

Drug Checking Suitability and Non-compliance Policy

1 Introduction

This policy provides guidance to the Manatū | Hauora Ministry of Health (the Ministry) to administer licensing of drug checking providers under the amendments made in December 2021 to the Misuse of Drugs Act 1975 (MoDA).

2 Policy overview

2.1 Overview

The policy includes the main information, guidance, principles and considerations for the Ministry's Drug Checking Licensing Team's approach to making decisions on licensing applications to ensure the approach is consistent, fair and equitable

2.2 Scope

This policy applies to:

- internal Ministry staff
- stakeholders applying for licensing to deliver drug checking services.

2.3 Definitions

The following definitions apply to this policy unless otherwise stated.

Word or phrase	Definition
Applicant	Refers to a person or entity applying for drug checking licence.
Director-General of Health	The Ministry's chief executive is referred to as the Director-General of Health.
Non-compliance	Refers to any serious breach of the MoDA, its regulations or licence conditions.
Repeated offence/non-compliance	Refers to any significant (or serious) offence or breach of the MoDA committed more than once, however for less significant (non-serious) offending the definition of 'repeated' is defined as habitual or regular offending.

Responsible person	In relation to an entity that is (or is applying to be), a drug checking service provider, responsible person means: <ul style="list-style-type: none"> • a director, partner or trustee of the entity, or • if the entity does not have directors, partners, or trustees, a person who acts in relation to the entity in the same or a similar fashion as a director, partner, or trustee would were the entity a company, partnership, or trust.
Seriousness of drug offences	This is determined by considering: <ul style="list-style-type: none"> • the usual justice system response to an offence • the likely impact of the offending on other people, and the scale of the likely impact • the extent to which the offending calls into question the character or judgement of the responsible person.
Seriousness of non-compliance	This is determined by considering: <ul style="list-style-type: none"> • the actual and potential impact of the non-compliance • if the non-compliance was of a technical nature (eg, providing information late or in the wrong format) or misleading (eg, not declaring relevant information) • whether the relevant regulatory team would view the non-compliance as serious.
Suitable	Refers to whether the applicant meets the requirements to be licensed as a drug checking provider.

2.4 Owner

The Director of Mental Health and Addictions

2.5 General enquiries

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2.7 Review date

November 2024

Drug Checking Suitability and Non-compliance Policy

1 Introduction

The purpose of the policy is to help Ministry staff assess whether drug checking providers are suitable to be licensed, and to ensure assessment processes are fair, equitable, reliable and applied consistently.

The policy is also available to inform stakeholders in an open and transparent manner of the Ministry's processes and considerations that guide the assessment of suitability in drug checking licensing decisions.

2 Legislative interpretation and guidance

The Misuse of Drugs Act (1975), Schedule 6, clauses (4) and (5) sets out the requirements to satisfy the Director-General of Health (or Minister) of the suitability to licence an applicant as a drug checking provider.

The Misuse of Drugs (Drug and Substance Checking Service Provider) Regulations 2022: Regulation 5(1)(b)(iii) and (c) sets out how to obtain the information required to satisfy the Director-General of Health (or Minister) to determine the suitability of an applicant, in accordance with the discretionary conditions as specified in Schedule 6, clause (4) and (5) of the Act (MoDA).

The Drug Checking Suitability and Non-Compliance Policy sets out the Ministry's approach to discharging its duty as set out in Schedule 6, clauses (4) and (5) of the MoDA to ensure the decision-maker's suitability threshold is met. To administer the licensing legislation, Ministry staff consider applicant information received as set out in Regulation 5 of the MoDA. The licensing decision-maker must give regard to (Schedule 6) this information to be satisfied the applicant is suitable to be licensed as a drug checking provider.

3 Principles

The following principles apply and are secondary to requirements of the MoDA and its regulations:

3.1 Lived experience

- Individuals with lived experiences of drug use are often the best people to provide advice about reducing harm and other support to people who are current users.
- The drug checking licensing team acknowledge the value of lived experience, in both leadership and governance roles, as well as for employees who deliver drug checking and drug-harm reduction services.

- Drug convictions or non-compliance under the MoDA does not automatically disqualify an applicant from holding a licence or being a responsible person.

