

Redacted Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	[The obstetrician]
Agency	Health and Community Services Complaints Commissioner
Ombudsman reference	2017/10752
Agency reference	M17/01584(JM)
Date complaint received	23 October 2017
Issue	Whether the Health and Community Services Complaints Commissioner misdirected himself as to the standard of proof applicable to a complaint under the <i>Health and Community Services Complaints Act 2004</i>

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*, as modified by section 86(c) of the *Health and Community Services Complaints Act 2004* (**the HCSC Act**).

The complaint concerns, generally, the determination of the Health and Community Services Complaints Commissioner (**the Commissioner**) to take no further action in respect of a complaint against a social worker made under the HCSC Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the Commissioner
- seeking further information from the Commissioner
- meeting with the Commissioner
- considering:
 - the Ombudsman Act
 - the HCSC Act
 - the *Health and Community Services Complaints Regulations 2005*
 - the *Criminal Law Consolidation Act 1935*
 - the *Health Practitioner Regulation National Law (SA) Act 2010*
 - the Australian Association of Social Workers Code of Ethics
 - relevant case law
- preparing a provisional report and seeking the views of the parties
- preparing this final report.

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 15 January 2018.
2. The Commissioner responded to my provisional report by way of letter dated 18 January 2018. The Commissioner advised that he accepted the finding foreshadowed in my provisional report and would accordingly apprise his staff of my views in respect of the matter.
3. [The obstetrician] responded to my provisional report by way of letter dated 29 January 2018. In this letter, [the obstetrician] invited me to 'readdress the [Commissioner]'s determination that [the social worker]'s actions were reasonable.' [The obstetrician] submitted, *inter alia*:
 - the seriousness of the allegations against the social worker weighed in favour of an investigation by the Commissioner and a determination by the Commissioner as to 'whether an offence has occurred'
 - in circumstances where he or she is unable to determine where the truth lies, the Commissioner should be obliged to conduct an investigation and make a positive finding of fact.
4. The greater part of [the obstetrician's] submissions sought to reargue the substance of his complaint to the Commissioner and the reasons why his version of the facts ought to be preferred over the social worker's. These arguments go to the merits of the Commissioner's determination and do not fall within the scope of the investigation I have conducted.
5. I accept that the seriousness of the allegations against the social worker may have been a relevant consideration for the purposes of the Commissioner's determination in respect of the matter. It is clear however that the Commissioner had regard to the nature of the conduct alleged (including by reference to the relevant criminal offence provisions) in his determination.
6. I do not agree with [the obstetrician's] contention that the Commissioner should be expected to 'determine whether an offence has occurred.' That does not fall within the functions of the Commissioner under the HCSC Act.
7. I also do not agree with [the obstetrician's] contention that the Commissioner's position in respect of the competing versions of events obliged him to conduct an investigation so as to make a positive finding of fact. Sections 29(2)(e) and 33(1) of the HCSC Act confer a broad discretion upon the Commissioner to determine what action, if any, to take in respect of a given complaint. In the circumstances, I consider it was at least reasonably open to the Commissioner to determine that further enquiries of the parties were not warranted.

Background

The HCSC Act

8. The HCSC Act provides, *inter alia*, for the making and resolution of complaints against health or community service providers. Section 5 of HCSC Act provides for the appointment of the Commissioner. Section 9 of the HCSC Act enumerates the functions and powers of the Commissioner, including, relevantly, 'to receive, assess and resolve complaints' (section 9(1)(e)).

9. Section 25(1) of the HCSC Act establishes that a complaint may be made to the Commissioner on various grounds, including:
- (c) that a health or community service provider has acted unreasonably in the manner of providing a health or community service;
 - [...]
 - (l) that a health or community service provider has acted in any other manner that did not conform with the generally accepted standard of service delivery expected of a provider of the kind of service to which the complaint relates.
10. Section 29 of the HCSC Act establishes that the Commissioner must assess each complaint and make a determination. Pursuant to subsection (2), the Commissioner may, *inter alia*:
- investigate the complaint under Part 6 of the HCSC Act (subsection (2)(b))
 - ‘if of the opinion that the complaint relates to a matter that falls within the functions conferred on another person or body and that it is appropriate in the circumstances to make a referral’, refer the complaint to that other person or body (subsection (2)(d))
 - determine to take no further action in respect of the complaint under the grounds specified in section 33 of the HCSC Act (subsection (2)(e)).
11. Section 33 of the HCSC Act establishes that the Commissioner may at any stage determine to take no further action in respect of a complaint in circumstances where he or she is satisfied, *inter alia*, that ‘the complainant has been given reasonable explanations or information and there would be no benefit in further entertaining the complaint’ (subsection (1)(e)). Subsection (4) obliges the Commissioner to give written notice to the complainant of his or her determination in this regard.
12. Section 85(1) of the HCSC Act establishes, *inter alia*, that in determining whether a health or community service provider has acted reasonably, the Commissioner may have regard to ‘any [...] matter or information the Commissioner considers relevant.’

