



Health & Safety Professionals

INVESTIGATION REPORT

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Prepared for:

Chief Investigator [CIPU] & the Private Security Personnel Licensing Authority [PSPLA]

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1. Executive Summary

This Report has inquired into the work of health and safety professionals and auditors with respect to whether their work as a health and safety investigator and auditor may be captured by the Private Security Personnel and Private Investigators Act 2010 (PSPPI Act).

The consensus from the engagement was that health and safety professionals' work falls within the definition of the PSPPI Act, but that an exemption should apply to those completing this work, particularly those who are members of HASANZ. Another common theme from the engagement with representatives from the sector was that a licensing regime for these people would be costly and potentially disadvantageous to health and safety in New Zealand.

This report has concluded that the work of health and safety professionals in the areas of health and safety investigations and audits is captured by the PSPPI Act. The Licensing Authority may wish to grant an exemption for a particular member group of HASANZ in line with the criteria for exemptions outlined by the Act and in subsequent Decisions.



2. Introduction & Licensing Authority's Directions

On 18 August 2021 the Licensing Authority issued Directions to CIPU with respect to forensic accountants and health and safety professionals. A separate report has been drafted that looks into the forensic accountant directions. For the purposes of this report, CIPU focuses on responding to the Licensing Authority's directions with respect to health and safety professionals.

The Licensing Authority issued the following directions regarding health and safety advisers:

c) Do health and safety advisers who carry out investigations or audits fit within the definition of private investigator in s 4 or 13 of the Act?

d) If so, is there any form of registration, certificate, licence or permit they might hold that would exempt them from registration under s 22(d) of the Act.

3. Key Terms

The following key terms will be used throughout this report:

Event – an umbrella term referring to accidents, injuries, incidents, near misses and hazards.

Safety Management System (SMS). A system encompassing the health and safety function within a PCBU, also referred to as an occupational health and safety management system (WorkSafe, 2018).

PCBU – a person conducting a business or undertaking, and is the term used in the Health and Safety at Work Act 2015 with respect to those covered by this Act.

Health and safety professionals. This term is used to capture all individuals working in roles that are health and safety related, such as consultants, practitioners, advisors, co-ordinators, health and safety auditors and investigators.

Health and Safety at Work Act 2015. This Act pertains to health and safety in New Zealand. This legislation proceeded the Pike River Mine disaster of 2010. The Act is not prescriptive and does not define nor describe what constitutes an investigation. When the Act uses the word *investigate* or *investigations*, it relates to the legal obligations and processes of WorkSafe.



The accompanying regulations to the Act outline that a PCBU is to conduct risk assessments – Investigations are not explicitly mentioned in the Regulations. Where the word *investigate* is used, its regarding the powers and functions of a Health and Safety Representative's role with respect to investigating incidents and representing their fellow workers.

Prior to the Act, the previous legislation was the Health and Safety in Employment Act 1992. Section 7(2) placed a duty on organisations to carry out investigations when an accident or harm occurred to determine whether it was caused by or arose from a significant hazard.

What is an Investigation?

According to the Cambridge Dictionary¹, an investigation is:

The act or process of examining a crime, problem, statement, etc. carefully, especially to discover the truth:

An investigation has been under way for several days into the disappearance of a 13-year-old boy;

A full/thorough investigation of the incident;

Currently, the individuals who might have caused the accident are subject to/under investigation.

WorkSafe's² definition of investigation is:

a purposeful, structured process of inquiry that helps use establish facts or find something out and decide what action to take (if any).

WorkSafe's website says investigations of events forms part of good practice to identify and manage risk for a PCBU. WorkSafe carries out investigations into the most serious of workplace health and safety investigations, known as notifiable incidents, although in recent years it has faced a degree of scrutiny through the media for a lower number of investigations undertaken.³

¹ *Cambridge Dictionary*. Retrieved from: <https://dictionary.cambridge.org/dictionary/english/investigation>

² WorkSafe (2018). *Investigations: Regulatory Function Policy*. Retrieved from: <https://worksafe.govt.nz/laws-and-regulations/operational-policy-framework/regulatory-function-policies/investigations-policy/>

³ Radio NZ (2020, March 11). *WorkSafe fronts up on low investigation numbers*. Retrieved from: <https://www.rnz.co.nz/national/programmes/ninetoonoon/audio/2018737913/worksafe-fronts-up-on-low-investigation-numbers>



An appropriate or effective investigation also depends on the type of event, the circumstances surrounding it, and the resources available to the PCBU to respond to it. The components of an appropriate interview can be utilised and incorporated within this approach. Academic literature sees health and safety investigations as an important part of health and safety.