3.2 Commitment to Te Tiriti o Waitangi and Pae Ora

- The principles of Te Tiriti o Waitangi: tino rangatiratanga; equity; active protection; options and partnership provide the framework for how drug checking services will meet our obligations under Te Tiriti o Waitangi in our day-to-day work.
- Meeting our obligations under Te Tiriti o Waitangi is necessary to realise the overall aim of Pae Ora (healthy futures for Māori) under He Korowai Oranga (the Māori Health Strategy).
Equity: We acknowledge conviction rates reflect inequities experienced by Māori and other groups and, for this reason, will apply the legislation, regulations and associated principles equitably and in accordance with the principles of Te Tiriti o Waitangi. No meaningful difference exists between a person who has been convicted of an offence and a person who committed the same offence but was not convicted (non-compliance).

3.3 Suitability

- Applicant entities are best placed to assess the suitability of their organisation.
- If an applicant entity has appointed someone to a responsible person position, that shows they believe the person to be trustworthy and responsible, and that the person will not put the entity's licence at risk.
- We consider whether the applicant entity as a whole is suitable for licensing and will comply with the MoDA, its regulations and licensing conditions, rather than considering any particular responsible persons suitability.

3.4 Case-by-case consideration

- We assess applicants on a case-by-case basis.
- The licensing scheme is flexible, fair and open to a wide range of circumstances to determine suitability.

3.5 Impartiality

- We apply principles of impartiality and independence to ensure our processes for assessing suitability are applied fairly, reasonably and consistently.

3.6 Management of sensitive and confidential information

- Sensitive information belonging to providers and responsible person(s) that is submitted to the Ministry (eg, criminal record check, suitability statements) is held in a secure Ministry database and only accessible to authorised officials who are tasked with discharging the Ministry's duty under the MoDA and the Drug Checking Licensing Scheme.
- Personal names and sensitive information of responsible persons are redacted in any Official Information Act enquiry.
- We retain sensitive information for as long as required by Public Records and Privacy Act legislation.

- When we archive sensitive information, it is stored in a secure Ministry database and only retrievable by authorised Ministry personnel.

Policy

4 Suitability assessment considerations

The purpose of examining suitability – including offences and non-compliance with the MoDA, the Psychoactive Substances Act or the Medicines Act, or regulations of any of those Acts – is to determine whether the licence applicant is suitable. In particular, we consider whether the applicant is likely to comply with the MoDA, its regulations and the licence conditions in the future.

Under MoDA Schedule 6, clauses (5), (2) and (3), the Director-General of Health or the Minister must have regard to whether the applicant (and any responsible person):

- has been convicted of an offence against MoDA, the Psychoactive Substances Act 2013, or the Medicines Act 1981 (or any regulations made under any of those Acts); or a crime involving dishonesty, and
- whether there has been a serious or repeated failure by the applicant (and, any responsible person) to comply with any requirement of MoDA or its regulations.

The Director-General of Health or the Minister must consider:

- the nature, seriousness and circumstances of the offending or non-compliance, and
- the relevance of the offending or non-compliance to the functions of service providers, and
- the time that has elapsed since the offending or non-compliance, and
- whether other grounds exist for considering that the applicant may fail to comply with any requirement of this Act, its regulations or the applicant's licence conditions, and
- any evidence the applicant provided about their suitability, and
- any other matter the Director-General or the Minister considers relevant.

We use a case-by-case approach in assessing an applicant's suitability. We look closely at repeat and serious offending or non-compliance, and consider the likelihood the applicant's responsible person will or will not cause the applicant to be non-compliant with the MoDA.

5 Seriousness of offences and non-compliance considerations

As noted above, we acknowledge conviction rates reflect inequities experienced by Māori and acknowledge no meaningful difference exists between a person who has been convicted of an offence, and a person who committed the same offence but was not convicted (non-compliance). In accordance with the principles of Te Tiriti o Waitangi, the drug checking services will apply the legislation, regulations and associated principles equitably and fairly.

Where there is a history of offending or non-compliance, we consider the seriousness or repeated nature of the offending or non-compliance including:

- the responsible person's role in drug checking service delivery, including whether they will be involved with any drug checking functions, and in what capacity
- what safeguards the entity has in place to support the workforce, and prevent and detect non-compliance, either in general or specifically in relation to that person
- the applicant's reasons for considering the person is appropriate to be a responsible person
- the nature and context of the person's offending, including:
 - how long ago it took place
 - the extent to which the offending calls the person's character and judgement into question
 - the person's current attitude to the offending
 - any other contextual matters which seem relevant.