The complaint before the Commissioner

13. [The obstetrician] is an obstetrician and gynaecologist practising out of a specialist clinic at [the hospital].
14. On [date], a social worker (**the social worker**) filed a formal complaint against [the obstetrician] with the Australian Health Practitioner Registration Agency (**AHPRA**). That complaint concerned [the obstetrician’s] professional conduct towards a young woman (**the client**) who had been referred to [the obstetrician] in [date] for a medical opinion concerning her request for an abortion. The social worker complained (on behalf of the client) that [the obstetrician] ostensibly obstructed the client’s request, causing the client unnecessary distress and, it appears, culminating in the client missing the window in which she might have lawfully terminated her pregnancy. The outcome of the social worker’s complaint to AHPRA is not known to me.
15. On 2 June 2017 [the obstetrician] ‘counter-filed’ a formal complaint concerning the conduct of the social worker with the Australian Association of Social Workers (**AASW**). [The obstetrician] alleged, *inter alia*, that the social worker had attempted to procure an unlawful abortion for the client and had unlawfully directed or incited him to facilitate this procedure.
16. On 29 August 2017 the AASW determined to refer [the obstetrician’s] complaint to the Commissioner for consideration as a complaint under the HCSC Act.

The Commissioner's determination

17. It is apparent that the Commissioner considered [the obstetrician's] complaint to fall within his jurisdiction under the HCSC Act.¹
18. On 12 September 2017 the Commissioner wrote to the AASW and [the obstetrician] to advise that he had determined to take no further action in respect of the complaint. The Commissioner's determination relevantly provided:

The complaint was correctly referred to the HCSCC as the ground of complaint falls within Section 25(1)(l) of the Act, "that a health or community service provider has acted in any other manner that did not conform with the generally accepted standard of service delivery expected of a provider of the kind of service to which the complaint relates."

In determining the reasonableness of the health and community service provider's actions, Section 85(1) of the Act is referred to. [...] [I]t is determined that the actions of the health provider were reasonable in the circumstances.

I have therefore determined to take no further action with the complaint. I have made this determination based on section 33(1)(e) of the Act, that states I may do so on the basis you have been given a reasonable explanation and that there would be no benefit in further entertaining your complaint.

19. The Commissioner in giving notice of his determination made a number of observations concerning the merits of the complaint. In opining that [the obstetrician's] complaint was 'misconceived at law', the Commissioner observed, *inter alia*:
- a report provided by the social worker to [the obstetrician] was consistent with the Social Workers Code of Ethics
 - [The obstetrician] and the social worker provided conflicting versions of telephone discussions complained about by [the obstetrician]
 - [The obstetrician] did not in any case acquiesce to pressure from the social worker and an abortion was not performed
 - there was 'nothing' in the social worker's report to [the obstetrician] that could be considered to breach the relevant provisions of the Criminal Law Consolidation Act (i.e. procuring an unlawful miscarriage) or the Health Practitioner Regulation National Law (SA) Act (**the Health Practitioner Regulation Act**) (i.e. directing or inciting a health practitioner to commit unprofessional conduct or professional misconduct)
 - a parliamentary discussion paper proffered by [the obstetrician] did not hold the force of law and could not amount to a relevant tool in interpreting the law.
20. Under 'Recommendations' the HCSCC made a number of additional observations, including:

The versions of events are diametrically opposed, pursuant to: *R v Calides (1983) 34 SASR 355* where the trier of facts is unable to determine where the truth lies, the onus is upon the plaintiff/complainant (in this case [the obstetrician]) to prove the case. In this matter both parties are equally balanced and therefore, the complaint must be dismissed.

