe may ask the applicant to provide information from their health care provider. Health care providers will be asked to provide an opinion on the applicant's fitness to hold the authorisation and whether they have any concerns about the well-being of the applicant or any other person if an authorisation is granted.

This additional information will only be collected if it is necessary for a lawful purpose connected with WorkSafe's functions.² To meet this standard, the decision-maker will clearly demonstrate the need for the additional information in relation to the authorisation sought.

Information prejudicial to the applicant

If WorkSafe intends to rely on information prejudicial to the applicant:

- the decision-maker must be reasonably confident that the information is reliable and credible, which may include seeking corroboration of the information if this is practical, and
- the applicant must be given a reasonable opportunity to comment on it.³

² See rule 1 of the Health Information Privacy Code.

³ See the Authorisations *Regulatory Function Policy: Application and Renewal Decision Making*.

⁴ Regulation 6.7(4) and regulation 7.2(5).

WorkSafe will disclose all relevant information that is being relied on, unless disclosure of that information would be likely to endanger the safety of any person.⁴ Withholding information under this provision requires that there is a real or substantial risk to an individual's physical safety. 'Real or substantial' means that the risk could well occur, but does not require that the danger is more likely to occur than not.

Applicants previously residing outside of New Zealand

WorkSafe will require applicants, who have resided in another country for a period of 12 months or more in the last five years, to provide evidence of their criminal history (or absence of) while in each country.

Where an applicant does not provide sufficient evidence of their overseas criminal history to allow WorkSafe to assess whether the applicant is fit and proper, WorkSafe may decline the application for the authorisation.

If an applicant legitimately cannot obtain evidence from an overseas jurisdiction despite their efforts to obtain such evidence, WorkSafe may consider other options to determine whether they meet the fit and proper person requirement.

Applicants that are not individuals

Where an organisation applies to be authorised as a compliance certifier, a fit and proper person assessment will be undertaken for each officer and the all individuals employed or engaged by the organisation to perform the functions of a compliance certifier.

WorkSafe will also undertake a fit and proper assessment of the organisation. Compliance with health and safety legislation and evidence of repeated corporate offending or other regulatory non-compliance will be relevant to this assessment.

The applicant organisation must:

- be currently accredited to a recognised industry standard by International Accreditation New Zealand on behalf of the Accreditation Council
- have procedures in place to ensure that the functions of a compliance certifier are performed only by one or more individuals employed or engaged for that purpose.