AFP Workplace Investigations Transcript

Last updated 19 March 2019

Module 1 - Introductory overview of workplace investigations

Slide 1

The purpose of this module is to introduce you to workplace investigations. We will discuss why workplace investigations might be required, consider how the context of the AFP may be relevant to this, and introduce you to some of the key features of conducting a workplace investigation.

By the end of this module, you should feel comfortable to launch into the rest of the training modules in relation to workplace investigations.

Slide 2 - What is a workplace investigation?

At a high level, a workplace investigation is an enquiry into alleged misconduct or unsatisfactory behaviour by an employee

Issues can either be raised by another employee (the complainant), or the employer may decide to investigate once it becomes aware of an issue. Generally, once the employer or organisation is put on notice of alleged misconduct, an investigation should happen. The employee being investigated is known as the subject or the respondent.

A range of conduct and behaviour can be the subject of investigation.

Workplace investigations can be used for a range of reasons, including determining whether an allegation of wrongdoing did or did not occur, or determining whether an instance of wrongdoing constitutes a breach of a policy.

The scope of an employer's obligations to employees will influence the range of conduct that may be investigated.

Slide 3 - Why do workplace investigations?

Workplace investigations should be conducted as a matter of practice, to ensure that employers comply with their legal obligations to employees.

It is well-known that conflict occurs in the workplace. Noting this, it is important that employers have mechanisms in place to ensure that conflict is managed effectively. Ensuring that a well-documented investigation is undertaken will mean that the employer is justified in sanctioning employees for poor behavior.

Employers have a range of legal obligations that are relevant to this, and which may result in ramifications if the obligations are breached. For example

- Under the *Fair Work Act* there are obligations in relation to bullying and harassment, unfair dismissal and general protections.

- Under the *WHS Act* the employer has an obligation to reasonably ensure the health and safety of employees in the workplace, which includes protecting them from poor behaviour.
- Under Commonwealth discrimination legislation there may be vicarious liability for organisations that do not take steps to prevent discriminatory behaviour.

Slide 4 - Workplace investigations in the AFP

Workplace conduct is the subject of some scrutiny at this point in time. The allegations against several high profile celebrities such as Harvey Weinstein and Don Burke have shone the light on the issue. This is a good thing. In a modern society instances of inappropriate workplace behaviour is completely unacceptable and should be dealt with to the full extent of the law.

Workplaces, as a construct of our modern society are no different. It is important that when people go to work, they feel safe and protected from wrongdoing. Given our role as upholders of the law, we are in a unique position where our behaviour needs to be, as best as possible, in conformity with the laws. Unfortunately, in the past, our standards have let us down in this regard.

Slide 5 - Workplace investigations in the AFP

Some of you may recall the review into the culture at the AFP, and how it can best achieve gender diversity and inclusion. This review as spearheaded by the former Sex Discrimination Commissioner, Elizabeth Broderick.

The Broderick Review into the AFP was critical of harassment, abuse and bullying within the AFP, and highlighted its negative effects such as:

- Absenteeism when people no longer want to attend work;
- Low team morale

The AFP Commissioner is keen to implement the recommendations from the Broderick Review, and address poor behaviour within the AFP. One way in which to do this is to highlight and investigate poor workplace culture so that it can be addressed. Taking a strong stance on poor workplace behaviour in the wake of the Broderick review will serve to protect, and hopefully strengthen the AFP's reputation.

When appropriately undertaken, workplace investigations can justify the organisation taking disciplinary action in relation to an employee, and can protect the organisation from litigation.

From the perspective of an accused employee, a formal investigation process gives them an opportunity to defend themselves if they wish to do so.

Part V of the AFP Act establishes the procedures for conduct and practices issues to be dealt with. The PRS Investigation Unit is constituted under section 40RD of the AFP Act.

There are also a number of relevant policies and procedures that should be considered when conducting workplace investigations, including:

- AFP Commissioner's Order on Professional Standards
- National Guideline on Complaint Management
- AFP Categories of Conduct Determination

Slide 6 – Workplace vs criminal investigations

While workplace and criminal investigations can have some similarities and crossover, there are also some key differences.

Both workplace and criminal investigations can deal with sensitive and emotional issues. Skills relating to empathy, understanding, confidentiality and other matters that may be important in conducting a criminal investigation will also be important in a workplace investigation.

Perhaps the major difference is the standard of proof relevant to finding that an allegation in a workplace investigation has been substantiated. It is the balance of probabilities (the civil standard). If the evidence gathered demonstrates that it is more probable than not that a particular allegation is true, it will be made out. In other words, when the evidence is considered together it must be at least 51% likely to have occurred. When compared to the criminal standard of beyond reasonable doubt, the balance of probabilities is not a particularly demanding evidentiary standard.

An effect of having a lower standard of proof is that the conduct of the investigation can be a little more informal.

Slide 7 - Qualities of a good workplace investigation

As you will learn during these modules, the key requirement for effective workplace investigations is ensuring procedural fairness to all parties.

Steps that can be taken to ensure that this occurs include:

- Drafting allegations that are clear, linked to an alleged breach of the relevant policy and adequately particularised;
- Advising the respondent of the allegations and potential sanctions;
- Giving the Respondent an adequate opportunity in which to respond to the allegations;
- Ensuring that the investigator is impartial and free of conflict from the beginning of the process. Whether a conflict exists for the investigator should be continually evaluated throughout the process. It may be useful to consider appointing an external investigator for this reason.
- Maintenance of confidentiality of information related to the investigation as far as practicable. For witnesses this means informing them that matters relating to the investigation cannot be discussed in the workplace, including with others who may be involved in the investigation.
- Supporting parties who are involved in the investigation. This may be through offering a support person to all of them
- Acting in a timely manner. There is no time limit in which investigations should be completed, but good practice dictates that they should be completed as quickly as possible. This must be balanced with the need to collect all relevant evidence, noting that relevant witnesses may have scheduled leave or something similar which prevents them from being unable to attend an interview;
- Ensuring that conclusions are supported with logically probative evidence gathered in the course of the investigation.

We hope you find this training useful and informative.

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Module 2 - Issues relevant to AFP Investigations

Slide 1

In this module, we will be going through the specific issues that are relevant to AFP Investigations. Whilst a lot of the matters we have discussed and will discuss apply to workplace investigations more generally, there are a number of requirements that are specific to the AFP that you need to know when conducting investigations.

The purpose of this module is to introduce you to those requirements and highlight some important things to keep in mind when you are conducting your investigations. We would strongly encourage you to also review guidance documents that will assist you in this process, which we will mention a bit later on.

Slide 2 - Sources of Powers and Resources

These six documents provide investigators in PRS with their powers, and provide guidance in relation to how they should go about their work. It is important that all investigators are aware of the obligations and powers contained in these documents.

The AFP Act

In particular, part V of this Act deals with Professional Standards and AFP Conduct and Practices Issues. It also requires the establishment of the PRS Investigation Unit to deal with more serious allegations of wrongdoing by AFP appointees. The AFP Act is the main source of the power for all that the PRS Investigation Unit does, and the remaining documents effectively expand on the powers that are provided for in this Act.

LEIC Act

This act is only generally relevant when issues of corruption are raised. It defines what corruption is and that definition is imported into the AFP Act. In all matters involving allegations of corruption, the Law Enforcement Integrity Commissioner is required to be notified and in some cases consulted in managing such issues. It is also possible for them to run an investigation themselves.

Determination

Under the AFP Act, the Commissioner and the Ombudsman are required to publish what kind of conduct amounts to each respective category. The Determination is that publication. It is a small but very useful document to assist those who are required to categorise alleged conduct. It is likely that by the time the issues come to you as investigators, they will have already been categorised based on a review of the evidence. However, it is important that you as investigators understand the categories as it is possible that during the course of your inquiries, the conduct may stray from one category to another, which may require you to seek further instructions.

CO2 and the Code

This outlines the behavioural expectations of all members of the AFP. Its aims are to set professional standards of the AFP to maintain the good order and discipline of the organisation, as well as outline how to manage and deal with allegations that the standards have been breached.

Included in the CO2 is the Code. The Code outlines 12 expectations that all AFP members must abide by. Some relate to actions undertaken in the course of AFP duties, whilst others apply at all times (even not at work). A breach of the Code is a breach of the professional standards.

National Guideline

This document further expands on the CO2 in relation to the manner in which alleged breaches are dealt with.

Slide 3 - Categories of Conduct

The AFP Act requires that the professional standards of the AFP be upheld by categorizing conduct that may fall below the expectations outlined in the CO2 and the Code into four categories. Where alleged conduct falls will depend on the objective seriousness of the offence, and be guided by the Determination.

Cat 1

Issues primarily focus on performance based issues. Some examples of allegations that may be classed as Cat 1 are:

- Minor mismanagement or customer service matters
- Unreasonable delay
- Failing to take appropriate action
- Discourteous behaviour
- Minor failures to comply with AFP procedures or policies
- Matters that reveal a need for improvement in the performance of AFP appointee.