21. On 4 October 2017 [the obstetrician] wrote to the Commissioner to express his disagreement with the Commissioner's determination and various conclusions

¹ Letter from the Commissioner to AASW and [the obstetrician] dated 12 September 2017 ('The services provided by the [service], comes [sic] within the ambit of the Health and Community Services Complaints Commissioner (HCSCC) Pursuant [sic] to Section 4 of the *Health and Community Services Complaints Act, 2004* (the Act) under – 'Interpretation' (*health service*) sub section (g) "a service involving the provision of information relating to the promotion or provision of health care or health education".')

expressed therein. Regarding the conflicting accounts of his interactions with the social worker, [the obstetrician] wrote:

The timing of [the social worker]'s report to me and her phone conversation with me were consistent with my account that [the social worker] was actively attempting to involve me in conduct (not merely as a "descriptor") which involved a breach of the Abortion Law:² ie she was "instigating" a breach of the Abortion Law by organising a social abortion for [the client] at [the hospital]. The meaning of instigate is '*to incite someone to do something, especially something bad.*' [The social worker]'s misconduct is compounded by her false notification to AHPRA that I phoned her instructing her to contact the hospital to seek approval for the abortion. Her version is patently implausible and misleading.

22. [The obstetrician] concluded this letter (emphasis in original):

The fact that [the social worker] phoned me so many times about organising an abortion for [the client], and then lodged her AHPRA notification containing serious misrepresentations against me demonstrates that [the social worker] had the intention to instigate me to carry out the social abortion for [the client] which in reference to the Abortion Law would be constituted [sic] a criminal offense [sic] had I conducted the act.

I would urge HCSCC and AASW to interview [the social worker] to establish the facts if you have doubt about my allegation and the evidence I put before you.

23. The Commissioner's Legal Officer responded by letter that same day:

The HCSCC cannot and will not agitate any conversations as to whether or not the law governing the termination of pregnancy (Abortion Law) is being adhered to. Section 3 of the Health and Community Services Complaints Act, 2003 outlines the purview of the Commissioners [sic] responsibilities. Other agencies are responsible for the enforcement of this issue[.]

24. The Commissioner's Legal Officer went on to respond to certain contentions made by [the obstetrician], before returning to the alleged contravention of the Criminal Law Consolidation Act:

Your reference to Section 82(A) of the Criminal Law Consolidation Act, 1935 (CLCA) is a Criminal Act which is overseen by the South Australian Police (SAPOL) and the Director of Public Prosecution [sic] (DPP) the HCSCC has no authority or standing on this issue.

[...]

The HCSCC maintains the view that there is a balance of assertions or versions to which it is not possible to consider one over the other – therefore the complaint against [the social worker] (made by you) has been closed.

The decision as outlined in the letter dated 12 September 2017 remains unchanged.

If you have concerns regarding the validity and or lawfulness of [the social worker] regarding the assertions of a breach of section 82(A) CLCA you retain the right to contact police and discuss with them.

[The obstetrician's] complaint to my Office

25. On 23 October 2017 [the obstetrician] wrote to my Office to request that I conduct a review of the Commissioner's determination. In this letter [the obstetrician] complained that his complaint to the HCSCC (as referred by the AASW) was 'treated in a somewhat dismissive manner without any attempt to address [his] serious concerns.'

² Elsewhere identified by [the obstetrician] as being 'section 82(A)' [sic] of the Criminal Law Consolidation Act.

26. [The obstetrician's] letter to my Office concludes:

Your independent review of HCSCC's determination of my complaint would be most appreciated. Importantly, it would be important to me as a registered medical practitioner to know whether [the social worker]'s action [sic] was acceptable and lawful or not, in reference to [section 82A of the Criminal Law Consolidation Act and section 136 of Schedule 2 of the Health Practitioner Regulation Act].

27. On 31 October 2017 I wrote to the Commissioner to seek clarification in respect of various matters, including the Commissioner's remarks concerning the application of *R v Calides* (1983) 34 SASR 355 (*Calides*) and his consideration of the conflicting evidence provided by [the obstetrician] and the social worker.

28. The Commissioner responded by letter dated 7 November 2017. The Commissioner observed that in his assessment, [the obstetrician's] complaint comprised three primary allegations:

1. the social worker breached the Code of Ethics for social workers
2. the social worker committed an offence under section 82A(9) of the Criminal Law Consolidation Act
3. the social worker committed an offence under section 136 of Schedule 2 of the Health Practitioner Regulation Act.

29. Section 82A of the Criminal Law Consolidation Act provides for the medical termination of pregnancies and serves to qualify the general prohibition against abortion found within section 81 of the Act. Section 81 establishes that, save for as authorised under section 82A, a person who undertakes certain acts with the intent of procuring a woman's miscarriage commits an offence and is liable to life imprisonment.

