

IN THE MATTER OF

An investigation into whether
HEALTH AND SAFETY
INVESTIGATORS & AUDITORS
are private investigators as defined
by sections 5 of the Private Security
Personnel and Private Investigators
Act 2010 (the Act)

DECISION

[1] This decision examines the question of whether health and safety professionals who carry out investigations or audits fit within the definition of private investigator or private investigator employee in s 5 or 13 of the Act, and if so whether they are required to hold a security licence or certificate.

Background

[2] Following the Authority's decision in *D, E & C Ltd*¹ relating to employment investigators, the Health and Safety Association of New Zealand (HASANZ) approached the PSPLA questioning whether health and safety investigators and auditors also came within the definition of a private investigator. HASANZ agreed that as an initial step we would refer the question to the Complaints Investigation and Prosecution Unit (CIPU) for investigation and report.

[3] The CIPU report concluded that health and safety professionals, particularly health and safety investigators, are captured by the PSPPI Act and its definition of private investigation work. It further concluded that membership of HASANZ or its member organisations did not exempt health and safety professionals from coverage under s 22(d) of the Act.

[4] We circulated CIPU's report among the groups and individuals that could be affected by the report and invited them to provide feedback and submissions on the findings. A considerable number of submissions were received and have been considered although they may not be referred to within this decision. At HASANZ's request a hearing was held in Wellington on 1 September for submitters to speak to and be questioned on their submissions.

[5] We accept that we do not have the statutory jurisdiction to issue a binding decision of a declaratory nature. Therefore, this decision is intended as indicative only to provide more clarity and guidance to the health and safety industry.

HASANZ

[6] HASANZ was established in 2014 and is an association of associations. Its membership is made up of health and safety specialities and disciplines. Its purposes are:

- To promote and influence excellent health and safety outcomes for New Zealanders;
- Advance the health and safety professions in New Zealand; and
- Enable the collaboration between diverse health and safety professions to promote and develop excellence in health and safety practice.

¹ *D, E & C Ltd* [2020]NZPSPLA 007

[7] HASANZ has 16 full or associate members which include all the key professional health and safety specialities and disciplines. To become a member of HASANZ the applicant association needs to provide evidence that its members maintain high standards, are competent and trained in their chosen sector and maintain those skills through professional development. HASANZ members are also required to have a complaints process in place.

[8] In 2018 the HASANZ register of individual health and safety professionals was established. The purpose of the register is to facilitate access for businesses to quality-assured health and safety expertise and to incentivise improvements to professional standards across New Zealand.

Health and safety professionals

[9] Health and safety professional is an umbrella term for individuals working in roles that are health and safety related. It includes consultants, advisors, auditors and investigators. They undertake a wide array of work including auditing clients' compliance with their obligations under the Health and Safety at Work Act 2015 (HSWA) and investigating health and safety events. Investigations tend to be reactive, responding after an event, whereas audits are proactive looking at processes designed to prevent or mitigate an event.

[10] HSWA is not explicit in how it defines and regulates health and safety investigations and auditors, nor does it describe what constitutes an investigation. When the HSWA uses the word *investigate* it relates to the legal obligation and processes of Worksafe.

Work and safety investigators

[11] Work and safety investigators undertake investigations into workplace incidents such as accidents, injuries, near misses and workplace bullying. Worksafe's definition of investigation is "a purposeful, structured process of inquiry that helps us establish facts or find something out and decide what action to take (if any)"²

[12] The processes of a health and safety investigation depend on the type of event and the circumstances surrounding it, but the ICAM (Incident Cause Analysis Method) is commonly used in workplace investigations. This is a process of systemically gathering and analysing information for the purpose of identifying root cause and making recommendations to prevent the events investigated reoccurring.

[13] Workplace investigations usually proceed with the consent or knowledge of the people whose information is being sourced or obtained or there is a legal basis to obtain the information. The purpose of an investigation is not primarily to allocate blame but is a systemic assessment of cause. We do not however accept that blame or responsibility is never a part of a health and safety investigation as some have submitted. To identify root cause, some findings on responsibility will be at the very least implicit.