Cat 2

Issues primarily focus on behavioural based issues. Repeated Cat 1 conduct may also be classed as Cat 2. Other examples are:

- Minor misconduct
- Inappropriate conduct that reveals unsatisfactory behaviour
- Breach of Commissioner's Orders
- Breach of National or Practical Guideline
- Breach of Code of Conduct

Cat 3

Issues are more serious issues that raise the question of whether an AFP appointee's employment should be terminated. Other examples provided in the Determination are:

- Conduct that involves breach of criminal law
- Conduct that involves serious neglect of duty
- Conduct that is deliberately don't and/or is so serious as to demonstrate wilful or reckless indifference to CO2
- Serious breach of Order relating to excessive use of force in a negligent manner

Corrupt Conduct

Any conduct that involves, or that is engaged in for the purpose of abusing their office, perverts the course of justice or having regard to the duties of the AFP appointee, involves corruption of any other kind.

What disciplinary action is available to the person making that decision is dependant on what category the conduct falls into. For example, termination can only occur if the conduct found to have been engaged in is either category 3 or corruption conduct.

Slide 4 - Process for managing Cat 1 and 2 allegations

We will very briefly touch on how Cat 1 and 2 matters are dealt with, but in quick summary, generally these matters will not be investigated by the PRS Investigation Unit.

CO2 and the National Guideline on Complaint Management provides that CMT's are to be established in all major AFP offices and business areas.

A complaint about an AFP appointee's conduct is generally submitted on CRAMS and provided in the first instance to the PRS Investigation Unit. From there, the complaint is appropriately categorised either category 1 or 2 and allocated to the appropriate CMT, who will then take charge of the matter. It is here that, usually the PRS Investigation Unit's involvement with Cat 1 or 2 matters usually ends here as the CMT is then responsible for taking an action they think is appropriate and permitted under the AFP Act. Such action

include remediation and training and development. For more information about what actions may fall under those categories, refer to Part V of the Act.

Slide 5 - Cat 3 and Corruption Issues

The primary categories of conduct we are concerned with are Category 3 and corruption issues, which PRSIU will have primary responsibility for. Importantly, what makes these allegations more serious is the access to termination as a disciplinary action.

Slide 6 - Process of dealing with Cat 3 or Corruption issues

Here is a very high level flowchart of how Cat 3 and Corruption issues progress through the PRS Investigation Unit.

As with Cat 1 and 2 issues, complaints can be made via CRAMS. Integrity reports can also be made, which is akin to self-reporting actions that may breach the Code.

From there, it is categorised by the PRS Investigation unit and, depending on the outcome of that classification, either the Ombudsman, in cases of Category 3 conduct or the Law Enforcement Integrity Commissioner for corrupt conduct, needs to be notified.

From there, the investigation may commence, and further discussion on how to best conduct the investigation is the topic of Module three.

Once the investigator has compiled all the relevant evidence and is in a position to provide their findings, the AFP Act requires a written report be prepared. There is considerable scope in the manner in which this report can be written and how to best draft the report is the subject of Module four.

Once the report has been finalised, it is provided to the subject of the complaint who is given 14 days in which to respond to the proposed findings. This is known as the natural justice response phase or NJR phase. The investigator is then required to consider any further information before submitting the final report to the Head of the PRS Investigation Unit.

This is then considered and, if the conduct that is subject to the allegation is found, it will proceed to a sanction panel who will determine what action (if any) should be imposed. The subject will be given another opportunity to respond to the proposed sanction prior to any final decision being made.

Slide 7 - Powers of the Investigator

The AFP Act gives the investigator of Category 3 and Conduct issues wide scope in conducting their investigation. Section 40VB(1) states that they can conduct the inquiry in such manner as they think fit.

There are other more specific powers that are given to an **investigator** which includes the power to issue directions to AFP appointees to:

- give information in specified manner and form;
- produce a document or thing;
- answer a question; and
- do anything else reasonably necessary for the purposes of obtaining evidence.

In addition, **investigators** have the power to search AFP premises to:

- examine any document or thing on the premises;
- take extracts or copy any document or thing on the premises; and
- retain any document or thing for a period as is necessary for the investigation.

Another power given to the investigator is to make recommendations as to appropriate sanctions if they determine that a breach of professional standards has occurred. It should however be noted that this is a discretionary ability and in some circumstances, it may not be appropriate for recommendations to be made, noting that the final decision on this rests with the sanction panel. If you are unsure whether you should be making such recommendations, talk to your supervisor who should be able to provide you with some guidance.

Slide 8 - Duties of the Investigator

Here are some duties and responsibilities that an investigator has when undertaking their investigation. Importantly, at the first stage, what it does not involve is determining the sanctions to be imposed on an AFP appointee who is found to have engaged in prohibited conduct. That is done by the sanction panel, however the sanction panel will consider and act on your report.

Drafting allegations

Drafting allegations is a skill of vital importance. A poorly drafted allegation can result in the whole investigation being derailed. We will talk more about drafting allegations in Module three.

Conducting Interviews

Another vital tool in any investigator's arsenal is the ability to conduct interviews that garner useful information.

Gather relevant documentary evidence

This can be gathered from numerous sources, using a number of the powers we discussed earlier.

Procedural Fairness

This is an important facet not just to AFP investigations, but to all workplace investigations. Without it, it is likely that all your hard work will be thrown away if the matter is ever litigated. Many facets make up procedural fairness and it will continually come up all through the modules. This should be at the forefront of your mind as you go about your investigation.

Make findings of fact

We will talk in another module about how to consider and weigh evidence and determine which evidence you prefer to others. Again this is a skill that is vital to all investigators.

Decide whether allegation is established or otherwise

At the end of the day, this is the reason the investigation is undertaken. So it is important that this finding is defensible and based on logical and reliable evidence. If it isn't, again there is a risk that all your hard work will be for nothing.

Consider whether investigation raises AFP practices issue

This is another requirement provided under the AFP Act. It relates to matters which may arise during an investigation that reveal the potential need for the practices and procedures of the AFP to be reviewed and possibly amended in light of what you have found. The purpose of this is to ensure that, as best as possible, the procedures are proactive, and preventing a number of issues that may arise rather than reacting to an AFP appointee not following the procedure where it may not be entirely their fault. You should keep this in mind when undertaking the investigation to ensure that you are alive to this issue should it arise.

Slide 9 - Considerations of suspension during investigation

The AFP Act states that an AFP appointee may be suspended from their duties. The AFP Regulations elaborate on this further with circumstances as to when this may be considered and this is underpinned by the AFP Better Practice Guide Redeployment or Suspension of AFP employees in relation to AFP conduct issues. It is recommended that you familiarise yourself with that document should the issue of suspending a member during an investigation arises.

The AFP Regs state that an AFP employee may suspend an employee if the Commissioner (or their delegate) believe on reasonable grounds that the employee may have engaged in conduct that contravenes the Professional Standards, or is corrupt conduct. They may also be suspended if they are charged with a summary or indictable offence and the Commissioner (or their delegate) believe that it would be inappropriate for them to continue their employment until the charge has been determines. This suspension can be with or without pay.

Some considerations include:

Seriousness of the allegation against the member

The Better Practice Guide outlines some situations where suspension may be considered appropriate, including where the conduct poses a risk to AFP employees or stakeholders, where misuse of resources or revenue is alleged, or where the allegations could undermine the confidence of the public in the administration of the AFP's operations.

With or without pay

The AFP Better Practice Guide for Redeployment or Suspension of AFP employees in relation to AFP Conduct Issues provides guidance for decision makers when deciding whether suspension or re-deployment is required. Its important to remember that suspension is not a punishment or a finding on the matter. It's an administrative decision based on the criteria in the principles contained in the Better Practice Guide.

Suspension without pay will normally turn on whether or not the alleged conduct could reasonably lead to termination of employment, where it will serve the purpose of protecting:

- the AFP workplace and its employees;
- the interests of the AFP; and/or
- the public interest.

Effect on member

Will the suspension affect the member who is alleged to have engaged in the conduct. This will be particularly relevant if suspension without pay is being considered. In considering this factor, it should be noted that the welfare of a member who is subject to a suspension

consideration is a holistic assessment, taking into account not only financial implications, but also mental and emotional considerations.

Work Health and Safety Obligations

The AFP, and its "officers" under the meaning in the WHS Act, have the responsibility to, as far as reasonably practicable, ensure their own health and safety, and those around them at work. For this reason, it is possible that suspension from duties may be necessary, if for example, a complainant and subject work in the same team or area. Redeployment may also be appropriate whilst the investigation is being undertaken.

It is important that this is considered as failure to do so may leave some employees personally liable to prosecution should they be officers and it be found they did not discharge their WHS obligations in the appropriate manner.