30. Schedule 2 of the Health Practitioner Regulation Act constitutes the 'Health Practitioner Regulation National Law'. Section 136 of Schedule 2 establishes that it is an offence for a person to 'direct or incite' a registered health practitioner to do something in the course of the practice of his or her health profession that amounts to 'unprofessional conduct or professional misconduct.'

31. Concerning the allegations delineated above, the Commissioner submitted to my Office:

The above allegations have different "burdens of proof" attached to them, in assertion 1 the consideration is on the "Balance of Probabilities", in assertion 2 and 3 the consideration is on "Beyond Reasonable Doubt" as the penalties fall within the criminal jurisdiction.

In assessing the initial complaint, [the Commissioner's Legal Officer] took it upon himself to consider the evidence and to adjudicate the complaint at the highest level – "Beyond Reasonable Doubt", particularly for consideration as to whether the above issues in 2 and 3 should be referred to SA Police (SAPOL) or AHPRA.

32. Concerning the application of *Calides*, the Commissioner submitted:

[*Calides*] is correctly applied to criminal law matters where the standard of proof is "beyond reasonable doubt" this is a very high assessment and usually only considered in criminal matters.

In this particular matter, consideration was given to the differences between reasonable belief and reasonable suspicion.

33. The Commissioner referred to the decision in *George v Rockett* (1990) 170 CRL 104, in which the High Court of Australia considered the evidence sufficient to give rise to a reasonable suspicion or belief on the part of a decision-maker.

34. The Commissioner went on to submit:

The *Health and Community Services Complaints Act*, 2004 sets out the standard or onus of proof on the “balance of probabilities” – however, in this case (given that there were competing issues between a complaint to SAPOL and AHPRA and a complaint made to the Australian Association of Social Workers (AASW)[]) it was prudent to consider the facts and the evidence to a greater standard (i.e. setting the bar higher, rather than lower, in order to consider the complaint appropriately).

The civil standard of proof is generally expressed in terms of the balance of probabilities. Occasionally, it is expressed in terms of reasonable satisfaction. [citing *Briginshaw v Briginshaw* (1938) 60 CLR 336]

Facts are not proved merely by showing a chain of evidence between the defendant and the default which is alleged. [citing *Chappel v Hart* (1998) 195 CLR 232]

The High Court has held that there are only two standards of proof known to the common law, the civil standard and the criminal standard. [citing *Briginshaw v Briginshaw* (1938) 60 CLR 336]

The criminal standard is always expressed in terms of proof beyond reasonable doubt, and the civil standard is distinguished from that. The civil standard is not formulated or applied as a mathematical standard, but as a reasonable search for truth in the circumstances of a particular case. [citing *State Government Insurance Commission (SA) v Laube* (1984) 37 SASR 31]

Based on the information at hand, the evidence put forward by both parties (on the papers), it was prudent to weigh up the information and to apply the ruling in *R v Calides* (the higher hurdle). Had it not been for the complaint referring to criminality the same outcome would have eventuated under the *Briginshaw* test.

35. The Commissioner otherwise observed:

Having reviewed the documentation objectively and without bias, both parties maintained an opposing position against each other, the clinical material also indicated that each party had representative support and in light of the material supplied and reviewed, the weight of evidence was ‘equally balanced’.

[...]

It should be noted that [the client] did in fact give birth to the child, this again is a significant factor, as such, pursuant to section 33(1)(e) and (k) of the *Health and Community Services Complaints Act*, 2004 (the Act) the HCSCC could have taken no further action on these grounds alone, however, given the criminality alleged by [the obstetrician] against [the social worker] the original consideration was deemed preferable.

Relevant law/policies

36. Section 86(c) of the HCSC Act provides:

86–Interaction with *Ombudsman Act 1972*

Despite any other provision of this Act or the *Ombudsman Act 1972*–

[...]

- (c) the State Ombudsman may conduct an investigation of an act of the Commissioner under that Act even if the matter involves a health or community service provider that is not an agency to which that Act applies (and may, in conducting the investigation, look at the substance of the original complaint, and consider or review any other matter that may be relevant to the investigation, even if the subject matter of the original complaint did not involve an administrative act within the meaning of that Act but may not make a determination or recommendation concerning the substance of the original complaint to the extent that that matter did not involve an administrative act of an agency to which that Act applies except to set aside (if the State Ombudsman thinks fit) a determination or recommendation of the Commissioner at the first instance).