Work and safety auditors

[14] Work and safety auditors assess an organisations' safety management systems, effectiveness and how they comply with statutory and other requirements. Audits can be based on documentation only but most generally also include a practice and site review.

² Worksafe(2018) ...

They are carried out to both assess and evaluate an organisation's health and safety performance and recommend improvements.

Are health and safety investigators and auditors private investigators?

[15] The word private when referring to private investigators or other security personnel does not mean covert or secret. It is used to distinguish private investigators and private security personnel from public or state appointed investigators and security workers such as police or those employed as investigators or security guards by government agencies.

[16] The question of whether people who carry out health and safety investigations or audits fall within the meaning of private investigator under s 5 of the Act is primarily a matter of statutory interpretation. Legislative purpose is an important cross check against the meaning of the text to ensure that the intent of the statute is achieved.

[17] Section 5 of the Act defines private investigator as:

- (1) In this Act **private investigator** means a person who, for valuable consideration, either by himself or herself or in partnership with any other person, carries on a business seeking or obtaining for any person or supplying to any person any information described in subsection (2).
- (2) For the purposes of this section **information-**
 - (a) means any information relating to-
 - (i) the personal character, actions, or behaviour of any person; or
 - (ii) the financial position of any person; or
 - (iii) the occupation or business of any person; or
 - (iv) the identity of any person; but
 - (b) does not include information that is contained in a public record.
- (3) For the purposes of this section but without limiting the meaning of the terms **carries on any business**, a person is carrying on a business if he or she holds himself or herself out to the public as being ready to carry on that business.
- (4) Despite subsection (1), no person is a private investigator within the meaning of this Act by reason of the fact that
 - (a) He or she seeks, obtains, or supplies any information -
 - (i) for or to the Crown, or any constable, or any local authority; or
 - (ii) at the request of a person who is not a client of the business; or
 - (iii) only as a necessary, usual, or reasonable incident of any other activity by that person that is not described in that subsection; or
 - (iv) for any person relating to the dissemination of news or other information to the public or section of the public; or
 - (v) for any cultural or historical purpose or for any purpose relating to education, literature, or science; or

[18] In accordance with s 29 of the Interpretation Act 1999 the word person when used in any statute includes a corporation sole, a body corporate, and an unincorporated body.

[19] The definition of private investigator was largely transposed from the Private Investigators and Security Guards Act 1974 (1974 Act) which was the predecessor to the current Act. The 1974 Act was introduced to Parliament "to provide greater protection of the individual's right to privacy"³. The purpose of the Bill was to control those who occupation required them to inquire into and interfere with some of the private activities of individuals.

³ (30 July 1974) 392 NZPD 3300

Its aim was to ensure only fit and proper persons could become private investigators and security guards.

[20] The current Act was introduced with the express purpose of reforming the law relating to the private security industry and private investigators. The purposes of the Act as set out in s 3 are to:

ensure that persons offering specified private security and investigation services for hire, and personnel providing those services:

- (a) are suitably qualified to carry out that work;
- (b) do not behave in ways that are contrary to the public interest.

[21] The explanatory note to the Bill which introduced the current Act observed that considerable flexibility is possible within the framework, both to accommodate possible changes in the technology and in the operating environment, without needing to amend the Act.

[22] Several submitters say that the definition of private investigator is only directed at covert investigations and surveillance. However covert surveillance and invasion of privacy is not part of the definition of the work of a private investigator as set out in s 5 of the Act. In addition, the work currently carried out by those more commonly considered to be private investigators covers a wide range of activities and frequently does not include surveillance or blatant invasion of privacy. It is to be acknowledged that the actual work of a private investigator in current days, differs considerably from the archaic notion of a surreptitious sleuth.