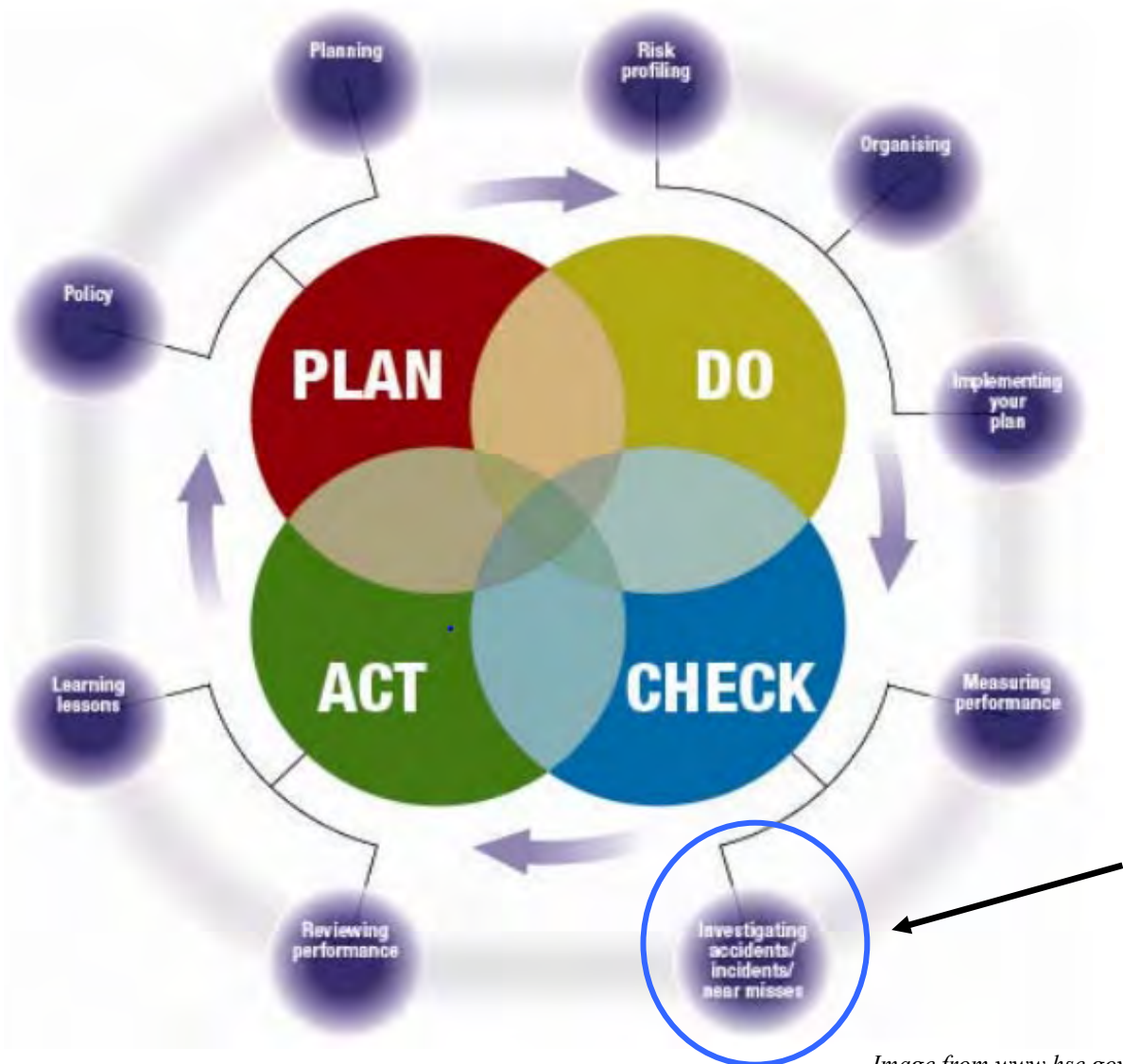


Image from www.hse.govt.uk

The image above depicts the Plan, Do, Check, Act approach used in health and safety. One of the key aspects of this approach is investigating accidents, incidents, and near misses.

It is important that those undertaking an investigation are suitably trained and confident to use basic investigation tools. Interestingly, some literature points to many health and safety practitioners not



possessing sufficient levels of training in areas such as investigative techniques, models, or awareness of analysis methods (Underwood & Waterson, 2013)⁴.

4. Investigation

CIPU's investigation commenced in September 2021, with the interviewing taking place in November and December 2021. These interviews were run more as discussions with stakeholders as opposed to a standard CIPU interview. The report, however, will refer to these meetings with stakeholders as interviews for sake of simplicity. Those interviewed include:

- 4.1 HASANZ
- 4.2 CosmanParkes
- 4.3 WorkSafe
- 4.4 Impac
- 4.5 Ministry of Business, Innovation & Employment (MBIE)
- 4.6 SiteSafe.

An invitation was also made to meet with EdenFx HSE Recruitment, a national health and safety recruitment company. A meeting was set up and then later rescheduled by EdenFx. Due to other commitments, EdenFx were not able to attend the rescheduled meeting.

4.1 Interview with HASANZ

Investigator Tess Cuthbert and Luke Ulrich met via *Zoom* with representatives from HASANZ on 16 November 2021. HASANZ stands for the Health and Safety Association New Zealand. Representing HASANZ were: (1) Robyn Bennett – President of the New Zealand Institute of Safety Management (primarily a health and safety auditor); (2) Jodi Wright – CEO New Zealand Safety Council (senior health and safety business partner role); (3) Mike O'Brien - HASANZ Independent Chair; and (4) Nick Crang – Legal Counsel of HASANZ, Duncan Cotterill. The following is a summary of the interview.

HASANZ was established in 2014 as a function of the task force that came out of the Pike River disaster. Its mission is to increase the capability and capacity of the health and safety community. It is predicted that 2000 more health and safety advisors will be required in the next 10 years. There are currently over 5000 health and safety advisors of HASANZ member associations. HASANZ holds a conference once every two years; however, due to COVID the rescheduled March 2022 conference has

⁴ Underwood, P., & Waterson, P (2013). *Accident analysis models: Guidance for safety professionals*. Loughborough. Loughborough University



been postponed to November 2022. HASANZ typically provides 15 scholarships per year for professional development with the scholarship funding donated from business and supplier sponsorship, Worksafe, through HASANZ workforce development projects and ACC.

Agencies that deal with health and safety risk in New Zealand include WorkSafe, MBIE, the Minister for Workplace Relations and Safety, and ACC. There are gaps in leadership and capability at the top and at the frontline across all health and safety professionals in New Zealand, says HASANZ.

HASANZ Register

HASANZ has a register, where the public can search for members that are listed on it. HASANZ is an umbrella association with 14 different members and each Association addresses different sectors across health and safety. These include generalist and specialist professions. The register is designed to provide information and reassurance to those that use health and safety professionals and to increase the professional standards throughout the industry, lift capability, and connect health and safety professionals and businesses that require services.

HASANZ has an approval process for a member to be listed on its register. HASANZ has good character tests for its members which includes character references and a requirement for its members to hold public and statutory liability insurance. There is also a requirement of at least 'Level 6 NZQA credits' to get on the register. HASANZ has a code of ethics and competency level set for its members and requires 40-hours of ongoing professional development for its members per year. The register sets minimum entry requirements, and one must apply to HASANZ to be a HASANZ approved auditor or health and safety investigator. HASANZ says *they confirm applicable qualification and experience to be approved in areas of expertise. This expertise is reviewed by approved member organisations and deemed appropriate competency in the area of discipline being applied for registration under.*

Definitions and Acts

A health and safety practitioner is someone newer to the role, whereas a health and safety professional is someone who has been in the role longer and has a higher level of qualification. Within the health and safety discipline there are also student members, certified fellows, advisors, coordinators, external advisors, and consultants. Consultants are typically external health and safety advisors and can come from any discipline to undertake audits or investigations. HASANZ says *this is within their area of scope and approved competency by the Registration process through the member*



organisations. Not HASANZ. To be a registered safety professional you must have a tertiary degree. Level 6 minimum to be an associate member you can have the degree but still need the experience to be competent and coached until you meet the desired level of competency to step up a level.

HASANZ members are not covered by a specific enactment and membership is voluntary – although HASANZ hopes this will ultimately change in the future. The membership committee at HASANZ provides coaching and support to members and graded competencies within a register; most members have a tertiary degree. Some members have their own separate registers; for example, engineers, medical/health and these would be covered by Section 22d of the PSPPI Act, says HASANZ.

What is a Health and Safety Audit?