Whether or not offending or regulatory non-compliance is serious depends on factors such as:

- the usual justice system response to an offence or non-compliance
- the likely impact of the offending or non-compliance on other people, and the scale of the likely impact
- the extent to which the offending or non-compliance calls into question the character or judgement of the responsible person
- the actual and potential impact of the offence or non-compliance
- whether or not it was of a technical nature (eg, providing information late or in the wrong format is not serious non-compliance)
- whether the relevant regulatory team would regard it as serious.

6 Assessing non-serious drug offences or non-compliance

The following offences or non-compliance are NOT regarded as serious:

- possessing or using any illicit drug under section 7(1)(a) of the MoDA
- small-scale supply¹ of Class C drugs under section 7(1)(b) of the MoDA
- very small-scale supply of Class A or B drugs under section 6(1)(c) of the MoDA (eg, supplying to a small number of friends for little or no profit)
- cultivating prohibited plants under section 9 of the MoDA, for personal use or small-scale supply

¹ In this case, small-scale supply is defined as being shared socially, not for the purpose of sale or other distribution.

- aiding or commissioning an offence in another country, under section 10 or 12C of the MoDA, if the offence would not be serious if it occurred within New Zealand
- under section 12, knowingly allowing a premises or vehicle to be used for commission of an offence under the MoDA, if the offence being committed was not serious
- utensils offences under section 13 of the MoDA.

Although we consider a history of non-serious drug offending or non-compliance on a case-by-case basis, we note the standard we set for assessing individual applicants is higher than that for responsible people, as the licence holder needs to comply with the MoDA.

We will likely treat all other non-regulatory offences under the MoDA as serious unless there is a compelling reason for doing otherwise.

7 Assessing serious MoDA offences or non-compliance

We will likely not consider as suitable for holding a drug-checking licence an applicant that, as an entity, has seriously or repeatedly failed to comply with any legislative requirement under any of the above Acts and their regulations.

We will assess any responsible person with a history of serious or repeated MoDA offences or non-compliance on a case-by-case basis to determine whether they are likely to increase the applicant's risk of non-compliance. We are likely to consider the responsible person as suitable if they can demonstrate they have taken steps to prevent non-compliance in the future.

If offending or non-compliance appears to be serious, the following questions will help determine whether it increases risk of future offending or non-compliance:

- How long ago did it happen?
- Was the offending or non-compliance deliberate? If not, was it negligent?
- What steps have been taken to prevent the offending or non-compliance recurring?
- Would it be an offence or non-compliance under the drug checking licensing scheme?

If the offending or non-compliance was by an entity that a responsible person was involved with, the following questions are also relevant:

- Did the responsible person know about the offending or non-compliance? Should they have known?
- To what extent were they directly or indirectly involved or responsible for it?
- Did they take or advocate appropriate action when they found out about it?

In some cases, a person may have committed a supply offence or non-compliance, but their actual behaviour was closer to personal use than to a serious drug offence or non-compliance (eg, involvement in the drug trade).

8 Personal drug use of a responsible person of an applicant

A history of convictions or non-compliance of a responsible person does not automatically disqualify an applicant from holding a licence. The drug checking licensing team has an approach to assessment that is fair and reasonable.

We will consider information provided in the licence application about any serious or repeated drug offending that did not result in a conviction. We have an obligation to reduce inequities in the justice system by giving equal treatment to people with convictions and people who have committed drug offences but were not convicted. In administering the licensing scheme, a person who committed an offence but was not convicted will be treated in the same way as a person who was convicted of the same offence.

Potential responsible persons may have a history of drug use (with or without conviction). This does not automatically disqualify them. Lived experience of personal drug use is likely to enhance an applicant's ability to connect with people who currently use drugs who need drug harm reduction services.

In some cases, we may know or suspect that a responsible person of an applicant may intend to use illicit drugs in the future. However, the significant question is whether this is likely to increase the risk the applicant will fail to comply with the MoDA, its regulations and licensing conditions in the future.