[23] Most submitters consider the definition of private investigator was never intended to include the type of work carried out by health and safety investigators. We accept that Parliament may not have had health and safety investigators in mind when considering the work of private investigators when the Act was passed. This type of work is a relatively recent feature in the New Zealand market. The Authority is however satisfied that Parliament intended the definition of private investigator to be sufficiently wide and flexible to accommodate not only the significant changes and developments in the private investigation industry that had occurred between 1974 and 2010, but also future developments. The purpose of the Act with respect to investigators clearly being to protect the public from inappropriate and unacceptable practices of those conducting investigations that affect individuals and organisations.

[24] The wording of the Act should not be interpreted to restrict its natural meaning to preclude new classes of investigators that would otherwise fit within the definition. The definition of private investigator includes *all* those in the business of carrying out investigations into a person's personal character, actions, behaviour, or business as well as financial position.

[25] We also do not accept that the word *personal* in s 5(2)(a)(i) means that information relating to character, actions and behaviour is restricted to information about private lives as opposed to character, action, or behaviour in their workplace. Nor does it preclude *person* also referring to companies, partnership, or other unincorporated bodies.

[26] In addition, we do not accept the submission that the definition of private investigator is limited to those sourcing, obtaining and supplying information about a person without their knowledge or consent. While work and safety professionals proceed with the consent or

knowledge of most of individuals involved this is not significantly different to many other investigations carried out by private investigators. Both employment investigations and some insurance investigations carried out by licenced private investigators are undertaken with the consent or knowledge of those involved.

[27] For example, investigations into workplace bullying are also undertaken by employment investigators and more traditional private investigators. There is nothing sufficiently different in the way health and safety investigators carry out investigations into workplace bullying that would differentiate them from employment and other private investigators who fit within the definition of *private investigator* in s 5 of the Act.

[28] However, we do not consider health and safety auditors are in the business of seeking, obtaining, or supplying information as defined in s 5(2) of the Act. Auditors undertake a proactive assessment of workplace processes and practice. Seeking or obtaining information as defined by the Act would rarely form part of their role. Even if it did, we consider coverage would be excluded under s (4)(a)(iii) of the Act.

[29] In contrast, seeking or obtaining information that is not contained in a public record is an integral part of the work of a health and safety investigator and cannot be excluded as being a usual or reasonable incident⁴ of any other activity by that person that is not described in s 5(2) of the Act. Investigations into workplace incidents or bullying will necessarily involve seeking information relating to a person's actions or behaviour that is not in the public record.

[30] Not all incidents investigated by health and safety professionals occur within a workplace or only involve people from one workplace. Members of the public can also be involved in workplace incidents as can employees of other businesses. In such cases information as defined by s 5(2) of the Act may be sought, obtained, or supplied about third parties as part of an employment investigation.

[31] We therefore conclude that those who are in the business of carrying out health and safety investigations are private investigators as defined in s 5 of the Act. However, in-house health and safety professionals who carry out workplace investigations do not fit within the definition of private investigators in s 5 as they are not carrying on a business. In addition, they are not private investigator employees as defined in s 13 of the Act as they are not employed or engaged by a private investigator.

Are health and safety investigators exempt from holding a licence under s 22 or for any other reason?

[32] Section 22(d) provides that the Act does not require any person to hold a licence or certificate:

in respect to the carrying on by that person of an occupation or business in accordance with a practicing certificate, licence, permit, or other authority granted or issued under any other enactment.

[33] HASANZ accepts that neither its membership nor that of its member associations is granted under any enactment. Therefore, being on the HASANZ register or a member of any of its member organisations does not exempt a health and safety investigator from holding a licence or certificate under s 22(d).

⁴ S5(4)(a)(iii) of the Act

[34] Some of the members of HASANZ member associations, such as health professionals and engineers, may also have professional registration issued under an enactment. If so, they are likely to be exempt from coverage of the Act under s 22(d).