Module 3 - Conducting the investigation

Slide 1

In this module, we will be discussing how a workplace investigation should be conducted. The techniques we discuss in this module apply not just to AFP investigations, but workplace investigations more broadly.

We will be discussing:

- How to draft allegations
- Putting together an investigation plan
- How to best gather evidence and identify useful witnesses
- The difference between conducting workplace and criminal interviews
- Maintaining confidentiality and its importance in preserving the integrity of the report

Slide 2 - Allegation drafting

The very first step an investigator needs to do when they are assigned a matter is to draft the allegation.

This first step is an extremely important step in the success of any investigation. All too often, vague, ambiguous or poorly particularized allegations result in it being very difficult to provide a respondent enough information on which they may respond, leading to procedural unfairness, which may threaten the validity of any findings made. Often when investigators discover a poorly drafted allegation, it is too late to amend it as the wheels of the investigation are already well in motion.

Taking your time to prepare a considered, specific allegation will also help direct your inquiries and conclusions and it will save you a lot of headaches in the future.

Slide 3 - Common problems

Some common problems encountered in the allegation drafting stage include:

Too many allegations

Often, complainants will make a lot of allegations with varying veracity. Practically, it may not be feasible to spend time investigating all of them. In order to narrow the scope of these allegations, you may want to narrow them down to the most serious. This may not be the complainant's preferred approach, however from an organisational perspective, it will position the AFP best to minimise its legal risk.

Vague allegations

Imprecision around dates, time or other details can be very problematic and may require further particulars being provided before a decision to investigate is made. It is therefore important to state, with as much particularity as is possible, the alleged events that make up the allegation. Use of words such as "on or around" give you a bit more room to move when it comes to temporal matters.

Stale allegations

These allegations do become difficult to investigate, especially if the primary source of evidence is to be from witnesses (as opposed to documents), as time erodes memory. Witnesses may have forgotten, or discussed the issue with others, which may compromise the integrity of their evidence. In circumstances where multiple allegations are made, with some being quite some time ago, it is best to rely on the most recent as the evidence will be in the most useable state.

Rumours

The problems with allegations made on rumour or not supported with evidence are obvious. There is no way to determine the veracity of what is claimed and the risk is that the complainant is dragged through an investigation process with a finding in their favour at the end. Many investigation schemes generally have a provision that allows investigators the discretion not to investigate if an allegation made is frivolous or vexatious. It is obviously important to remember however to not easily discount an allegation outright without trying to garner more information from the complainant first.

Slide 4 - Tips for drafting allegations

So, what should our allegations have? Well obviously, they shouldn't have the common problems we have just discussed. The allegations should refer back to the alleged breach of the policy or procedure that is "you breached s. 8.9 of the AFP Code, which states…)".

Once you have outlined that, it is important that you provide the respondent with alleged particulars of their conduct. Be as specific as possible, give date, time, location what was said and anything you have. The more specific the better. The famous 5 W's and one H is very relevant here. If you can tick most or all of these off in an allegation, chances are, it is well drafted. There may be more than one event that make up an allegation. If that's the case, go through that process with all of the alleged incidents.

Once you have drafted the allegations, they should be provided back to the complainant to confirm that it captures the essence of what they are alleging. Generally, complainants don't draft allegations in an acceptable manner, so you as the investigator may have to take the information you have been provided and meld them in an appropriate way.

Once they have been settled, you should provide the allegations to the respondent as soon as possible to ensure they are given adequate time to consider the allegations and prepare any response that they wish to provide. This is an important procedural fairness step. An allegation should not be given to a respondent just before they enter an interview room.

Slide 5 - Contents of a good investigation plan

Now, drafting an investigation plan. What should go in it? Pretty much everything. Putting it all in a plan will ensure that you don't miss anything and will ensure you are best placed to provide a good report on time. There is no set formula for what should be in a plan and each investigator's plan may be different. Some common things that may be included are:

Summary of the task

What are the allegations? What policy or procedure was allegedly breached? What is the scope of your investigation? Putting these things down in your plan will ensure you stay on track and keep in scope.

Timeline

It is important that any investigation is conducted methodically, but in an appropriate time. An investigation process that meanders along slowly runs the risk of denying the respondent procedural fairness. That's why it is always good to have your deadline front of mind whilst conducting your investigation. Some delays are inevitable, however it is best to attempt to keep them to a minimum. Putting these key milestones on a timeline will keep you informed as to how you are travelling. Bulk up the timeline with other events that you need to do and you will be in a very good position to complete your investigation in a timely manner.

List of documents that need to be given to people and when

Things like the letter to the respondent outlining the allegation, Directions to witnesses, and correspondence to relevant third parties like the Ombudsman. If you make a list of these documents that need to be provided, you will reduce the risk of forgetting these steps.

Places of information deficiency

If you are commencing an investigation, it is probably because you have, on its face, enough information on which to reasonably suspect the alleged conduct may have occurred. It is extremely important to consider that evidence and highlight which aspects of the allegation you need more information on. It might be that after your inquiries, nothing else is found, but you should go through this process in order to be sure. This will also guide your interviews and questioning.

Interview Schedule

Arranging interviews can be a surprisingly difficult task that may take a lot of preparation. Its important to keep a few days clear to conduct interviews, as it will ensure you can work around your interviewee and their availability. Any schedule should also anticipate how long you intend to spend with each interviewee.

Steps to secure evidence

This is much more important when allegations of misuse of technology are raised. It is important that employees who are suspected of doing the wrong thing do not have time to destroy valuable evidence. Whilst it is true that most things, especially when it comes to work computers can be recovered, it may come at a cost or time. That's why it is best to put these things in place at the start of the investigation to ensure this does not become a headache.

Securing evidence can also come in the form of directing witnesses not to discuss with each other the allegations. The risk is that if they talk to others about their evidence, it may contaminate it and become less reliable. It should be noted to employees that failure to follow such a direction may lead to disciplinary action being taken against them.

AFP Investigation Documents

Finally, we just wanted to note the existence of a number of AFP documents on procedures and templates for investigation planning. It is quite likely that most of the investigations you will be tasked to do will not require you to follow these religiously, but in some of the larger investigations where there are multiple witnesses or if the allegations against the subject are criminal, these documents should be adopted.

Slide 6 - Gathering evidence

It is important that the evidence you gather is relevant and reliable to the allegations. Without these two things, your investigation will not achieve the purpose that it set out to achieve.

There are a number of ways an investigator may gather the evidence that they will use in their investigations. The most obvious being by conducting interviews. The benefit to conducting interviews is that it gives you the chance to assess the interviewees response to the question, as well as their. This is relevant when assessing their credibility.

This is not possible when you simply give a person a list of written questions which they are required to answer. In addition, it allows them to carefully script their response and may lead to a less forthright answer during interview. Despite this, the written questions do have a use and may be good for more preliminary or unobjectionable issues such as timings on issues that are contained in emails.

In addition to this, other general searches can garner a lot of information. Things such as reviewing emails and employee access records may be the smoking gun needed that takes your investigation to the next step. It will also be important to get these documents prior to meeting any interviewees, so you are in a position to put any adverse evidence to them and get them to respond.

Slide 7 - Interviews - Who should be interviewed?

Interviews will get you the most content to consider for your investigation, but at the same time, it can be a time consuming process to prepare, conduct and consider interviews. That's why its important to select carefully who you intend to interview.

The subject is one that you should definitely interview. This is for two reasons, both of which are interrelated. Firstly, you are required, under the AFP Act, to give the subject an "adequate opportunity to be heard" in relation to the allegations against them. The reason for this has to do with the second reason, which is that principles of natural justice require the respondent to an investigation to be provided with any adverse information that an investigator may intend to rely upon to their prejudice.

You may wish to interview the Complainant if their complaint is in writing. And any other eye witnesses as well.

Slide 8 - Tips for conducting interviews

Here are some tips for conducting interviews as part of your investigations. We also remind you of the availability of the training on conducting interviews, which outlines some procedures and tips to assist you. This slide is intended to be a high level snapshot of what

you should do in an interview and it is recommended that you refer back to the interview training for more specific information.

Sometimes it can be difficult to proffer information from a reluctant interviewee, but some you will find will be like an open book as soon as you get them in the room. It is important that you know how to deal with both.

There are a number of preliminary questions that you should ask at the start. Things like "are you aware that a Code applies to your employment?" "How long have you been at the AFP?" "What role are you in?". Once these are out of the way, you can commence the interview proper.

Firstly it is important to make the interview subject feel comfortable to answer your questions. This can be started by clearly advising them what your role is. Something along the lines of "I am here to conduct a fact finding investigation and my findings will be used by a sanction panel to determine if and what sanctions may need to be imposed."