Usually an auditor will define the scope of the audit with the client before they begin. It can be whatever the client wants. It could be an audit on an investigation (i.e., did the investigation follow the process?), and it would also include potentially reviewing medical health records and medical reviews. Today there is an increased focus on health, well-being and rehabilitation. There are a number of training types undertaken, dependant on the audit. Questioning techniques are typically taught as part of the training process. HASANZ says *to be an auditor and approved you must have completed an approved training course at an approved training group and then show the competency in the skill. This course is an intensive 5-day course with stringent testing. Also note most audits are to particular standards such as the ACC Audit for the Partnership Programme etc and others for ASNZS4801 or higher.*

What is a Health and Safety Investigation?

ICAM [Incident Cause Analysis Method] is used for higher risk events. These could include: assessing if there was fatigue involved in the incident; training given; equipment used; the maintenance history of the equipment; performance reviews; formal interviews and statements from those involved, such as witnesses, photos, videos, and any medication taken by those involved. If the investigation requires further information, then the person undertaking the investigation should ask for more information from the employer. Sometimes an audit or investigation can take from half a day through to three or four days. HASANZ says *ICAM investigation process is a taught skill and qualification used by many different disciplines to undertake an in-depth investigation into the incident getting right back to root causes which may be many. This can involve health information, personal information, work situations*



and many other areas for information. Any confidential information is held securely and not for public use. Any HS Professional that uses this is under the health Information and Privacy Acts to control the security of this information.

Complaints Process

When a complaint is received, it goes to the member's 'regulator' of each specific Association before coming to HASANZ (e.g., nurses association/organisation). All members must have a comprehensive complaints process through their own website. HASANZ checks each complaint process.

Should health and safety professionals be licensed?

HASANZ says the training to get a private investigator licence is very different to the work they undertake. There are some similarities, but overall very different and the work has a different purpose. HASANZ says the requirements to gain a private investigator licence is expensive and the cost would be passed on to the consumer. There is no specific category under the class of work that would fit with a health and safety practitioner (e.g. crowd controller).

HASANZ's View

HASANZ says if we were to flip the question around, would it be acceptable for a private investigator to undertake a health and safety investigation...?

Although HASANZ Legal Council does not have a position to date with respect to whether some of the work of health and safety professionals meets the description of private investigator under the Act, its position is that of requesting an exemption for its members, so that they would not need a private investigator licence. Section 22 (d) would not cover generalist health and safety professionals and appears to only cover those members that have their own enactments (i.e., nurses) says HASANZ.

Licensing under the PSPPI would create another barrier for health and safety professionals and add confusion in the market. It would also add cost for individuals whom must register with other annual registrations that its members must hold (e.g., this may include a HASANZ annual fee and their own particular organisation's annual fee.)

Follow-up email



In an email of 8 December 2021, Mike O'Brien provided a list of HASANZ member organisations and its fee structure. An excerpt of the email is provided below:

1. Full list of the 14 HASANZ member organisations

Full Members:

- a. Faculty of Asbestos Management of Australia & New Zealand Ltd (**FAMANZ**)
- b. Hazardous Substances Professionals New Zealand (**HSPNZ**)
- c. Human Factors and Ergonomics Society of NZ (**HFESNZ**)
- d. Institute of Organisational Psychology (**IOP**)
- e. NZ Institute of Safety Management (**NZISM**)
- f. NZ Occupational Health Nurses Association (**NZOHNA**)
- g. NZ Occupational Hygiene Society (**NZOHS**)
- h. NZ Safety Council (**NZSC**)
- i. Occupational Therapy New Zealand - Whakaora Ngangahau Aotearoa (**OTNZ-WNA**)
- j. Physiotherapy New Zealand (Occupational Group) (**PNZ**)
- k. Royal Australasian College of Physicians (**RACP**) and The Australasian Faculty of Occupational Environmental Medicine (**AFOEM**)

Associate Member Associations:

- l. Australian/ NZ Society of Occupational Medicine (**ANZSOM**)
- m. Human Resources Institute of New Zealand (**HRNZ**)
- n. Maintenance Engineers Society of NZ (**MESNZ**)
- o. NZ Institute of Hazardous Substances Management Inc (**NZIHSM**)

2. List of Acts that cover some of the HASANZ member organisations

I am currently seeking response from each association and will revert back to you shortly as each association will be covered under different legislation.

3. The annual membership costs of various HASANZ memberships (to be an individual member, or an organisation member?)

Member associations are charged \$350 when they join but nothing further. Appreciating that HASANZ is an umbrella association rather than a membership association.

Our associations members pay a membership fee to their respective associations which will differ per association.

Fees Charged for Register Applications

However, fees are charged, to the associations, for each member that is listed on the HASANZ register, as follows:

	HASANZ	HFESNZ	NZISM	NZOHNA	NZOHS	NZSC	PNZ
<i>New</i>	\$100.00	\$150.00	\$200.00	\$150.00	\$150.00	\$150.00	\$0.01
<i>Renewal</i>	\$85.25	\$85.25	\$85.25	\$85.25	\$85.25	\$85.25	\$85.25
<i>Administration</i>	\$14.75	\$14.75	\$14.75	\$14.75	\$14.75	\$14.75	\$14.75

4. What specifically does the "good character test" involve to get onto the HASANZ register? (Does it include a Ministry of Justice Criminal Conviction History?)

When they are being screened to join the HASANZ Register they must comply with the [Associations Registration Standards](#). This is done by the member association.



We will naturally need to update and align a few requirements for those wanting to achieve a competency relating to 'Accident Investigation' so that they undergo screening via a police check before they can have this competency approved. We are working with Nick Chang at Duncan Cotterill to review requirements and modifications in both content and process that would need to be amended.

A follow-up email was sent to HASANZ in late December 2021 and again in late January 2022 with respect to Point 2. A draft of the summary of the November 2021 CIPU interview with HASANZ was sent to HASANZ for their review in early March 2022. HASANZ reviewed the summary, and made a few changes to the summary, including some additional comments. These changes were accepted, and the additional comments have been included into the summary and italicised to identify them.

With reference to the final paragraph and to Point 2, HASANZ's comment is as follows:

From NZSC certain members will be covered with their specific qualifications are covered by Acts. i.e. any current registered nurses, HIRNZ for HR. However, many of the team sit working under the Health and Safety at Work Act and Regs 2017 as with work place health monitoring site monitoring etc and then ACC Act for rehabilitation and holding of records on site. There is no specific Act or Regulation that covers HS Generalists however they must work to the Acts and Regulations of the Land. All control is on the Membership organisation and then through HASANZ. Code of conduct and competencies, and professional behaviours etc.