Whether the Health and Community Services Complaints Commissioner misdirected himself as to the standard of proof applicable to a complaint under the *Health and Community Services Complaints Act 2004*

37. It is apparent that the Commissioner considered [the obstetrician's] complaint to primarily raise issues under section 25(1)(l) of the HCSC Act ('that a health or community service provider has acted in any other manner that did not conform with the generally accepted standard of service delivery expected of a provider of the kind of service to which the complaint relates').³
38. That being said, the Commissioner in his determination appears to have also assessed the objective reasonableness of the social worker's actions.⁴ In this regard, the Commissioner may have been considering whether [the obstetrician's] complaint gave rise to an issue under section 25(1)(c) of the HCSC Act ('that a health or community service provider has acted unreasonably in the manner of providing a health or community service'), although this is somewhat unclear on the face of the determination.
39. There is no express provision within section 25(1) of the HCSC Act that suggests that it falls within the functions of the Commissioner to determine whether a health or community service provider has acted contrary to law or contrary to an offence provision of some other Act.
40. That being said, section 56B of the HCSC Act permits the Commissioner to take certain 'interim' actions (e.g. the imposition of an order prohibiting a health provider from providing health services for a specific period of time) if, upon an investigation under the HCSC Act, the Commissioner has a reasonable belief that the relevant person has committed a prescribed offence. This includes an offence against section 82A of the Criminal Law Consolidation Act⁵ however does not appear to include an offence against the Health Practitioner Regulation Act.
41. Section 56B of the HCSC Act would not have been enlivened by the Commissioner's consideration of [the obstetrician's] complaint as the Commissioner did not conduct an investigation into the complaint.
42. The Commissioner in his determination and in his correspondence with my Office has not suggested that he considers that it falls within his functions to conduct a criminal inquiry or determine a person's guilt or innocence of a criminal offence.

³ Letter from the Commissioner to the AASW and [the obstetrician] dated 12 September 2017 ('The complaint was correctly referred to the HCSCC as the ground of complaint falls within Section 25(1)(l) of the Act[.]')

⁴ Letter from the Commissioner to the AASW and [the obstetrician] dated 12 September 2017 ('In determining the reasonableness of the health and community service provider's actions, Section 85(1) of the Act is referred to. Based on the findings above, it is determined that the actions of the health provider were reasonable in the circumstances.')

⁵ Health and Community Services Complaints Regulations, regulation 5C.

43. It is commonly understood that the civil standard of proof applies to administrative investigations, including investigations of a disciplinary nature.
44. It is apparent that the Commissioner nevertheless gave consideration to whether [the obstetrician's] complaint disclosed evidence that the social worker had committed a criminal offence for the purposes of determining whether or not to refer certain of the allegations to SA Police or AHPRA.⁶ This was plainly an appropriate consideration in the circumstances.
45. It is apparent that the Commissioner also considered the alleged contraventions of the Criminal Law Consolidation Act and Health Practitioner Regulation Act in the course of his assessment of whether to conduct an investigation of [the obstetrician's] complaint.
46. In my view, it was not inappropriate for the Commissioner to do so. Central to [the obstetrician's] complaint to the AASW was the assertion that the social worker had committed certain offences in the course of her provision of a health service. Clearly, if the Commissioner was satisfied to the requisite standard that the social worker had committed one or both of the nominated offences, that would be a relevant consideration for the purposes of section 25(1)(c) or (l) of the HCSC Act.⁷
47. The issue lies, however, in the standard of proof applied by the Commissioner in assessing [the obstetrician's] complaint and the allegations of criminality made against the social worker.
48. According to the Commissioner, the particular nature of [the obstetrician's] complaint and the criminal conduct alleged caused him to assess the complaint against the criminal standard of proof; namely, whether the allegations against the social worker were proven beyond reasonable doubt.⁸ With respect to the Commissioner, I consider that he erred in this regard.
49. The standard of proof applicable in civil proceedings where the matter to be proved involves criminal conduct is the subject of considerable judicial authority.
50. An early case to consider this issue was *Doe dem. Devine v Wilson (Devine)*,⁹ where a dispute over a parcel of land largely turned upon a deed of conveyance that the plaintiff alleged to be fraudulent. In that matter, the Privy Council determined that the trial judge fell into error in directing the jury 'that they must try the question as to whether the alleged conveyance was forged, in the same manner as if [the recipient] had been on his trial for forgery.' In this regard, the court observed (at 744):

[T]here is a great distinction between a civil and a criminal case when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine; the jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it; and unless he can satisfy the jury that the instrument is forged, to the exclusion of reasonable doubt, the prisoner must be acquitted.

⁶ Letter from the Commissioner to the Ombudsman dated 7 November 2017 ('...consideration as to whether the above issues in 2 and 3 should be referred to SA Police (SAPOL) or AHPRA.')