From there you can begin to ask questions and it really is a matter of getting the subject in your interview to tell you about the events they saw, heard or otherwise perceived during the time in which the alleged conduct was said to take place. To do this, it is best to adopt a funnel style approach (start broad and end narrow). You may start by asking "so can you tell me what happened on X at Y?" Following this, you may wish to unpick specific parts of their timeline and put the other evidence to them that you have gathered as alternatives "would it surprise you if we had evidence to suggest that event occurred at Z and 1, 2 and 3 were present?". Things like that. You should start with open ended questions that allow the subject to expand on their recollections and drill down later on in the interview with more closed questions "so if I understand your evidence correctly, you say that xyz occurred at 123, is that correct?"

Closed questions may be more useful if for example, you have a hostile interviewee and you need to attempt to get as much information from them as possible.

It is particularly important with the respondent to an investigation to put to them all the alleged particulars that may be used to make an adverse finding against them. This is a crucial step in affording procedural fairness and courts and tribunals do not look favourably on investigations that do not do this. Generally failure to follow this step is fatal to any investigation. After all, should the matter be eventually disputed in court, all the investigation report is good for is showing that procedural fairness was afforded to the relevant parties. You should still start with the funnel technique we discussed earlier, but short of a fully fleged admission, questions such as "it is alleged that at x you did Y, do you have any reason to dispute this recollection?" will satisfy the procedural fairness requirements. This process should be undertaken for each particular of each allegation.

One thing that is often not considered in conducting interviews is the manner in which we respond to answers given. It is important not to use language which may imply agreement. Words like "yes", "I see", "You're right" imply that you may be on their side, even if you are just simply communicating that you have understood what they have said. You may avoid this misunderstanding by carefully choosing your words "I understand what you are saying" or by making a short statement at the beginning of the interview advising that you saying encouraging words is not an indication of your acceptance of the evidence given.

At the conclusion of the interview, you should ensure all that has been said is kept confidential by simply telling the subject to not disclose the contents of the interview with anyone or discuss the investigation more generally. You should also not make comment on how you think the interviewee went or speculate on the outcome of any aspect of the

investigation. If a finding that is inconsistent with this comment is made, it may result in unnecessary headaches.

Good interviewing technique is a skill and the only way you get better is to keep practising. If you get time after an interview, it is always a good idea to review the manner in which you went about your interview with a critical eye, keeping a look out for how you may wish to do it better next time.

Slide 9 - Conducting criminal v workplace interviews

Whilst most of the skills you may have learnt as a criminal investigator will translate to workplace investigations, there are a few differences that need to be discussed.

Firstly, unlike criminal matters, it is generally not as important to garner the subject's state of mind at the time of the alleged events. This is because most of the time, breaches of workplace policies or code are strict liability. That is, if it happened, it doesn't matter what was going through the respondent's mind.

It is also important to remember that in a workplace investigation, you are more likely than not to be the "judge and jury" who will determine whether the incidents occurred and possibly, make recommendations as to sanctions. For that reason, you need to act more like a judge and jury, being more impartial than what you may have been during a criminal interview. This goes back to the previous slide where it was mentioned to not give any indication to the interview subject how they fared.

Slide 10 - Not all evidence is created equal

Not all evidence is created equal, and this is where a weighing exercise come into play. It is important that an investigator in their report describes the evidence they have relied upon to come to their conclusions, and the weight they have placed in it. More on this is in Module four.

Briefly, eyewitness evidence is generally the most reliable. It is a person's account of what they saw, heard or otherwise perceived. If they were at the alleged place at the alleged time that the alleged events took place, they will be a witness you will want to talk to. It is also important you act in a timely manner to ensure that their recollection is the best it can be, and not risk it becoming stale. You may also ask the person if they made any contemporaneous file notes of what they observed, upon which a lot of weight may be able to be placed upon.

Any evidence that corroborates other people's version of events are also of use and may be used to tip the investigator to one conclusion or another.

Hearsay evidence is a difficult one to grapple with. It is evidence from one person who did not witness an event, but was told about it by someone else. Ideally, you will get evidence from the person who told them about the event, but sometimes this is not possible.

The use of tendency evidence has for a long time been a topic of some contention. It is evidence of past conduct that is not the subject of the investigation used to suggest that the respondent may have a propensity or tendency to act in such a manner. If the allegations that are the subject of the investigation are substantially similar, it may reasonably concluded that, on the balance of probabilities these allegations also occurred. The controversy for this type of evidence is that it is highly prejudicial towards the respondent.

The question that must be asked is whether evidence of this type actually helps to prove that the actions that are specifically alleged occurred. Generally if you have other evidence, it is preferred that you place more weight in those documents, as opposed to tendency evidence.

Again, it is always important to put any evidence that will be relied upon to the person whom it may be used against.

Slide 11 - Documenting evidence

In the course of your investigations, you will be provided with a lot of documents that you will need to consider. It is important that you keep track of who gave what to you and when. Document management can, in some cases, be just as important as the investigation itself.

E-filing is always good to ensure you are not swamped with paperwork that you will lose track of, but failing that, it is really important to just ensure you document and store as best you can.

Slide 12 - The importance of confidentiality

Last, but certainly not least, the importance of confidentiality of the investigation process should not be understated. There are plenty of reasons why and these are just a few.

Firstly it protects the reputation of all parties. This includes the complainant, respondent, witnesses and the AFP as an organisation. In relation to the complainant, it will prevent them from being the subject of victimisation due to the fact that they have made a complaint. It should be also noted that the AFP Act has protections from victimisation, which may be an offence for someone who engages in such conduct.

For the respondent, it will ensure that they are given the benefit of the doubt until a finding is made. The old adage, innocent until proven guilty is still applicable here.

From the AFP's perspective, confidentiality will ensure that people will feel comfortable in the system to make such complaints. This in turn will ensure the workforce is engaged and satisfied. It will also mean that sensitive issues will be dealt with internally as opposed to becoming a potentially damaging public relations matter.

It also preserves the integrity of evidence provided, and yet to be provided in the investigation by avoiding collusion. Similarly with victimisation, there are offences for people who give false or misleading information as part of an investigation under Part V.

Finally, this is a good point to mention that there are a number of provisions in the AFP Act that make it an offence to breach the secrecy of the investigation. In addition, there are provisions that protect people who give evidence from engaging in any victimising behaviour against anyone who has given or will give evidence to an investigation.

However, CO2 gives PRS the power to authorise the disclosure of information relevant to the investigation for the purposes of assisting them to deal with the investigation that is to talk to support people, welfare officers, or their spouse.

Module 4 - Drafting the investigation report

Slide 1

In this module, we will be considering how the investigator actually goes about drafting a report in an investigation.

The purpose of this module is to introduce you to some ideas about structuring your report, weighing up the evidence and finding facts in relation to each allegation.

Slide 2 - What must be in the report?

While your report must address the key question, there are a number of additional areas that need to be covered off in any investigation report you do. These relate to the purpose of an investigation report. Ensuring that this information is included in all investigation reports will help to ensure that others within your organisation can rely on your findings to make employment decisions. It will also help to constitute a record in the event that similar behaviors occur in the future, and in the event that the investigator's findings are appealed internally or externally.

It is important that all workplace investigation reports contain an acknowledgement that the investigator has followed fair procedure and stayed within the scope of the terms of reference. A well-documented procedure is critical, because it closes off the opportunity for findings to be appealed on the basis of inadequate investigative procedures. It may be useful to consider annexing the terms of reference to your report so that this can be objectively determined.

Detail in relation to the investigation procedure and methodology should also be included in the report. This could include:

- information about how you were appointed. This may be particularly important for external investigators to clarify the extent of their investigative powers;
- Information about the interviews that were conducted - who was interviewed and when?;
- How was the interview recorded? If a transcript was created this should be stated;
- Outline what other evidence was collected and relied upon. If parties involved in the investigation provided any evidence after their interviews this should be stated.
- Identify the evidence that is relied upon for the purposes of the report.

Slide 3 - Tips for structuring your report

Your report will provide most assistance for the reader if it is structured clearly around the allegations that were made, and the evidence you relied on as the investigator when making findings of fact in relation to the allegations. From your report, the reader should be able to understand the evidence you gathered in relation to each allegation and the weight you gave it in your assessment and ultimately making a finding of fact. When conclusions are drawn they should be clear and succinct. This will enable the reader of your report to assess the findings you have made and give them appropriate weight when using your report. Ultimately, only the necessary information should be included in the report.

It will also be important to consider the purpose of your report. Are you fact finding or determining sanctions? If your findings will be used for sanction determination, it will be important that your findings be made in a clear way.

Related to this, is who the audience for your report will be, and how the report will be used. Whether the report will be provided to HR or the Board, or externally, or to the parties involved in the investigation may warrant different decisions in relation to the drafting of the report. If the report is to be provided to the parties, you will need to consider the impact that its findings may have on working relationships. A simple way to be respectful of any ongoing working relationship that may need to be maintained is deciding to summarise evidence of witnesses rather than quoting them in full.