[35] HASANZ and its member organisations submit that although their members do not fit within the exemption set out Section 22(d), they should still be excluded from coverage of the Act. The purpose of the s22(d) exemption is to reduce the requirement for duplicate licencing for people who are licenced to carry out investigation work under some other regime. This is particularly the case when that regime has a robust complaints process and ensures their members are qualified to carry out the work.

[36] We are satisfied that HASANZ and its member organisations currently have robust processes in place to ensure that their members who work as health and safety investigators are qualified and have the specialist skills to carry out the work. Their members are also required to meet ethical standards and undertake regular professional development. In addition, all HASANZ members are currently required to have a comprehensive complaints process.

[37] HASANZ and its members' registration requirements are currently more onerous and specialist than those that the PSPLA can impose under the current legislative framework. The purpose of the Act is to ensure those offering private security services are suitably qualified to carry out the work and do not behave in ways that are contrary to the public interest. We accept that HASANZ and its member organisations as they are currently established, are better able to meet these objectives for health and safety investigators than the PSPLA. We are also satisfied that there are adequate protections in place outside of the PSPLA to ensure the privacy of anyone who may be involved in a health and safety investigation and to provide redress if privacy is breached, such as the Privacy Act 2020 and the Employment Relations Act 2000.

[38] We accept the submission that requiring health and safety investigators who are members of HASANZ to hold licenses or certificates as private investigators will provide no benefit for them. To the contrary it could be detrimental to the development of the health and safety industry to impose further regulation which may affect the ability of businesses to be able to engage independent, appropriately trained, and experienced specialists.

[39] We therefore accept that HASANZ and its member organisations are currently the more appropriate bodies to regulate and have oversight over health and safety professionals, than the PSPLA. There will be no material benefit to the PSPLA, health and safety professionals or the public if HASANZ members who are in the business of carrying out workplace investigations also need to be licenced with the PSPLA.

[40] For the above reasons we conclude that whilst a strict interpretation of the Act classifies health and safety investigators as private investigators, it is not in the spirit of the Act to include those who are members of HASANZ member organisations. Accordingly, as an exemption on policy grounds, the Authority deems health and safety professionals who are on the HASANZ register, or are members of HASANZ member organisations, are not required to hold a licence in the class of private investigator with the PSPLA when undertaking health and safety investigations. Nor do we deem that any employee of a company that provides health and safety investigative services and who is on the HASANZ register, or is a member of a HASANZ member organisation, is required to be certified with the PSPLA to do so.

[41] In practice therefore, the PSPLA will neither accept complaints from members of public against health and safety investigators who belong to HASANZ member

organisations for failing to hold a security licence, nor will we refer any such complaints for investigation or prosecution.

[42] The above exemption on policy grounds from holding a PSPLA licence or certificate only applies to members of HASANZ member associations in their current robust forms. Any person in the business of carrying out health and safety investigations who is neither on the HASANZ register nor a member of one of its member organisations should hold a security licence in the class of private investigator. Further, any employee of such an investigator is required to hold a certificate of approval to undertake such investigative work.

[43] Given the status of this decision the only way HASANZ and its member organisations can obtain a legally binding exemption is by way of an Order in Council in accordance with s 12 of the Act. HASANZ will need to consider whether this further step is necessary following this decision.

Summary & Conclusions

[44] We conclude:

- a) Health and safety auditors do not fit within the definition of private investigator in s 5 of the Act and accordingly are not required to be licensed or certified under the Act.
- b) Health and Safety professionals who are in the business of carrying out health and safety investigations are private investigators as defined by s 5 of the Act and, subject to the proviso below, should be licensed or certified with the PSPLA. This finding extends to health and safety investigator employees as defined in s13 of the Act.
- c) HASANZ and its member organisations are better placed than the PSPLA to regulate and have oversight of health and safety professionals. Therefore, any person who is on the HASANZ register or is a member of a HASANZ member organisation is not required to also hold a licence or certificate with the PSPLA, and complaints against them for failing to do so will not be accepted by the Authority.

DATED at Wellington this 30th day of September 2022



P A McConnell & K A Lash

Private Security Personnel Licensing Authority