9 Other drug offences (including drug trade, possession under 71a and utensils)

We consider historical drug trade offences² when assessing an application for a responsible person. Someone who was involved in the illicit drug trade (eg, dealing, manufacturing, smuggling) may pose a risk to the applicant's suitability. We assess such offences (whether or not they resulted in conviction) based on information provided, such as the time which has elapsed, the nature and seriousness of offending, and (if the applicant is a responsible person) the person's role in drug checking.

10 Dishonesty offences

Section 2 of the Crimes Act defines a wide range of offences as involving dishonesty including bribery, forgery, obtaining by deception, aggravated robbery, theft, match fixing, receiving stolen goods, accessing a computer system without authorisation, criminal breach of trust and blackmail.

² Note that 'drug trade offences' is not an official or widely used term and used here to differentiate these kind of offences from drug offences involving regulatory non-compliance.

The seriousness and active deception of some of these offences may cast doubt on the person's character and the likelihood they will comply with legislative requirements. If a person has committed such a crime, they will almost always be unsuitable to hold a licence as an individual. If they are a responsible person, they will need to provide assurance in the entity suitability statement about the risk of their future compliance with the MoDA, its regulations and licensing conditions.

At the other end of the scale, historical non-violent property offences, such as theft and receiving stolen goods, are less likely to create risk of non-compliance against the MoDA, its regulation and licensing conditions.

Our assessment of dishonesty offences will consider:

- the time which has elapsed
- the extent to which the offending creates risk that the applicant will be non-compliant or otherwise unsuitable
- (if they are a responsible person) the person's role in drug checking.

11 Offending or non-compliance by another entity including revocation of licenses

The application process requires applicants to provide information if they, or any responsible person of the applicant, have held a licence or other permit under the MoDA, or been a responsible person for any entity which has held a licence or permit under the MoDA. The Ministry licensing team liaises with Medsafe to determine any compliance issues with MoDA licences for all applicants.

Revoking or cancelling a licence is only applicable if the offending or non-compliance occurred while the person was a responsible person of an entity. Whether or not this would make an applicant unsuitable would depend on the circumstances of the offending or non-compliance. In particular:

- whether the responsible person was involved in the offending or non-compliance
- whether they knew about it, and
- what they did or could have done to prevent or stop it.

12 Other suitability considerations

Other reasons why we would consider applicants unsuitable are likely to be concerns that granting them a licence would be inconsistent with the aims of the drug checking licensing amendments to the MoDA. These amendments are about reducing drug harm and enabling provision of good quality drug and substance checking services.

Applicants who carry out activities, or profess beliefs, that are incompatible with principles of drug-harm reduction are unlikely to be considered suitable. For example, an entity with a punitive approach to drug testing for employees may be contrary to drug-harm reduction

principles. Similarly, an organisation that advocates an abstinence-only approach to drug use is unlikely to provide appropriate harm reduction advice.

For these reasons, offences that are not specified in the legislation may still be relevant to assessing suitability. An applicant may be unsuitable because of ethical concerns, for example if they are known to have committed significant breaches of health and safety or employment legislation. In some of these cases, a conflict of interest may exist between the entities' other activities and providing good quality drug checking within a harm reduction ethos (or service delivery model).

Public expressions of dissatisfaction with the MoDA, including with the drug checking licensing scheme, will not be taken as an indication the applicant will not comply.

Additionally, an applicant may be unsuitable if they provide inaccurate or false information in their application, do not declare relevant information, or if they, or a responsible person, has publicly said they do not intend to fully comply with requirements.

If we deem an applicant to be unsuitable, we will let the applicant know our reasons. A review of our decisions process is available to enable applicants to have an independent review of the decision.

13 Licensing decisions

Under MoDA, Schedule 6 (licensing of drug and substance checking service providers), clause 4 (issuing of licenses), (1)(a)–(g), the Director-General of Health may issue a licence if satisfied that:

- the applicant is suitable, and
- the applicant's proposed service model will deliver the functions of a drug checking provider to an appropriate standard, and
- the applicant will ensure all workers are appropriately trained, and
- the applicant will ensure all controlled drugs or psychoactive substances in their possession are stored securely, and
- the applicant's information and harm-reduction advice is accurate and appropriate, and
- the applicant has considered their obligations under the Privacy Act 2020.