Stylistically, most investigation reports are written in the first person - "When I put this evidence to X…" rather than the more formal "In relation to X, the investigator finds…", however if the investigation is more formal a formal stylistic approach may be more appropriate.

The length and format of your investigation report will to some extent be determined by the number of allegations you are required to investigate. It is crucial that all reports include the key information and that the reader understands your report and can use it, rather than being a prescribed length.

Slide 4 - Structure for each allegation

In light of the approach on the previous slide, for each allegation in your report you should:

- clearly outline it (for example if it has been put to the subject in a direction, you could use that);
- If there is any uncontested evidence in relation to the allegation, list it;
- Analyse the contested evidence - this could occur over a number of paragraphs; and
- Make a finding of fact in relation to the allegation.

This process should be completed for all of the allegations that you are required to investigate.

Slide 5 - Weighing up the evidence

It is important that findings in your report are made on the basis of evidence, rather than any personal feelings you may have in relation to the subject matter or other external factors. Critical thinking about the weight of evidence will be helpful in making your assessment.

In your report, it should be clear what evidence you have relied upon, the weight that the evidence has been given and why it has been given that weight.

Key factors to consider when you are determining the strength and reliability of a piece of evidence include:

- Whether it can be corroborated. Where witnesses have substantially similar accounts, this is corroborative evidence and suggests that their evidence should be given more weight. While corroborative evidence can be determinative in making findings of fact on the balance of probabilities, it is important to also consider the

sources of the corroborative evidence. For example, if the evidence comes from two friends, it will be important to ensure that they are not colluding.

- The credibility of the witness who gave the evidence

Slide 6 – Credibility

A witness's credibility will affect the weight that you can place on their evidence when making findings of fact.

In your investigation report, when a credibility finding is used to justify the weight that you give to a particular witness's evidence, your credibility finding should be expressly stated and based on a clear and logical basis.

Slide 7 - Credibility - factors to consider

Some key areas that you might question when making this finding include:

- Whether the witness was unsure of any evidence;
- Whether they had a clear or a poor recollection of events?
- Whether they appear to have been truthful in what they have told you, in terms of internal consistency with their own evidence;
- Whether the witness would have a motive to mislead you in the evidence that they provide;
- Whether the way they answered your questions suggests that they are seeking to sway you in a particular direction. For example, did they answer your questions directly or were they emotive, did they exaggerate or were they evasive?
- The witness's demeanour and body language during the interview.

When weighing up these factors it is important to remember that an assessment of a witness's credibility should also be made logically.

Poor recollections

When using a witness's poor recollection as justification for a finding of low credibility, it is important to remember that recollection can be affected by a range of issues. These include time, illness, age of the witness and significance of the event in the witness's life.

Lying

If you suspect that a witness is lying, you should consider what has caused you to hold this view. It might also help to consider the relationships between the different parties involved, and if there is a motive for the witness being untruthful.

Inconsistency

Where there is internal inconsistency within a witness's evidence, you can rely on this inconsistency when you are making findings of fact in your report. Generally the more consequential the inconsistency, the more weight it should be given. Minor inconsistencies are not as relevant to a witness's credibility, as they may be able to be explained.

Slide 8 - Making a decision

Making a decision is often a very daunting part of conducting investigations! All you have to do, is think rationally and critically about the evidence that you have been provided, and

avoid common biases which may make you more likely to make the wrong decision. It is important that your decision is clear and logical, as if it is not, it may be open to challenge.

You need to consider the evidence provided, and its weight, and ultimately make a call in relation to the allegation or question of fact

- It is important to think critically at this point, and check yourself to ensure that you are not being influenced by any bias.
- Think about whether you will be able to defend your decision on a rational and logical basis.

Types of finding

There are two types of finding that you can make as an investigator.

For each allegation you need to make a decision on the balance of probabilities:

- That the conduct did occur (was established); or
- That the conduct did not occur (not established); (we don't do part established – allegation is established or not established)

Where conduct is found to be established, it means that you consider that the evidence shows that the conduct is at least 51% likely to have happened.

Allegations are not established where on the balance of probabilities it is more? less than 50% likely the behaviour occurred. Note that a finding that an allegation is not established is not the same as a finding that the conduct did not occur.

Intuition

Intuition can be both beneficial and detrimental in the context of workplace investigations. Noting that as humans, we rely on intuition in decision making processes in our lives regularly, it is important to ensure that as an investigator, you are able to suspend the affect of your intuition, and ensure that you are acting and making decisions on the basis of logical conclusions, and can consider the evidence in an impartial way. Use of intuition is not an appropriate decision-making tool.

Bias

There are a range of biases that can influence you as an investigator, whether you are conscious of them or not. It is important to be aware of the different biases, and when they may be affecting your investigation.

Anchoring bias refers to the tendency to heavily rely on, or "anchor" on one piece of evidence only. For example, when an investigator uses one piece of evidence to evaluate all the other evidence, instead of evaluating each piece of evidence individually on its own merits.

Confirmation bias refers to the propensity for investigators to interpret evidence in a way that accords with the investigator's own preconceptions or hypotheses. This is problematic because it can lead to logical errors. Where an investigator has a pre-existing hypothesis in relation to an investigation, it can meant that they are less likely to seek out evidence that may challenge their hypothesis, or give such evidence inappropriate weight. This can pose obvious problems for the integrity of an investigation.

Familiarity can also be a risk for investigators when reaching a decision. The familiarity principle refers to the human tendency to like things, ideas or people the more that we are exposed to them. This is not a rational basis for a feeling. When reaching a decision, investigators need to be cautious of reaching a view on the basis of familiarity.

Findings must be defensible, logical and reasoned.

Slide 9 - Managing bias

We just wanted to touch briefly on the concept of bias as part of investigations. It is a fact of life that we as humans are vulnerable to bias affecting what should be an objective process of investigation. It is therefore important for PRS investigators to identify the potential for bias and work towards eliminating it.

The diagram outlines whom biases may be held for or against as part of a PRS investigation. Those in blue are AFP appointees, and those in red are other members of the public. The image of the funnel represents the risk that once a bias is held, it can be very difficult for it to be ceased and an investigation can be flawed and defective.

Let's discuss conscious and unconscious bias:

Conscious bias relates to prejudices or stereotypes that one can readily identify within themselves. For example, if you were asked to investigate someone whom you had worked with previously and have a good relationship with your ability to adjudicate on conduct tainted by the fact that this relationship exists. Not only may this actually affect your ability to conduct an appropriate investigation, even if it doesn't, there will be a perception that any concluded investigation was tainted with bias, diminishing its authority.

Unconscious bias is far more difficult to identify. It refers to the prejudices or stereotypes that are developed unknowingly as a result of the stimuli around us, such as the news, social media and other societal factors. These biases are far more difficult to identify (as people may not know they even hold them), and as such, challenging to deal with. Unconscious bias may exist in relation to the way that you prefer evidence of an AFP appointee over a member of the public, for example. The risk in unconscious bias is that it may hinder your ability to conduct a thorough investigation, leading to infected findings that are susceptible to challenge.

Dealing with bias

There are many ways in which the risk of bias may be mitigated. The best way is for you to be live to the issues, identify both conscious and unconscious bias that may impact you and where appropriate declare any actual bias or conflict through a conflict of interest declaration. This will require anyone working on a matter to consider whom an investigation is into, and if there is any identifiable conflict, which may result in bias, it will result in that person being removed from the investigation. Prior to all PRS Investigations, investigators are required to complete a conflict of interest declaration.

PRS will do anything it can to assist in dealing with bias, this may involve engaging external assistance for some matters.

However there are other things that you can do to address any biases you may have. Including asking yourself:

- what biases do I hold?
- How can I address them?
- Which ones can't I remove?

In undertaking investigations, you can manage bias by:

- Being aware of their existence;

- Let the evidence guide your findings, rather than the finding you want guide your evidence gathering;
- Constantly assessing your ability to act impartially and if required, ask to be taken off an investigation;
- Running any final report past someone else, to ensure your conclusions are come to in a logical and defensible manner;

Slide 10 - Has the Code of Conduct been breached?

Once you have made decisions in relation to the facts, you may need to consider whether there is also a breach of policy or the AFP Code of Conduct.

Often making a decision in relation to this question might be a value judgment, however the prescriptive nature of the AFP Code of Conduct and Values make this judgement easier.

It will be important when making this conclusion to consider:

- What does the Code say?
- What is your judgement in relation to the allegations of fact?
- Then reach a conclusion in relation to the breach

What does the Code say?

- You may have to interpret the meaning of some of the words in the Code or policy

Determining whether there has been a breach

- When determining this question, you should assess the behaviour or conduct as found against any examples provided (the Determination is particularly helpful in this regard by identifying examples of conduct) or any directions given by the AFP Commissioner.
- Making a decision on this is different from any fact finding, because it will involve a subjective assessment of the facts in relation to the policy.