4.2 Interview with CosmanParkes

Investigators Tess Cuthbert and Luke Urlich met with Mike Cosman from CosmanParkes via Zoom on 30 November 2021. The following is a summary of the discussion with Mike Cosman.

Mike Cosman is a self-employed health and safety consultant and director of CosmanParkes. He is based in Auckland and his business associate is based in Wellington. Its client base is varied including public agencies and private businesses. He has worked in the industry for 42 years. For 28 years he was a regulator. He has been in health and safety consultancy for the last 15 years. He also ran a workplace health and safety company *Impac* for seven years. In 2014 he took part in the health and safety taskforce working group that followed Pike River. He also undertakes some investigation work, peers reviews and has appeared in court as a expert witness for both the defence and prosecution. He is currently involved with five cases before the courts. He has appeared as an expert witness for four of the defendants in relation to the Whakaari White Island case. When he was in the United Kingdom, he appeared in the UK magistrates court. Much of his work today involves working as a health and



safety assessor. He is also the chair of the New Zealand Institute of Safety Management NZ and does occasional guest lecturing at universities.

Mike Cosman believes health and safety is a key part of business success. It is also now widely accepted the importance that mental health plays within business. Big challenges in health and safety are about focus and the ownership of issues.

Consultants – Generalists

Mike Cosman refers to health and safety consultants as generalists who do not specialise in one particular sector. He says it is too hard to know how many of these individuals are consulting in New Zealand. Some of our investigations are into workplace bullying, sexual harassment, and workplace suicide. Investigations may also include assistance from occupational physicians, psychologists and others. These professionals are covered by different enactments. Consultants would often work with Russell McVeagh lawyers and sometimes investigate claims that certain industries have issues such as in the sporting field, gymnastics and swimming.

Health and Safety at Work Act 2015

Mike Cosman says he has looked at the legislation and the purpose of it. Health and safety legislation in New Zealand is very broad. The purpose is for the public interest, but it does not say what the public interest specifically is. However, it does go on to explain what unsatisfactory conduct is and the way he reads it referring to incompetence / negligence with respect to professional standards.

Mike Cosman has worked with NZISM to bolster the code of ethics for the graded members by ensuring there is a mechanism to support and monitor graded members. If the intention of the Act is that a person who is part of a profession that already registers or controls them around professional standards, then we have the legislation and an independent Licensing Authority to do that. However, when he looks at opportunities for exemptions in the Act, it talks about an exemption being conditional on people being members of affiliates of a named professional organisation, which again suggests the default option is that there is an organisation that regulates in some way. In the safety community, there is HASANZ or NZISM and the other professional bodies, that could be deemed to satisfy that requirement.



Mike Cosman says he thinks that health and safety consultants would be captured by Section 5 of the PSPPI Act. This is in terms of the information required to collect in an audit review and investigation. In investigating an accident, one of the things we are trying to understand is the behaviour of the people involved, he says. This may include a review of CCTV footage. In short, Mike Cosman believes their 'gathering information activities' would be captured under the PSPPI Act.

Mike Cosman says that approximately 50% of the health and safety consultants are members of NZISM, but only a smaller subset of this 50% are on the HASANZ Register. Of the 50%, he is not sure how many would be consulting. Consultants who investigate often deal with workplace bullying, sexual harassment, or a work-related suicide. This could be in a multi-disciplinary team, of which a health and safety professional is just one member. In this scenario, it could be possible to have a range of individuals covered under a range of enactments. However, in these teams it is likely to be led by a senior lawyer – with input from subject matter experts who are also on the team.

Mike Cosman believes there would be pushback from the sector, particularly if it created a parallel requirement in terms of needing to be members and licensed under the PSPPI Act. There might also be pushback from those whom are not regulated in any way and from those whom are members of a professional body.

Mike Cosman says that people in health and safety are often very poor at meeting the requirements of the privacy of individuals. In some ways it would be quite good to remind people this information is confidential and can only be shared when there is a 'need to know.'

Training

Mike Cosman does not believe there is sufficient training for health and safety consultants whom undertake an investigation. There is training around investigation techniques, but not enough training on the privacy aspects of that. In a former role, Mike Cosman delivered ICAM training, but there was not a big focus on privacy in this training.

Mike Cosman says there has been a review of the qualifications on the NZQA framework around health and safety that the NZISM has been a part of with Skills Consulting Group. If a question around whether a unit standard could be created to incapsulate the things we are looking for, NZISM is linked in with the various parties that could make this happen, says Mike Cosman.



Mike Cosman says anyone with a regulatory background who comes into a health and safety role may have been trained in investigative models, although a lot of this is around criminal rights and responsibility. However, he suspects the majority of those carrying out health and safety investigations would not have been trained at that level.

An Investigation versus an Audit

An investigation tends to be reactive, whereas an audit tends to be proactive. An investigation will typically be into the specific circumstances of an event or series of events and looking to identify what happened and why in order to make recommendations for improvement. An audit is typically a proactive activity where you have a standard or framework of what good looks like and you are looking for evidence that the organisation is meeting that standard. An organisation that is conducting an investigation is generally looking to learn and improve rather than blame. Increasingly, organisations are reframing how they go about this. They may call this a learning team, concentrating on learning, rather than on recrimination or blame.

Some investigations may have 1000+ documents, whereas some are much less complex, he says. Most health and safety professionals will do a range of things, and are unlikely to just do investigations or just do audits. However, a typical investigation would likely include interviews and would likely include the recording of those interviews.

There may be a range of individuals who may not be in health and safety type roles that are carrying out health and safety audits or investigations. There could be a number of groups in these scenarios. For example, you might have people involved in audits in public safety management in the electricity industry that are more likely to come with an electricity industry background and see themselves as an electricity industry specialist, rather than a health and safety specialist.

Health and Safety at Work Act 2015

Mike Cosman says that the Health and Safety at Work Act does not actually include a duty to investigate nor any specific requirements around competency and around the people giving health and safety advice. These may be implicit – but not explicit requirements. The Act does not provide a mechanism to hold people to account for the kind of things the PSPPI Act does. It is the regulator and industry bodies that play a role in this regard. A debate occurring for a few years is whether health



and safety or parts of all of it should be regulated professionally. Some parts, particularly the medical ones are regulated in different ways, but the bulk of people in health and safety are not covered by any of those. Anyone can set themselves up as a health and safety consultant.

Mike Cosman does not think his business would be adversely effected if a licensing regime with the PSPLA was required other than the cost of registering with the PSPLA. However, there may not be any material benefit to his business or sector for registering with the PSPLA. Mike Cosman is paying for five different bodies in broadly the same space. Although none of these memberships are mandatory, he would not like to duplicate further.