Also under Schedule 6, clause 4, (2)(a) and (b), the Director-General of Health must not issue a licence without the Minister of Health's approval if any responsible person of an applicant entity:

- has been convicted of an offence against MoDA or its regulations, or
- has had a licence under MoDA revoked for failing to comply with a licence condition or a requirement of MoDA or its regulations.

The Minister of Health must not give their approval to licence a drug checking provider unless they are satisfied the applicant is suitable. Suitability is determined by the information and considerations outlined in this policy.

When determining suitability as part of making a licensing decision, the focus is on whether the applicant (entity) is suitable, rather than whether the responsible person is suitable to hold a

licence. This means where we have doubt about whether a responsible person will comply with the MoDA, the applicant as a whole may still be deemed suitable if there is no other reason to believe the person will cause the applicant to be non-compliant or otherwise unsuitable.

In general, where the applicant and the applicant's responsible persons have no record of non-compliance, the Director-General will likely be satisfied as to the applicant's future compliance and suitability to hold a licence. Where there are responsible persons with a history of non-compliance, a case-by-case approach is taken to consider suitability overall. We also acknowledge in this assessment the importance of those with lived experience leading and being involved in drug checking services.

Ultimately, the decision to licence lies with the Director-General's (or Minister's) satisfaction that the entity will comply with the MoDA, its regulations and the applicant's licence conditions.

14 Related reading

Refer to related documents below:

- The Misuse of Drugs Act (1975)
- The Misuse of Drugs (Drug and Substance Checking Service Provider) Regulations 2022
- The Drug Checking Service Provider Licensing Handbook
- Drug Checking policies including:
 - Review of Licensing Decisions Policy
 - Complaints Policy
 - Change to Licensing Status Policy
 - Maintenance and Monitoring Policy
 - Compliance and Enforcement Policy

Relevant legislative clauses

15 Misuse of Drugs Act 1975 (MoDA) (as at 7 Dec 2021)

Drug and substance checking

Schedule 6: Licensing of drug and substance checking service providers

Issuing of licenses

16 Decision on licence application

- (1) The Director-General of Health may issue a licence if satisfied that—
 - (a) the applicant is suitable; and

- (b) the applicant’s proposed service model (including the proposed methods for testing drugs and substances) will enable the applicant to carry out their functions as a service provider to an appropriate standard; and
 - (c) the applicant will ensure that those functions are carried out to an appropriate standard; and
 - (d) the applicant will ensure that all of their workers who perform those functions are appropriately trained; and
 - (e) the applicant will ensure that all controlled drugs or psychoactive substances in the applicant’s possession are stored securely; and
 - (f) the information and harm reduction advice that the applicant proposes to provide to help individuals make informed decisions about drug and substance use is accurate and appropriate (having regard to the principles set out in [clause 6](#)), and
 - (g) the applicant has given proper consideration to their obligations under [the Privacy Act 2020](#) (including how they will comply with the information privacy principles set out in [section 22](#) of that Act).
- (2) The Director-General of Health must not issue a licence without the Minister’s approval if any relevant person, or an entity of which any relevant person was a responsible person at the time of the conviction or revocation,—
- (a) has been convicted of an offence against this Act or its regulations; or
 - (b) has had a licence under this Act revoked for failing to comply with a licence condition or a requirement of this Act or its regulations.
- (3) The Minister must not give their approval unless the Minister is satisfied that the applicant is suitable.
- (4) The Director-General of Health must decline an application if the Director-General is not satisfied of any of the matters listed in subclause (1).
- (5) If the Director-General of Health decides to decline an application, the Director-General must give the applicant written notice of the decision and the reasons for it.
- (6) In this clause,—
- relevant person* means,—
- (a) if the applicant is an individual, that individual;
 - (b) if the applicant is an entity, that entity and every responsible person
- suitable*, in relation to an applicant, has the meaning given by [clause 5](#).