Module 5 - Avenues for review

Slide 1

Welcome to Module 5 of the AFP Workplace Investigation Training: Avenues for review.

This session will take about 45 minutes and will examine the various ways in which an AFP appointee might challenge the outcome of an investigation through an application for review.

Let's get started.

Slide 2 – Overview

As mentioned, in this module we will cover the various options of review open to an AFP appointee following an investigation into their conduct which amounts to a breach of the AFP Code. Such avenues of review include:

- Making a complaint to the Commonwealth Ombudsman about the way in which the investigation was run, which the Ombudsman may then investigate and make recommendations to the AFP;
- Seeking judicial review of the decision following the investigation on the basis that it is not administratively sound;
- Making an application in the Fair Work Commission for unfair dismissal or a breach of the general protections provisions based on adverse action or other prohibited reason;
- Making a public interest disclosure about the way the investigation was handled, although the available outcomes are slightly different for this one which we will discuss later.

We will also consider some things that you can do to mitigate the risk of an unfavourable or adverse finding against the AFP if an AFP appointee challenges a decision coming out of an investigation into their conduct.

Slide 3 - Commonwealth Ombudsman

The Commonwealth Ombudsman has a wide range of investigative powers under its enabling legislation, the *Ombudsman Act 1976* (Cth). The Ombudsman can get involved in AFP Code or AFP practices matters in a number of different ways.

For example, the Ombudsman has the ability to inspect the records of AFP conduct and AFP practices issues at any time and for the purpose of reviewing the administration of Part V. This is provided pursuant to section 40XB of the AFP Act. This is important, because it means that a complaint does not need to have been made for the Ombudsman to exercise his power under this section. He can inspect AFP records whenever he so chooses in circumstances that relate to a matter arising under Part V of the AFP Act.

However, a person may complain to the Ombudsman about the way in which an investigation by the AFP was handled (see section 5(4) of the Ombudsman Act). This includes complaints by AFP appointees about information that was given to them as part of the investigation process. For example, a subject of an investigation may complain that sufficient information was not provided to the subject to enable them to meaningfully respond to an allegation about their conduct in respect of another AFP appointee.

If the Ombudsman receives such a complaint, it may conduct an own motion investigation into the complaint to determine whether it should make recommendations to the AFP about remedying the issues raised in the complaint or the future handling of similar matters. He has the power to obtain documents that he considers necessary for the purposes of any investigation into a complaint, including documents that are protected by legal privilege (see section 9 of the Ombudsman Act). Of course, any recommendation from the Ombudsman is not binding, but is usually followed by agencies.

Further, the Ombudsman may enter into an arrangement with the AFP to investigate a category 3 conduct issue or an AFP practices issue jointly in accordance with the terms of the arrangement (section 8D of the Ombudsman Act).

The Ombudsman also has oversight of the Public Interest Disclosure Scheme, which employees often use as a way of raising grievances with an investigation process. We will talk about this in more detail later.

Slide 4 - Judicial review

If a decision is made to terminate the employment of an AFP appointee following an investigation into their conduct, another way that the AFP appointee could seek redress is by lodging a request for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

While such requests are rare due to the expense involved in bringing the matter to the Federal Court, applications for judicial review do occur and we need to be aware of the relevant grounds of review when decisions are made about an AFP appointee's employment.

An AFP appointee must establish that an error of law has occurred in order to be successful in judicial review. The applicable grounds of review include:

- That a breach of the rules of natural justice occurred in connection with making the decision;
- Procedures that were required by law to be observed in connection with making the decision were not observed (this is probably the most likely ground to be argued in circumstances where the AFP appointee is challenging the procedural fairness of the investigation);
- The person who purported to make the decision did not have jurisdiction to make the decision;
- The decision was not authorised by the Act under which it was said to be made;
- The making of the decision was an improper exercise of power by the decision maker under that Act (including factors such as taking into account an irrelevant consideration, failing to take into account a relevant consideration - this is particularly important in the context of considering mitigating circumstances - exercising a discretion in bad faith, acting under the dictation of another person or otherwise abusing the power);
- The decision was induced or affected by fraud;
- There was no evidence or other material to justify the making of the decision;
- The decision was otherwise contrary to law.

The onus of proving an error of law rests with the applicant (the AFP appointee) which they must prove to the civil standard, being on the balance of probabilities.

Slide 5 - Judicial review

If an AFP appointee is successful in claiming an error of law as part of a judicial review application, there are a number of remedies that the Court may consider.

These include:

- An order to quash or set aside the investigation or decision (this depends at which stage in the process the application is made);
- An order remitting the matter back to the AFP to take a particular action that the Court thinks appropriate - this could include re-making the decision "according to law" (which would necessitate a new delegate who will bring a fresh set of eyes and an additional level of independence to the decision);
- An injunction - this is an order which prevents the AFP from taking the action that it originally intended to take. Commonly this occurs in circumstances where an employee is put on notice that their employment may be terminated (either through the findings of the investigation or through a show cause process) and they seek an

injunction to stop the AFP from continuing with termination until something else happens. This might be a further consideration of material as part of the investigation or remedying a procedural issue that was identified as part of the investigation.

- A declaration - this is a public statement issued by the Court which sets out the wrongdoing by the respondent in the eyes of the law. That is, the respondent made a decision which was unlawful and that decision will be remedied. Declarations are usually awarded as a secondary or ancillary remedy to an order that sets aside the decision.

If an AFP appointee is unsuccessful in an application for judicial review, they have the option of appealing to a higher court, but must find an error of law in the original court's decision to do so.

Slide 6 - FWC - Unfair Dismissal

An investigation into the conduct of an AFP appointee may result in a finding so egregious that it warrants termination of their employment.

If this occurs, an AFP appointee may lodge an application with the Fair Work Commission for unfair dismissal. But the timeframes for the FWC are short, an AFP appointee only has 21 days from the date the dismissal takes effect to lodge their application.

If an AFP appointee decides to pursue a claim of unfair dismissal, they must convince the FWC that the dismissal was harsh, unjust or unreasonable. In deciding whether the dismissal was harsh, unjust or unreasonable, the FWC will turn its mind to the following factors:

- Whether there was a valid reason for the dismissal related to the person's capacity or conduct (this includes whether the conduct had an effect on the safety and welfare of other employees);
- Whether the person was notified of the reason for dismissal (this should be covered off in the termination decision letter);
- Whether the person was given an opportunity to respond to any reason related to their capacity or conduct (i.e. were they afforded procedural fairness);
- Did the AFP unreasonably refuse to allow the AFP appointee to have a support person present during any discussions relating to their dismissal;
- If the dismissal relates to the AFP appointee's performance, whether they were warned about their performance before the dismissal;
- The size of AFP and whether it would impact the procedures followed in making the dismissal decision (this means that the larger the organisation, the higher the expectation that established procedures will be in place);
- Whether the absence of dedicated HR specialists would impact on the procedures followed in effecting the dismissal (again, the onus on a larger organisation will be to demonstrate that its HR area knew what it was doing and followed the procedures for terminating a person's employment); and
- Any other matters the FWC considers relevant (this will include the age of the employee, their length of service, whether they are likely to obtain alternative employment and other mitigating factors).

If an AFP appointee succeeds in an unfair dismissal claim, they could be reinstated to the job they held before their employment was terminated, or be awarded up to 6 months'

compensation, or both. If the FWC is satisfied that the AFP appointee engaged in misconduct, they may reduce any award of compensation that would otherwise be payable.

Slide 7 - FWC - Unfair Dismissal

These cases demonstrate that a good investigation and report will put AFP in the best position to prove that the resulting decision to dismiss an AFP appointee was not harsh, unjust or unreasonable. This is important to bear in mind when drafting your findings; you need to ensure that an established fact is supported by logically probative evidence. That is, based on the objective evidence before you (cctv, photos, file notes, emails, records of interview etc.) it is more likely than not that the conduct in question occurred and the allegations are substantiated.

The below case examples demonstrate just some of the evidentiary issues that come up before Tribunals and Courts:

Zisopoulos v Commissioner of Police

Facts

Mr George Zisopoulos was a Sergeant at NSW Police. He had an unblemished career in the NSW Police but for a minor complaint when he was a Probationary Constable.

On 16 April 2015, Mr Zisopoulos was randomly drug tested which returned a non-negative result based on his urine sample. He was then required to provide a hair sample for testing. The hair sample returned positive results for MDMA and methylamphetamine. He was suspended with pay on 16 May 2015. On 30 March 2016, Mr Zisopoulos was served with a notice alleging that he had consumed a prohibited drug which resulted in the positive test result and contravened the *Police Act 1990* (NSW) (**Police Act**). Mr Zisopoulos responded on 6 June 2016. He denied he ever consciously consumed illicit drugs and argued that the positive results from testing his hair was because of "*environmental contamination*" (at [11]).