⁷ With regard to section 25(1)(l), the AASW Code of Ethics states that '[s]ocial workers must act in accordance with the law and with organisational directives.'

⁸ Letter from the Commissioner to the Ombudsman dated 7 November 2017 ('In assessing the initial complaint, [the Commissioner's Legal Officer] took it upon himself to consider the evidence and to adjudicate the complaint at the highest level – 'Beyond Reasonable Doubt', particularly for consideration as to whether the above issues in 2 and 3 should be referred to SA Police (SAPOL) or AHPRA.')

⁹ (1855) 1 Legge 722.

[...]

If, indeed, by the pleadings in a civil case, a direct issue of forgery or not be raised, the *onus* would be on the party asserting the forgery, and this would be more like a criminal proceeding; but even then the reasons for suffering a doubt to prevail against the balance of probabilities, would not, in their Lordships' opinion, apply.

51. The High Court of Australia had regard to *Devine* in the oft-cited case of *Briginshaw v Briginshaw* (*Briginshaw*).¹⁰ In those proceedings, a question arose as to whether an allegation of adultery made in the context of divorce proceedings needed to be proven to the civil or criminal standard.¹¹ At the time, section 80 of the *Marriage Act 1928* (Vic) required a court hearing a petition for dissolution of marriage to 'satisfy itself, so far as it reasonably can, as to the facts alleged'.

52. In considering this expression, His Honour Rich J observed (at 339; citations omitted):

The phrase "satisfy itself, so far as it reasonably can" obviously reflects the influence of the common expression "reasonable satisfaction." In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as "satisfaction beyond reasonable doubt." A petition for dissolution of marriage is not quasi-criminal, whatever the grounds[.]

53. His Honour Dixon J similarly observed (at 342; citations omitted):

It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty"[.] This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues[.]

54. Notwithstanding the above, His Honour went on to remark that in such matters, 'weight is given to the presumption of innocence, and exactness of proof is expected.'¹²

55. His Honour otherwise observed (at 342):

No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters

¹⁰ [1938] ALR 334.

¹¹ At the time, it had been determined that 'adultery, though a grievous sin, is not a crime': *Briginshaw* at 337; citing *Mordaunt v Moncreiffe* (1874) LR 2 HL (Sc) 374.

¹² *Briginshaw* at 342.

“reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

56. The High Court of Australia considered the effect of a subsequent Privy Council decision upon the positions expressed in *Briginshaw* and *Devine* in the case of *Helton v Allen*,¹³ where it was contended that some inconsistency existed between the relevant authorities. In separate but concurring opinions, the court determined that no such inconsistency existed.¹⁴
57. The Full Court of the Supreme Court of New South Wales considered the specific effect of *Briginshaw* upon the principles expounded in *Devine* and other authorities in the case of *Hocking v Bell*.¹⁵ His Honour Davidson J opined that *Briginshaw* ‘qualified slightly’ the position expressed in *Devine* as to the different standards of proof applicable to civil and criminal trials.¹⁶ In considering the standard of proof applicable in civil proceedings where the matter to be proved involves criminal conduct, His Honour went on to state (at 478):

The test as to the balance of probabilities still remains; but in future it will be unsafe to advise the use of the metaphorical scales. The jury must be directed to be certain that their minds are persuaded to a degree of reasonable satisfaction, having regard to the circumstances disclosed by the evidence that the balance of probabilities is one way or the other or neutral, and with the addition that if charges are made, the graver the charge the stricter should be the proof they should require.

58. His Honour’s view as to the status of the law in this regard was subsequently affirmed on appeal by the High Court of Australia.¹⁷
59. The High Court of Australia considered the operation of *Briginshaw* more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,¹⁸ where the majority observed (at [1]; citations omitted):

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court

¹³ (1940) 63 CLR 691.