4.3 Interview with WorkSafe

Investigator Luke Ulrich met with Emma Madison-Ross & Kelly Hanson-White from WorkSafe via *Zoom* on 7 December 2021. Emma Madison-Ross is the manager of the Regulatory Frameworks Team. The team develops legislative tools (safe work instruments) and interacts with the MBIE health and safety policy team around regulatory reform. Kelly Hanson-White is the Chief Advisor Regulatory Excellence. She advises internally about matters of policy and practice, and interacts with other government agencies, primarily in relation to COVID. The following is a summary of the interview.

WorkSafe's Role

WorkSafe's role is the Regulator of the Health and Safety at Work Act 2015. They are concerned with businesses not causing harm to workers. There are 500,000+ PCBUs in New Zealand, which WorkSafe regulates. WorkSafe oversees the sector but it also has inspectors that undertake their own investigations. It has a core team of 40-50 Investigators who can investigate significant or notifiable incidents and 120 inspectors that front-line regulate businesses throughout the country. WorkSafe would struggle to provide oversight and administration with respect to any mandatory qualifications for training in health and safety investigations due to current resourcing.

The Health and Safety in Employment Act 1992 preceded the Health and Safety at Work Act 2015 and provided an explicit duty for organisations to conduct an investigation after an incident/event. However, no such explicit provision was retained for the Health and Safety at Work Act 2015. In some countries it is mandatory for businesses to seek health and safety advice, but this is not the case in



New Zealand. New Zealand business is a spectrum, between those whom have not adopted health and safety, versus those whom have taken it seriously. Overall there is a small number of individuals carrying out investigations and audits.

WorkSafe's View

Although WorkSafe does not have a strong view on the Licensing Authority's Directions, it believes health and safety investigations are unintentionally captured by the PSPPI Act and an exemption for health and safety professionals should be considered by the Licensing Authority, particularly for members of HASANZ. This is because HASANZ is a professional body that lifts capability and provides reassurance to the public. WorkSafe says that the PSPPI Act has some 'scoping issues' and it does not believe parliament was thinking that health and safety professionals ought to have been captured by it when it was created.

WorkSafe does not believe that being licensed under the PSPPI would have a material difference to the quality of service that businesses provide. WorkSafe says that a health and safety professional would be far more concerned with facing prosecution under the Health and Safety at Work Act, than from losing their PSPPI licence.

WorkSafe says there is not enough evidence to suggest that WorkSafe itself should step into licensing health and safety professionals in New Zealand. They say that any changes that may effect incentives in the health and safety system could produce perverse outcomes. PSPPI licensing could result in health and safety investigations becoming less affordable.

Health and Safety at Work Act 2015

Under the Health and Safety at Work Act, there are 20 sets of relevant regulations that WorkSafe administers. There are also other Acts that are relevant such as the Electricity Act 1992 and Gas Act 1992. [Note under the Health and Safety at Work Act – WorkSafe has an additional role to oversee public safety under those pieces of legislation.] WorkSafe can prosecute a health and safety professional for doing a poor job by putting people's health and safety at work at risk. A poor job could include a health and safety investigation. This would be a breach of the Act, and WorkSafe is commencing its first proceedings against a health and safety consultant on this basis. Generally



speaking, it is the PCBU that holds the duty of care to the health and safety of its workforce, rather than the health and safety professional whom conducts an investigation.

Health and Safety Investigations

WorkSafe says that no one health and safety professional is purely an investigator as those who do provide the service often do it as an addition to their main work. If an accident occurs, an advisor is called. They would look to see why it happened and how to stop future incidents occurring. An investigation is typically conducted post an event and sometimes interviews would be conducted in a health and safety investigation.

Issues in health and safety investigations are more likely related to the advice given by the health and safety professional with respect to the investigation, rather than the actual conclusions made through an investigation. For example, if the recommendation were for guards on high-risk machines to be removed, which was then followed by workers losing limbs to the machine, then the issue would be with respect to the advice, as opposed to the investigation that was undertaken prior to this advice.

Health and Safety Audits

WorkSafe says that in health and safety circles, people often use the terms of health and safety investigations/inspections and health and safety audits interchangeably. Likewise, sometimes people have different working definitions of the two, whilst within an organisation, it is not uncommon for some parts of a business to use different words to describe different tasks or activities.

An audit cannot be completed in a vacuum of information. Gathering and seeking information would be a key part of a health and safety audit and investigation. It could be a desk-top audit or reviewing CCTV footage. It could also involve observing the scene. SafePlus Auditors, for example, often seek information to complete parts of their work.

4.4 Interview with Impac

Investigators Tess Cuthbert and Luke Ulrich met with Tracy Gory from Impac Services Limited via Zoom on 8 December 2021. Tracy has 20 years of experience in health and safety and is a member of NZISM. She worked in the United Kingdom as a health and safety manager. She has worked in New Zealand



for seven years for organisations such as IRD and Wellington Water. Her academic qualifications are in IOSH. She describes her role as a trainer and consultant. She recently moved into teaching health and safety leadership qualifications. Tracy currently delivers the NEBOSH training and the ICAM course through Impac. The following is a summary of the discussion with Tracy Gory.

Health and Safety Investigations – ICAM

ICAM investigations are reserved for the more complex investigations as this approach to health and safety investigations is time intensive, systematic and thorough. ICAM came out of the petro-chemical industry. In New Zealand, only a limited number of companies can deliver this course as a licence is required to deliver the course. Some investigations may involve going-over an investigation that has already been completed by an organisation. ICAM investigations are typically done by a team, rather than by an individual.

A key fundamental of the ICAM course is not to apportion blame or identify personal mistakes or faults of the worker. Rather, it is about understanding *how* the incident occurred and more about how the organisational factors played a part in an incident, so to avoid similar situations occurring in the future. For example, was the worker supported or was the equipment suitable for the task at hand? The organisation is looked at as a whole, which may include looking at procedures, management structures, and organisational changes processes.

Once the information has been gathered, the investigator would scope it down into six pivotal areas. A timeline is then constructed. The analysis is trying to understand what the conditions were like for those at the time of the incident. Relevant factors would include whether those involved had experience, and whether risk factors involved had contributed to the event.

Evidence is collected in an ICAM investigation process (i.e., involves gathering information from witnesses; gathering photos, visiting the scene, looking at environmental conditions, information provided by manufacturers). Interviews are a small part of the process and are audio recorded with consent of the interviewee. Open questions are used and getting the witnesses involved to construct a narrative around what happened. Finally, a report is generated at the end of the investigation.