As part of Mr Zisopoulos' response, his lawyers provided two reports from Mr John Farrar, a Forensic Pharmacologist, which discussed the possibility of external contamination of his hair, stating "*in my opinion the available information does not support the allegation of consumption of methylamphetamine and [MDMA] by Mr Zisopoulos*" (at [8]). Mr Farrar expressed this opinion on the basis that he considered it was "*not possible to interpret the presence of methylamphetamine and [MDMA], as the concentrations of those drugs in the hair sample are below the specified cut-off limit and there is no evidence of the presence of their respective metabolites*" (at [9]).

This is at odds with the opinion of the experts provided by NSW Police (Dr Lewis and Dr Lindsay) which state that while the test results could be ascribable to use of illicit drugs by Mr Zisopoulos, each expert agrees it is possible that the levels of drugs reported could have been due to external contamination.

Despite this, on 19 December 2016, Mr Zisopoulos was removed from the NSW Police in accordance with s181D(1) of the Police Act and on the basis that the NSW Police Commissioner had lost confidence in his suitability to remain a police officer. Mr Zisopoulos then lodged an unfair dismissal claim in the NSW Industrial Relations Commission (**NSWIRC**).

Issue

Whether Mr Zisopoulos' removal from the NSW Police was harsh, unreasonable or unjust under s181E of the Police Act.

Commissioner Murphy was required to consider the factors set out in s181F of the Police Act, including:

- the reasons for removing Mr Zisopoulos from the NSW Police;
- the case presented by Mr Zisopoulos as to why the removal was harsh, unreasonable or unjust; and
- the case presented by NSW Police in response.

Decision

Commissioner Murphy accepted Mr Zisopoulos' claim and ordered that he be reinstated to the NSW Police at the same rank and pay he held before the date of his removal. Commissioner Murphy reached this view taking into account the following:

- the doubt cast by Mr Zisopoulos on the finding by NSW Police that he had consumed prohibited drugs, which shifted the burden of establishing that fact to NSW Police (at [142]);
- in particular, the evidence of Professor Fu, Dr Robertson, Mr Farrar, Ms Lindsay and Mr Kostakis, who were all of the opinion that the results do not exclude contamination as an explanation. The only witness who took an opposing view was Dr Lewis (at [131]). Commissioner Murphy further accepted the evidence of Dr Robertson that the low concentration level in the hair sample was consistent with either occasional use and/or environmental contamination and it cannot be reliably differentiated which of these alternative scenarios is more or less likely than the other (at [169]). Further, there was no evidence that Mr Zisopoulos actually ingested the substance (at [170]);
- the decision by NSW Police to remove Mr Zisopoulos because he consumed prohibited drugs was not based on logically probative evidence (at [151]). In particular, based on the evidence before the Commission, there were a number of occasions in the period leading up to the hair test when it was likely Mr Zisopoulos came into contact with the two substances through carrying out his duties at work (at [162]); and
- the procedures and practices used to wash the hair sample before testing are not entirely settled and could not reliably exclude environmental contamination as a possible cause for presence of illicit drugs in the sample (at [173]).

Based on the above and the combination of expert evidence that favours Mr Zisopoulos' explanation that environmental contamination was the cause of the positive test result, Commissioner Murphy found that NSW Police did not satisfy the evidentiary burden of proving, on the balance of probabilities, that Mr Zisopoulos used prohibited drugs.

Slide 8 - FWC - Unfair Dismissal

Farah v Australian Federal Police

Mr Farah commenced employment with the AFP in 2002. He was employed as a sworn officer in the ACT and then Sydney. Between July 2008 and November 2009 he breached the AFP Code by receiving requests to provide certain information and agreed to provide that information, and failed to report those approaches to his superiors. He also requested another officer to access a particular database for lawful purposes when no such purpose existed. He further used an Australian Government diplomatic bag to send personal mail to a relative overseas.

His conduct was investigated while he was suspended for more than two years while ACLEI also did an investigation and ultimately he was dismissed from his employment. Mr Farah filed an unfair dismissal claim in the FWC but was not successful, with the FWC being satisfied that the AFP had a valid reason for the dismissal and that it was not harsh, unjust or unreasonable due to affording Mr Farah procedural fairness throughout (despite the delay while Mr Farah was suspended). Mr Farah sought appeal of this decision by the Full Bench, however leave to appeal was not granted. In reaching its decision, the Full Bench was satisfied that it was open to the FWC Commissioner to apply different parts of the AFP Code to determine that a valid reason for dismissal was present. It said a member of the Commission may use evidence in proceedings for a purpose other than the purpose for which it was adduced. Although that being said, the Commissioner in this instance did not come up with an entirely new valid reason and the factual basis for the reason was largely consistent. On this basis, Mr Farah was not denied procedural fairness.

Slide 9 - FWC - Unfair Dismissal

The basic overview of an unfair dismissal application is as follows:

1. A decision is made to terminate the employment of an AFP appointee and they are notified of that decision;
2. The AFP appointee disagrees with the decision and lodges an application with the FWC for unfair dismissal;
3. The AFP has an opportunity to respond to the application and provide any material in support of its response (such as the decision letter, any policies etc.);
4. The matter is listed for a conciliation conference, where an independent conciliator assists the parties to try and resolve the dispute without the need for a hearing. All conciliations are confidential;
5. If the conciliation is successful, the parties will sign a Deed of Settlement that reflects the terms on which they agree to resolve the matter. This will include the AFP appointee withdrawing their application and usually an agreement of confidentiality (that is, the outcome of the conciliation is not to be disclosed to anyone);
6. If the matter does not settle, it will be listed for a hearing before a Commissioner who will decide what to do with the application;
7. The Commissioner will hear the evidence from both sides as to why they think the dismissal is unfair / justified and make a decision based on the harshness factors I spoke about earlier;
8. If the application is successful, the Commissioner will decide whether to reinstate the AFP appointee or to award them compensation (or both).

Slide 10 - FWC - General Protections

In addition to making a claim of unfair dismissal, an AFP appointee could make a general protections claim citing adverse action. This is a little tricky and there are a few important things to remember about general protections.

The AFP appointee could argue that adverse action was taken against them because they exercised a workplace right; that is, they were terminated from their employment (the adverse action) because they exercised their right to make a complaint or enquiry in relation to their employment (the workplace right). Or, the AFP appointee could assert that their

employment was terminated because they exercised their right to join the Australian Federal Police Association or because they suffer from a disability (these are known as prohibited reasons).

The most important thing to remember with a general protections claim is there is a reverse onus. This means that once the AFP appointee has established they were fired and connected that decision to a workplace right or a prohibited reason, the onus then shifts onto the AFP to prove that they **didn't** terminate the AFP appointee's employment because of a proscribed reason. The reason this is important is because it is a positive onus (whereas in unfair dismissal the responsibility is on the applicant to make out their case). Discharging the reverse onus will likely require direct evidence to be given by the decision maker which clearly articulates the reasons for their decision. The decision maker needs to demonstrate that the substantial and operative reasons for their decision do not include factors which are a proscribed reason under the general protections provisions. They will be assisted in doing this through a robust report which clearly sets out the basis for the misconduct and any appropriate action that may be taken as a result of that misconduct. A good investigation will show the reason any adverse action is taken and assist the decision maker to discharge the reverse onus.

An AFP appointee must first apply to the FWC when making a general protections claim that involves their dismissal. The FWC will attempt to conciliate the matter and if it is not successfully resolved, the FWC will issue a certificate and the AFP appointee can agitate their claim in the Federal Court.

Importantly, damages in the general protections jurisdiction are uncapped and can be awarded for hurt, humiliation and distress suffered as a result of the adverse action. The AFP appointee could also seek reinstatement as part of their general protections application.

Slide 11 - FWC - General Protections

An AFP appointee can choose to commence an adverse action claim while they are still employed. They do not need a decision that terminates their employment in order to make a claim of adverse action. For example, the AFP appointee could be given a direction that they are required to attend an interview and answer questions, which they perceive as a prejudicial action in relation to their employment because of a proscribed reason (such as making an enquiry about their employment entitlements which is being interrogated). Like a dismissal matter, the onus then reverses on to the AFP to establish that it did not take the adverse action complained of because of the proscribed reason.

However, the key difference in a non-dismissal dispute is that the AFP appointee has the option of going straight to the Federal Court and does not need to commence their application in the FWC. While this may be unlikely in circumstances where the Federal Court fees are significantly higher than the FWC, it is still open to the AFP appointee to pursue this option.

While damages are uncapped, the Court may also award the AFP appointee an injunction which stops the AFP from taking a particular action. Of course this will depend on the circumstances, but we need to be conscious of what can happen as an investigation progresses and be ready to defend the basis for commencing an investigation if a claim arises.