¹⁴ *Helton v Allen* (1940) 63 CLR 691 per Rich J at 696 (‘I do not for a moment suppose that there has been any impairment of the rule laid down in *Doe d. Devine v. Wilson* that in a civil proceeding involving even a direct allegation of crime “the reasons for suffering a doubt to prevail against the probabilities would not ... apply.” Lord Atkin in *New York v. Heirs of Phillips Deceased* cannot be understood as meaning anything contrary to a rule established so long by such high authority.’); per Starke J at 701 (‘The passage from the speech of Lord Atkin in *New York v. Heirs of Phillips Deceased*, which some of the learned judges in the Supreme Court of Queensland thought inconsistent with *Doe d. Devine v. Wilson* and *Briginshaw v. Briginshaw*, appears to me in line with those cases’); per Dixon, Evatt and McTiernan JJ at 713 (‘In the Full Court a difficulty was felt about a passage in a recent judgment of the Privy Council, which, it was thought, laid it down that where in civil proceedings an issue rose as to the commission of a crime, the fact that the criminal act was done must be proved beyond reasonable doubt. The contrary was directly decided by the Judicial Committee in *Doe d. Devine v. Wilson*, and such a statement would be opposed to a stream of authority. [...] There could be no difficulty in supporting such a statement. In using the expression “as clearly as in a criminal proceeding” Lord Atkin may have had in mind the exactness of the proofs rather than the standard of persuasion or certainty. But in any case it is impossible to treat the observation as overriding *Doe d. Devine v. Wilson* and a line of cases and authority.’).

¹⁵ (1944) 44 SR (NSW) 468.

¹⁶ *Hocking* at 477.

¹⁷ *Hocking v Bell* (1945) 71 CLR 430 per Latham CJ at 464 (‘In the Supreme Court it was argued that the jury should have been directed that, because the allegation against the defendant could be regarded as a charge of misconduct which was criminal in character, the plaintiff’s case must be proved beyond reasonable doubt. The learned trial judge refused to give such a direction, and in my opinion rightly. I do not desire to add anything to the reasons stated by *Davidson* J. in support of this view.’).

¹⁸ [1992] HCA 66.

should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

60. Their Honours otherwise remarked (at [3]):

When an issue falls for determination on the balance of probabilities and the determination depends on a choice between competing and mutually inconsistent allegations of fraudulent conduct, generalisations about the need for clear and cogent proof are likely to be at best unhelpful and at worst misleading. If such generalisations were to affect the proof required of the party bearing the onus of proving the issue, the issue would be determined not on the balance of probabilities but by an unbalanced standard. The most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities.

61. In my view these authorities are applicable to administrative and disciplinary investigations that apply the civil standard of proof such as those conducted under the HCSC Act.¹⁹

62. The Commissioner in his determination and in his correspondence with my Office has submitted that his assessment of the allegations made by [the obstetrician] was informed by the decision in *Calides*.

63. In *Calides* the Full Court of the Supreme Court of South Australia considered certain directions made to a jury in the context of a criminal trial. It was said by the trial judge in that matter that there ostensibly existed two opposing bodies of evidence before the jury and it was for the jury to consider ‘where the truth lies.’ His Honour Wells J, in criticising that direction, observed (at 358-359):

The onus of proof and the standard of proof must be correctly applied. It is not just for the jury to decide where the truth lies if that means, and it could well mean to a jury, that it is for them to say whether there is some material which could give them an inclination of opinion in favour of one side or the other. It would be even worse if the jury were left with the impression that it was their task to decide, and to find, whether there is some material for providing a basis for an inclination of opinion one way or the other.

[...]

[I]n such circumstances there are really, for all practical purposes, three possibilities: the jury may be completely satisfied with the evidence led from the Crown, in which case, assuming all other matters to be properly established, the verdict will be guilty; the jury may be perfectly satisfied with the version presented by the accused, in which case there will inevitably be a verdict of not guilty; and there is the third possibility, which must never be overlooked, and that is that the jury, after a full and careful consideration, may arrive at the result that they are unable to say where the truth lies, or that they are unable to say who is telling the truth. If that is the situation, then, of course, the verdict must also be not guilty.

[...]

[U]nfortunately, the portions of the summing up to which objections have been taken were concerned very closely with the essential factual issues, and when considering those factual issues an allusion was made—it may not have been an intended reference, but an allusion was made—to something that directly concerns onus and standard of proof, and as the matters then discussed by the learned trial Judge were so central to the case, it was more than possible that the jury could have been misled, that they could have believed that they were doing their duty, notwithstanding the directions on onus of proof,

¹⁹ Here I have corrected an error in my provisional report where I appeared to suggest that this observation extended to *Calides*.

by finding some reason for accepting one side or the other, and that that could well lead to a miscarriage of justice.

64. In his determination, the Commissioner observed that he considers *Calides* to stand for the following proposition: 'where the trier of facts is unable to determine where the truth lies, the onus is upon the plaintiff/complainant [...] to prove the case.'
65. In his correspondence with my Office, the Commissioner went further in appearing to suggest that *Calides* stands in alternative to *Briginshaw*, observing (in non-consecutive passages):

[*Calides*] is correctly applied to criminal law matters where the standard of proof is "beyond reasonable doubt" this is a very high assessment and usually only considered in criminal matters.