The ICAM course is two days in length and costs approximately \$950.00. Class sizes are about 16 participants. This allows for four groups of four, with a lot of group activities. On completion of the course, a certificate is generated; there are no NZQA credits for this course.

Health and Safety Audits

An audit is dependent on what is selected by the client and the consultant would agree with the client around the timeframe for completion of the audit. For example, the client may ask for the consultant to look at one particular aspect of an organisation (e.g., the provision for contract management with respect to health and safety. Audits usually involve in-person visits by the consultant to the organisation, meaning the information remains within their organisational bubble. Information should always be sent securely says Tracy Gory.

An audit could also involve examining documents and comparing with best practice or look at the entire health and safety management system of the organisation (i.e., risk management, emergency procedures, worker engagement, organisation structure including roles and responsibilities). An audit is dependent on the size and scope of the organisation and on its maturity level.

Membership of NZISM

Members or bodies such as NZISM are bound by rules and must meet a threshold to go on the HASANZ Register, along with strict criteria. NZISM has a complaints process and code of conduct. If a professional gave incorrect advice, they membership could be revoked from NZISM and the HASANZ Register. There is no specific legislation for NZISM and health and safety investigations would need to defer to the Health and Safety at Work Act 2015.

Benefits of belonging to NZISM

Tracy Gory says belonging to NZISM has benefits, such as a national branch network, guest speakers, including some impressive international guest speakers and webinars, and they are looking at ways to hone the craft. As one progresses through levels, there is a grading panel of one's qualifications and the amount of practice work done each year. The annual fee for NZISM is about \$300.



Intent of the Act

Tracy Gory says that she does not believe it was the intent of the PSPPI Act to include health and safety professionals, and that the work of health and safety professionals does not meet the description of a private investigator. Health and safety investigations are rather different to conventional investigations, in that they look at the organisational factors, rather than blaming individuals. There are different specialisms in health and safety, i.e., occupational hygienists, ergonomists. There are up to 15-20 bodies that cover the different specialisms.

There is likely to be resistance should health and safety professionals be required to be licensed under the PSPPI, and Tracy Gory does not believe there should be a distinction between those completing interviews versus those doing desk-based reviews. With respect to client privacy, measures are already in place.

4.5 Interview with MBIE

Investigators Tess Cuthbert and Luke Ulrich met with Lisa Collins and Zach Boyle from the Ministry of Business Innovation and Employment (MBIE) via *Zoom* on 8 December 2021. Lisa Collins is the Manager of the Health & Safety Policy Team, a role she has been in for two years. Zach Boyle is a Policy Advisor at MBIE based in the same team for five months. Both are based in Wellington. The following is a summary of the discussion with MBIE.

MBIE's Role

MBIE's role is to advise the Minister of Workplace Relations and Safety. The Team's work is focused on the health and safety at work system which is largely governed through the Health and Safety at Work Act 2015. MBIE's role is regulatory stewardship, i.e., looking at whether the system as a whole is actually delivering on the activities, as well as, looking at the direction it is heading, and on any needed adjustments.

A key finding from Pike River was that there are not a lot of health and safety professionals in New Zealand, and businesses typically hire-in expertise, although it is unclear what sort of expert a business should hire.



MBIE is not doing any structured policy work in the area pertaining to health and safety investigations or audits and there are no planned updates to the Health and Safety at Work Act in the next few years. Their current focus centres on equipment, machinery, scaffolding and cranes and the rules/regulations in place to manage these risks. A full review of the Health and Safety at Work Act is probably about 7 to 8 years into the future.

Health and Safety Workforce

MBIE believes the workforce might be around 5000. A large part of this 5000 would be doing health and safety investigations, although it is unclear as to how many are offering-up this kind of service, and very few would strictly be health and safety investigators as the job market is too small. The good ones would belong to an occupational body. Health and safety generalists belong to NZISM; however, professionals can also belong to their member organisations. However, there will be others who do not wish to join multiple organisations.

Investigations

MBIE says that businesses would generally call in a health and safety professional following an incident or near miss in an attempt to understand what happened and to understand the failings in the system and what they might want to change. It is common for small businesses to call in this expertise as small businesses do not typically possess this type of expertise themselves.

Health and safety typically takes the view that the system has failings as opposed to locating failings of individuals within that system. However, it is possible for an individual to be held to account for their actions and for this to effect their employment. Health and safety investigations can look into the actions and behaviours of the employees to form a picture of what happened and the drivers behind it and whether the business should be concerned. This may be needed to understand the actions and behaviours of the workers or whomever was involved.

Health and Safety Audits

Health and safety audits happen when a business wants to know if it is doing the right things so not to be pulled up by the regulator. These audits can be described as passive-informal audits or risk assessments. However, there are some instances when audits are required in legislation, such as the adventure activities regime. Here, in order to be called as a registered activity, a business must have



passed an audit by an independent auditor, who is registered to provide such audits by WorkSafe, whom has handed this task to JAS ANZ, which is an auditing body.

MBIE says most health and safety audits do not involve the seeking or obtaining of information. The process is not about people, but about auditing the system, seeking information about the business in terms of risk and not finding information about individuals. MBIE does not see how health and safety audits would be captured by the PSPPI Act.

HASANZ's Role

HASANZ is a private body and does not have a legislative framework underpinning it says MBIE. Although membership of HASANZ would probably be sufficient to provide assurance around the competency of individuals. MBIE understands that HASANZ has a relatively new complaints and disciplinary process, but doubts whether HASANZ would have the resources to raise-up these processes. MBIE understands that HASANZ has thorough upfront checks for gaining membership, as opposed to the checks that deal with human elements and post joining checks after gaining membership. MBIE doubts whether they are able to deal with sexual harassment and bullying complaints, for example.

Training

There is a wide range of qualifications in the health and safety field, including bespoke qualifications such as occupational hygiene. There is no plan to introduce mandatory qualifications for health and safety professionals. MBIE, however, is looking at mandatory qualifications for those whom undertake very hazardous work, such as the high hazards sector.

MBIE's View

MBIE says there would be massive pushback from the sector should PSPPI licensing be required as the sector feel they are all doing a great job. On the question of whether those whom are doing the work that would fall under the definition of investigator, MBIE says this would be a reasonable balance to be licensed, in particular for those carrying out investigations. For individuals whom are not members of HASANZ, MBIE believes that it would not be unreasonable for them to be licensed, although industry



would not be happy with the idea. To be captured by the Act, MBIE believes we have to be very clear about what tips one into the definition.