5 Deciding whether applicant is suitable

- (1) For the purposes of [clause 4](#) and [clause 9](#), an applicant is suitable if the Director-General of Health or the Minister (as the case may be) is satisfied that—
- (a) the applicant will comply with this Act, its regulations, and the applicant’s licence conditions; and

- (b) there is no other reason why the applicant would not be suitable.
- (2) The Director-General of Health or the Minister must have regard to the following when deciding whether subclause (1)(a) is met:
 - (a) whether the applicant (and, if the applicant is an entity, any responsible person) has been convicted of—
 - (i) an offence against this Act, the [Psychoactive Substances Act 2013](#), or [the Medicines Act 1981](#) (or any regulations made under any of those Acts); or
 - (ii) a crime involving dishonesty (as defined in [section 2\(1\)](#) of the Crimes Act 1961); and
 - (b) whether there has been a serious or repeated failure by the applicant (and, if the applicant is an entity, any responsible person) to comply with any requirement of this Act or its regulations; and
 - (c) if the applicant or any responsible person has been convicted of an offence of a kind referred to in paragraph (a) or has been responsible for non-compliance of the kind referred to in paragraph (b),—
 - (i) the nature, seriousness, and circumstances of the offending or non-compliance; and
 - (ii) the relevance of the offending or non-compliance to the functions of service providers; and
 - (iii) the time that has elapsed since the offending or non-compliance; and
 - (d) whether there are other grounds for considering that the applicant may fail to comply with any requirement of this Act, its regulations, or the applicant’s licence conditions.
- (3) The Director-General of Health or the Minister must have regard to the following when deciding whether subclause (1)(a) and (b) is met:
 - (a) any evidence provided by the applicant about their suitability; and
 - (b) any other matter that the Director-General or the Minister considers relevant.

16 Misuse of Drugs (Drug and Substance Checking Service Providers) Regulations 2022

Part 1: Licence applications, renewals, and other matters

Licence applications

5 Information that must be included in or accompany licence application

- (1) An application for a licence must include or be accompanied by the following information:
 - (a) the name and contact details of the applicant; and
 - (b) if the applicant is an entity,—

- (i) the name and contact details of the individual who is the contact person for the entity; and
 - (ii) the name of every responsible person of the entity; and
 - (iii) the results of a criminal record check that complies with subclause (2) for each of the entity's responsible persons; and
 - (iv) a description of any activities other than drug checking activities that will be, or are likely to be, carried out by the entity during the term of the licence; and
 - (c) if the applicant is an individual, the results of a criminal record check for the individual that complies with subclause (2); and
 - (d) if the applicant or any responsible person has a relevant conviction or is aware that they have a record of relevant non-compliance, an explanation of why the applicant is suitable to hold a licence despite that conviction or record of non-compliance; and
 - (e) a description of the proposed service model, including a description of—
 - (i) the locations or types of locations where the applicant will carry out drug checking activities; and
 - (ii) the methods that the applicant will use to test drugs and substances; and
 - (iii) how the applicant will dispose of drugs and substances that are surrendered to them; and
 - (f) a description of how the applicant will store the controlled drugs and psychoactive substances that are in the applicant's possession; and
 - (g) examples of the documents or recordings that the applicant will use to train the workers who will carry out the applicant's drug checking activities; and
 - (h) examples of the information and harm reduction advice that the applicant will provide to help individuals make informed decisions about drug and substance use; and
 - (i) a description of—
 - (i) the risks (if any) to the personal privacy of individuals who do 1 or both of the following:
 - (A) present drugs or substances to the applicant for checking; or
 - (B) surrender drugs or substances to the applicant for disposal; and
 - (ii) how the applicant will mitigate those risks; and
 - (iii) the other measures (if any) that the applicant has taken, or will take, for the purpose of complying with the applicant's obligations under [the Privacy Act 2020](#).
- (2) The results of a criminal record check required by this regulation must be a record obtained from the Ministry of Justice that is dated no earlier than 3 months before the date of the application.

(3) In this regulation,—

drug checking activities means activities carried out in performing 1 or more of the functions specified in [section 35DB](#) of the Act

harm reduction advice means advice of the kind required by [section 35DDF](#) of the Act

relevant conviction means a conviction for—

(a) an offence against the Act, [the Psychoactive Substances Act 2013](#), or [the Medicines Act 1981](#) (or any regulations made under any of those Acts); or

(b) a crime involving dishonesty (as defined in [section 2\(1\)](#) of the Crimes Act 1961)

relevant non-compliance means a serious or repeated failure to comply with any requirement of the Act or its regulations.



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Appendix 1: Drug checking suitability decision support tool