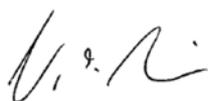
Based on the information at hand, the evidence put forward by both parties (on the papers), it was prudent to weigh up the information and to apply the ruling in [*Calides*] (the higher hurdle). Had it not been for the complaint referring to criminality the same outcome would have eventuated under the *Briginshaw* test.
66. These passages are to be read in light of the Commissioner's submission, made earlier in the same correspondence, that, owing to the allegations of criminality, his Legal Officer considered the evidence and adjudicated the complaint 'at the highest level – "Beyond Reasonable Doubt"'.
67. As may be seen from the clear line of authorities quoted above, it is incorrect to suggest that in proceedings to which the civil standard of proof applies the fact of the commission of a criminal offence need be proved beyond reasonable doubt. Rather, the standard of proof required remains proof on the balance of probabilities and, per *Briginshaw*, the particular gravity of the conduct alleged necessarily 'affects the process by which reasonable satisfaction is obtained', requiring stricter scrutiny of the evidence before the decision-maker.
68. In my view, *Calides* – which concerns the correct formulation of the onus and standard of proof in criminal proceedings – does not detract from or otherwise supplement this observation.
69. In my view, the Commissioner fell into error in considering the evidence raised by [the obstetrician's] complaint against the criminal standard of proof. In my view, an investigation of the allegations made by [the obstetrician] would have called for the Commissioner, *inter alia*, to reach a conclusion on the balance of probabilities as to whether the social worker had committed one or more of the nominated offences, taking into account the considerable care in assessing the evidence called for by *Briginshaw* (and here the allegations made by [the obstetrician] were very grave indeed), with the ultimate view of determining whether the social worker's actions met one or more of the grounds identified in section 25(1) of the HCSC Act. In my view, it was necessary for the Commissioner's assessment of the complaint to have regard to these considerations.
70. I am accordingly of the view that in misdirecting himself as to the standard of proof applicable to the assessment and investigation of complaints under the HCSC Act, the Commissioner's determination in respect of the complaint was based in part on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act.

Should the Commissioner's determination be set aside?

71. Section 86(c) of the HCSC Act provides that I may set aside a determination of the Commissioner if I think it fit to do so.
72. In all of the circumstances, I do not consider it necessary or appropriate that I set aside the Commissioner's determination in respect of [the obstetrician's] complaint. Having regard to the terms of the Commissioner's determination, I am not satisfied that there is any real possibility that the Commissioner would have come to a different determination had he not misdirected himself in the manner identified above.
73. Accepting that the Commissioner formed the view that the opposing evidence of the parties was 'equally balanced', such that he was 'unable to determine where the truth lies', and accepting that the Commissioner did not consider further enquiries by his Office would have been likely to advance the matter further, it would follow that the complaint against the social worker could not have been upheld on the balance of probabilities. In this regard, I accept the Commissioner's submission to my Office to the effect that the 'same outcome' would have eventuated on the application of the principles expounded in *Briginshaw* to the matter.
74. In the circumstances, I do not foreshadow making a recommendation under section 25(2) of the Ombudsman Act. It is my expectation that the Commissioner will take appropriate action to ensure that his staff are made aware of the observations made in my final report.
75. I make one further comment in respect of the Commissioner's submissions to my Office. In his letter dated 7 November 2017 the Commissioner suggested that it would have been open for him to conclude, per section 33(1)(k) of the HCSC Act, that the birth of the client's child amounted to 'some other reasonable cause' justifying discontinuance of proceedings under the HCSC Act. I understand the Commissioner to be suggesting that the fact that no abortion was performed weighed against his investigation of the allegations. With respect to the Commissioner, this strikes me as a peculiar position to take.
76. It appears to me that the Commissioner could have formed the view that the social worker had incited [the obstetrician] to commit a serious criminal offence (I make no suggestion that on the information before him the Commissioner could or should have done so) independent of whether or not that offence was actually committed by [the obstetrician]. Such a conclusion could in turn have informed a finding under section 25(1) of the HCSC Act. In this regard, the birth of the child, while perhaps not an irrelevant consideration, should not have been determinative of the greater issue.

Opinion

It is my final view that in misdirecting himself as to the standard of proof applicable to the assessment and investigation of complaints under the HCSC Act, the Commissioner's determination in respect of a complaint was based in part on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

31 January 2018