4.6 Interview with SiteSafe

Investigators Tess Cuthbert and Luke Urlich met with James Mead and Chris Jobson from SiteSafe via *Zoom* on 15 December 2021. The following is a summary of the interview.

Chris Jobson is the Northern Regional Manager for SiteSafe and has a background in high hazard industries. James Mead has a background in architecture. He has been involved with SiteSafe for about 20+ years and his job title is Group Manager Education, Development & Delivery.

SiteSafe is a national, non-profit organisation established by the construction sector, and has a board of directors. It has offices in the main centres around the country and its head office is in Hamilton, whilst safety advisors are domiciled in the smaller centres to obtain full national coverage. SiteSafe field staff (known as safety advisors) support the industry in all things health and safety. SiteSafe is funded by its members and via the services it provides to the sector, such as training. Membership fees vary depending on the size of the organisation – 80% of its membership is made up of small companies (1-5 staff). SiteSafe works closely with WorkSafe, MBIE, Ministry of Justice, NZ Police and ACC. They also have relationships with the Ministry of Education that includes independent audit work. Similarly, they have a relationship with the Ministry of Social Development that involves training for 700+ clients on the Jobseeker Support Benefit to obtain a site passport. Its regional safety advisors provide an independent view of how their construction safety practices are performing on the job.

SiteSafe provides training to approximately 70,000 people per year. SiteSafe is also NZQA registered private training establishment (PTE). They receive a small amount of funding from TEC for a level three certificate it delivers. SiteSafe also offers consultancy and advocacy services to the construction sector and can go onsite themselves and complete independent audits.



SiteSafe has 6000 ‘largely construction-based’ members. SiteSafe plays a part in the vertical construction leaders group and has a mandate to speak on its behalf. Under this group is a forum that SiteSafe facilitates which is a health and safety practitioners group. That forum is for national safety managers of large commercial construction businesses. Across the regions, SiteSafe facilitates safety liaison groups.

Health and safety investigations and audits

SiteSafe says that employers are obligated to conduct an investigation following an incident irrespective of whether WorkSafe is involved. These are usually done by health and safety managers. Clients may also ask SiteSafe to assist them in their investigation, in terms of supporting clients about the ‘how to’ complete a health a safety investigation, rather than completing an investigation on behalf of the client. SiteSafe says that investigations can include examining training records and maintenance records, whilst most site reviews are conducted onsite.

Training

SiteSafe delivers some training regarding health and safety investigations and audits. The training courses cover basic questioning and interviewing techniques used in investigations. SiteSafe offers a one-day ‘Accident Investigation and Prevention’ course, which highlights the benefits of conducting an investigation, as well as, root-cause analysis, multiple causation, and a systematic process of conducting an investigation. General information-gathering guidance is discussed, as is taking witness statements and talking to those onsite.

SiteSafe’s View

SiteSafe believes some health and safety investigations and site reviews (known as audits) are captured by the definition under the PSPPI Act but this would depend on the kind of investigation undertaken. However, SiteSafe doubts that it was the intent of the PSPPI Act to capture health and safety investigations and audits. From an investigation perspective, the intent of the Act was not in relation to the gathering of that sort of information.



The PSPPI licensing requirements would create some real challenges for the health and safety sector, says SiteSafe. They described this requirement as being a 'bridge too far.' SiteSafe believes there would be pushback from health and safety professionals to be licensed under the PSPPI as they would receive this negatively. They do not see the need for this requirement and it would become a compliance box-ticking activity.

SiteSafe was not aware of any health and safety professionals whom are licensed under the PSPPI. The Health and Safety at Work Act is the main Act for the construction industry, although there are additional pieces of regulations for high hazard work, for example. The key piece of law underneath the Act is the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.

5. Assessment and further considerations for the Authority

This report has aimed to answer the Licensing Authority's Directions with respect to whether health and safety professionals fit within the definition of private investigator as outlined in Sections 4 and 13 of the PSPPI Act.

Are health and safety professionals captured by the Act? CIPU believes health and safety professionals are captured by the PSPPI Act and its definition of private investigation work. From the discussions with stakeholders through the information-gathering phase of this investigation, some common themes and points emerged:

- a) It was generally believed health and safety professionals are captured by the PSPPI Act.
- b) There is no identifiable blanket exemption for health and safety professionals in the PSPPI Act.
- c) There is no explicit provisions or regulations for health and safety investigations and audits in the Health and Safety at Work Act.
- d) The Health and Safety at Work Act does not provide for a licensing regime with respect to investigations and audits; WorkSafe does not wish to introduce a licensing regime.
- e) Membership to HASANZ is voluntary and has some checks and balances in place including a complaints process, although these are not backed by legislation.
- f) The number of health and safety investigators and auditors is thought to be a low number, although many generalists may be carrying out investigations and audits occasionally.



- g) Seeking and obtaining information as well as interviewing people were identified as parts of the health and safety investigative role, but less so for the auditing role.
- h) There are no mandatory training qualifications for health and safety investigators or auditors, apart from the ACC ones listed by HASANZ.

5.1 CIPU's View

There is currently no health and safety licensing regime. There is also a Health and Safety at Work Act that is not explicit in how it defines and regulates health and safety investigations and audits. CIPU believes that health and safety investigations and audits are captured by the PSPPI Act.

On the question of whether Parliament intended for health and safety investigations and audits to be captured by the PSPPI Act, and whether the PSPPI Act is suffering from 'scope creep,' it is worth noting that the PSPPI Act was introduced before the Health and Safety at Work Act. At this time, it is arguable that licensing for these activities was not identified as awareness about these activities was at a lower level than today. It is also possible that, as a developing sector, health and safety practice in New Zealand was at a lower maturity level at this time, and that as the sector/workforce developed, so too its activities might have expanded into areas covered by other Acts, such as the PSPPI.

One of the important aspects of a health and safety investigation is how causation is attributed, and how responsibility or blame is likewise attributed. Hallinan's view of human error is that after something goes wrong we tend to look for the last person involved in the chain of events and blame them for the outcome. Although satisfying, it usually does not stop an error from being repeated. If multiple people make the same mistake, then that should inform us about the mistake, as its cause probably isn't individual, but systemic, he says.⁵

To complete many health and safety investigations, a high level of skill and experience is required with respect to all aspects particularly the systemic ones. Professionals ought to demonstrate a high level of insight, care, knowledge of appropriate legislation, and foundation skills in investigation to be competent in this field. Not only are they looking into individuals' actions or behaviours, but the interaction and performance of the health and safety system as a whole.

⁵ Hallinan, J. T (2009). *Why we make mistakes*. New York. Broadway Books



Exemptions

Depending on the tasks undertaken in an audit, some auditors may be exempt if they are providing a general risk assessment and are not seeking or obtaining information in the course of their work as a health and safety auditor.

Key aspects to assist to determine whether a health and safety investigation or audit may be captured by the PSPPI Act, include the following questions:

- Are individuals or groups being interviewed, and are statements being taken or recorded?
- Are maintenance, training, incident, or other records or reports examined?
- Is other information being sought or obtained that is not a public record?
- Is information about individuals' behaviours, actions, or character being gathered?
- Is information that is generally considered private being obtained or provided to the health and safety investigator or auditor?
- Is a report being generated that includes conclusions or recommendations?

On HASANZ's request for an exemption, CIPU's view is that unless its member organisations can demonstrate that they are regulated by another Act with respect to the questions listed above and have a complaints and disciplinary process, then no blanket exemption should apply to individuals from those member organisations whom conduct health and safety investigations and audits. Membership to HASANZ would not automatically mean that members of it would qualify or be entitled to an exemption under the PSPPI Act. CIPU's understanding is that, being a private body without a legislative framework with a mixed membership not all of whom hold a practicing certificate, licence, permit by other authority under and enactment and a track record of a robust complaints and disciplinary process, no exemption would apply.

The Licensing Authority has outlined criteria in which an exemption may apply. In the Decision of D, E & C Ltd 2020,⁶ for example, an exemption may apply for people who are licensed or permitted to carry out security work under some other regime. This is particularly the case if the other regime which they are licensed ensured they are qualified to carry out the work and have a robust complaint process if they act contrary to the public interest. With respect to push back from the sector and the costs

⁶ *D, E & C Limited 4 June 2020* – Private Security Personnel Licensing Authority, Wellington New Zealand.



imposed by the PSPPI licensing regime, there may also be some positives that may also result from having a level playing field for all those who carry out this type of work, and that the benefits to the community and public counter-balance the costs of licensing with the PSPLA. Bar legislative change, it is open to HASANZ and the broader health and safety profession to seek an exemption from the Governor-General through an order in Council issued pursuant to Section 12 of the Act to exempt them from the definition of 'private investigator' under the Act and associated licensing requirements.

6. Next Steps

This report is submitted to the Licensing Authority for her information, further directions or decision.

7. Legislation Summary

The following section details the sections of the PSPPI ACT we investigated under.

5 Meaning of private investigator

- (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 or whereabouts 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 term **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 purpose relating to the dissemination of news or other information to the public or to any section of the public; or
 - (v) for any cultural or historical purpose or for any purpose relating to education, literature, or science; or
 - (vi) relating only to the person by whom he or she is engaged or retained; or
 - (vii) in the course of and for the purposes of the business of a bank, or of a credit bureau, or of a debt collecting agency; or
 - (b) he or she is a security technician, security consultant, confidential document destruction agent, repossession agent, property guard, personal guard, or crowd controller.

Section 5(4)(b): amended, on 6 March 2015, by [section 82](#) of the Credit Contracts and Consumer Finance Amendment Act 2014 (2014 No 33).



13 Meaning of private investigator employee

In this Act, **private investigator employee** means an individual who in the course of his or her employment, or engagement as a contractor, by a private investigator seeks, or obtains for any person or supplies to any person, any information specified in [section 5\(2\)](#).

22 Application of Act in certain cases

Nothing in this Act—

- (a) requires any Police employee to hold a licence or certificate of approval in respect of any act performed in the course of his or her employment by the Commissioner of Police; or
- (b) requires the Commissioner of Police to hold a licence or certificate of approval; or
- (c) requires any employee of the Crown to hold a licence or certificate of approval in respect of—
 - (i) any act performed in the course of his or her employment by the Crown; or
 - (ii) any act performed by any other employee of the Crown in the course of his or her employment by the Crown; or
- (d) requires any person to hold a licence or certificate of approval in respect of the carrying on by that person of an occupation or business in accordance with a practising certificate, licence, permit, or other authority, granted or issued to him or her under any other enactment.

23 Persons who must hold licence

- (1) The following persons must hold a licence under this Act:
 - (a) a private investigator;
 - (b) a security technician;
 - (c) a security consultant;
 - (d) a confidential document destruction agent;
 - (da) a repossession agent;
 - (e) a property guard;
 - (f) a personal guard;
 - (g) a crowd controller.
- (2) Every person who contravenes this section commits an offence and is liable on conviction,—
 - (a) in the case of an individual, to a fine not exceeding \$40,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$60,000.

Section 23(1)(da): inserted, on 6 March 2015, by [section 82](#) of the Credit Contracts and Consumer Finance Amendment Act 2014 (2014 No 33).

Section 23(2): amended, on 1 July 2013, by [section 413](#) of the Criminal Procedure Act 2011 (2011 No 81).



44 Persons who must hold certificate of approval

- (1) The following individuals must hold a certificate of approval under this Act:
 - (a) a private investigator employee:
 - (b) a security technician employee:
 - (c) a security consultant employee:
 - (d) a confidential document destruction agent employee:
 - (da) a repossession employee:
 - (e) a property guard employee:
 - (f) a personal guard employee:
 - (g) a crowd controller employee.
- (2) A person commits an offence and is liable on conviction to a fine not exceeding \$20,000 who—
 - (a) is employed, engaged as a contractor, acts, or holds himself or herself out to any person or to the public as a person of any kind specified in subsection (1); and
 - (b) does not hold a certificate of approval authorising him or her as a responsible employee of that kind.
- (3) This section is subject to [section 61](#).

Section 44(1)(da): inserted, on 6 March 2015, by [section 82](#) of the Credit Contracts and Consumer Finance Amendment Act 2014 (2014 No 33).

Section 44(2): amended, on 1 July 2013, by [section 413](#) of the Criminal Procedure Act 2011 (2011 No 81).

101 Functions of Complaints, Investigation, and Prosecution Unit

The functions of the Complaints, Investigation, and Prosecution Unit are—

- (a) to prepare reports on applications for licences and certificates of approval when requested under [Part 2](#);
- (b) to take part in oral hearings of applications for licences and certificates of approval as provided for in [Part 2](#);
- (c) to prepare reports on complaints against licensees and certificate holders and matters referred by an Authority when requested under [Part 4](#);
- (d) to take part in disciplinary hearings as provided for in [Part 4](#);
- (e) to institute prosecutions for contraventions of this Act, and regulations made under this Act, in the cases that the chief investigator of the unit considers appropriate.

Section 101(c): amended, on 14 November 2018, by [section 228](#) of the Tribunals Powers and Procedures Legislation Act 2018 (2018 No 51).