Slide 12 - Public Interest Disclosure

As you may know, the Public Interest Disclosure Scheme commenced on 1 January 2014. It replaces the whistleblowing provisions in the *Public Service Act 1999* (Cth) and expands the application of such mechanisms to raise allegations of wrongdoing to current and former public officials.

An AFP appointee, or a former AFP appointee, is a public official for the purposes of the *Public Interest Disclosure Act 2013* (Cth) (PID Act) (see section 69(1) Item 11).

A public official can make a disclosure of suspected wrongdoing that is engaged in by the AFP or another public official - currently the categories of disclosable conduct include conduct that constitutes maladministration or would give rise to disciplinary action.

Where a public official makes a disclosure, they receive very specific protections under the PID Act. These protections include preservation of their identity and protection from reprisal action on the basis that someone suspects they have, or might have made a disclosure. These protections are serious and carry criminal penalties.

This means that even if a decision is made to terminate the employment of an AFP appointee, they can still make a disclosure about the decision and the issues they perceive to be wrong with the decision and receive the protections under the PID Act. An AFP appointee could make a disclosure to the Ombudsman complaining about the handling of the investigation and the Ombudsman could conduct a PID investigation into that complaint, or an investigation using its Ombudsman Act powers and compel the AFP to provide any relevant information that was created as part of its initial investigation.

Further, once an AFP appointee has made an internal disclosure (either to the AFP or the Ombudsman) and they are not satisfied with the response, they can make an external disclosure to any person, for example a journalist, and still receive the protections under the PID Act. While the PID Act does not necessarily result in a direct outcome as far as any investigation is concerned, it does create administrative complexities that must be carefully navigated as part of any investigation.

Slide 13 - Risk Management Strategies

While there are many possible avenues that an AFP appointee may pursue if they are dissatisfied with an investigation or a decision arising from it, there are ways we can address the risk of these as we progress our investigations.

These include:

- Continuing our practice of taking contemporaneous records of interview (both file notes and audio recordings) to ensure the integrity of the evidence that we receive;
- Ensure that the findings we make are based on logically probative evidence (that is, the relevant standard of proof is satisfied and based on evidence that is credible, relevant and significant) and are properly articulated in our investigation reports so our findings are clear;
- Ensure the relevant decision maker is independent and separate from the investigation process in case they are required to give evidence about how they reached their decision;
- For this reason, we want to avoid having investigators give evidence in FWC proceedings - the report should be able to be a standalone document that explains

the investigation process, evidence and findings without having to interrogate the author of it.

AFP Workplace Investigations Transcript

Last updated 13 January 2025

Module 1 - Introductory overview of workplace investigations

Slide 1

The purpose of this module is to introduce you to administrative investigations conducted under Part V of the *Australian Federal Police Act 1979* (Cth). We will discuss why administrative investigations might be required, consider how the context of the AFP may be relevant to this, and introduce you to some of the key features of conducting an administrative investigation.

By the end of this module, you should feel comfortable to launch into the rest of the training modules in relation to workplace investigations.

Slide 2 – Course Information

Audio forms part of the online course. A transcript of the audio is provided as a PDF in the resource tab within IApsire.

Please note you will be required to complete a quiz as part of Modules 2-5 to check your understanding of the course content.

Slide 3 - What is a workplace investigation?

A workplace investigation is an independent and impartial enquiry into alleged misconduct or unsatisfactory behaviour by an employee.

Issues can either be raised by another employee or a member of the public (the complainant), or the employer may decide to investigate once it becomes aware of an issue. Generally, once the employer's organisation is put on notice of alleged misconduct, an investigation should happen. The employee being investigated is referred to as the subject.

A range of conduct and behaviour can be the subject of investigation.

Workplace investigations can be used for a range of reasons, including determining whether an allegation of wrongdoing did or did not occur, or determining whether an instance of wrongdoing constitutes a breach of a policy.

Workplace investigations are conducted to the civil standard of proof of whether or not the conduct occurred on the balance of probabilities.

The scope of an employer's obligations to employees will influence the range of conduct that may be investigated.

Slide 4 - Why do workplace investigations?

The AFP's Professional Standards Unit plays a key role in maintaining the legitimacy and trust of the Australian community, noting the unique position police organisations have in

upholding the law. The undertaking of workplace investigations is a key activity in fulfilling this responsibility and achieves the following:

- Ensuring the AFP complies with its legal obligations to employees which includes providing a work environment where staff feel safe and protected from wrong doing

- When matters are referred by members of the public, allows for transparency and the opportunity to ensure AFP appointees are held accountable for their conduct on or off duty.

- Ensures accountability and public trust

The delivery of a well-documented and objective investigation process ensures that the employer has transparent and accountable mechanisms for identifying breaches of the code of conduct, and is justified in taking appropriate sanction action in respect to employees for harmful or otherwise inappropriate behaviour.

Employers have a range of legal obligations that are relevant to this, and which may result in ramifications if the obligations are breached. For example:

- Under the *Fair Work Act* there are obligations in relation to bullying and harassment, unfair dismissal and general protections.
- Under the *WHS Act* the employer has an obligation to reasonably ensure the health and safety of employees in the workplace, which includes protecting them from poor behaviour.
- Under Commonwealth discrimination legislation there may be vicarious liability for organisations that do not take steps to prevent discriminatory behaviour as well as a positive duty to prevent certain workplace behaviours, including but not limited to, sexual harassment and related acts of victimisation.

Slide 5 - Workplace investigations in the AFP

The role of Professional Standards (PRS) is to maintain, promote and enhance integrity within the AFP through:

- a proactive integrity framework incorporating the development and delivery of misconduct and corruption prevention strategies.
- complaint management through investigation and resolution of misconduct, practices issues and corruption matters.

The PRS Investigation Unit (PRSIU) is constituted under section 40RD of the AFP Act and is responsible for conducting workplace investigations for Category 3 conduct issues and corruption issues, also referred to Category 4 matters, within the AFP.

The Workplace Issues and Complaints Resolution Team (WICR), who sit within People Command, conduct and manage workplace investigations for Category 1 and 2 conduct issues.

An administrative investigation will usually occur following the receipt of a complaint. Complaints may be received from a member of the public, or may be internally generated, such as a complaint by one AFP appointee against another AFP appointee.

We will discuss complaint categories in greater detail in Module two.

Slide 6 – Workplace investigations in the AFP

When appropriately undertaken, workplace investigations can determine whether the organisation should take disciplinary action in relation to an employee, maintains organisational integrity, provides fair treatment and fosters a positive work environment. A thorough and independent workplace investigation can also protect the organisation from litigation.

From the perspective of an employee alleged to have engaged in conduct in breach of the AFP Code of Conduct and the AFP professional standards, a formal investigation process allows an opportunity to provide evidence and their version of events in order to defend themselves if they wish to do so.

Part V of the AFP Act prescribes the process for recording and dealing with conduct and practices issues relating to the AFP.

There are also a number of relevant policies and procedures that should be considered when conducting workplace investigations, including:

- The AFP Commissioner's Order on professional standards (CO2)
- The AFP National Guideline on complaint management and resolution of grievances
- The AFP Categories of Conduct Determination (2013 & 2023)

Slide 7 – Workplace vs criminal investigations

While workplace and criminal investigations can have some similarities and crossover, there are also some key differences.

Both workplace and criminal investigations can deal with sensitive and complex issues. In addition to core investigative skills, soft skills such as empathy, understanding and confidentiality that may be important when conducting a criminal investigation will also be important in the conduct of a workplace investigation.

Perhaps the major difference is the standard of proof. Workplace investigation findings are determined based upon the civil standard of proof, being the 'balance of probabilities'. To find that an allegation is substantiated on the balance of probabilities, the available evidence must demonstrate that it is more probable than not that the alleged conduct occurred.

In other words, another way to look at it is when the evidence is considered together it must be at least 51% likely to have occurred.

Findings made on the balance of probabilities need to be made with the Briginshaw principle in mind (*Briginshaw v Briginshaw [1938] HCA 34 – 60CLR 336)*.

The Briginshaw principle is *not* a separate standard of proof, but rather a standard of satisfaction that must be reached. The principles in Briginshaw require that the more serious the allegations, which may lead to serious consequences for the employee (such as termination of employment), then the evidence relied upon needs to be of proportionately high probative value.

Unlike the criminal standard of "beyond a reasonable doubt," the balance of probabilities is a lower threshold and is appropriate for civil matters, including workplace investigations.

Slide 8 - Qualities of a good workplace investigation

As you will learn during these modules, the key requirement for effective workplace investigations is ensuring procedural fairness to all parties.

Steps that can be taken to ensure that this occurs include:

- Providing the subject appointee and the complainant an adequate opportunity to be heard. This is legislated per section 40TH of the AFP Act for Category 1 and 2 conduct issues, and under section 40TQ(2)(a) for category 3 and corruption issues.
- Drafting allegations that are clear, linked to an alleged breach of the relevant governance and adequately particularised.
- Advising the subject of the allegations.
- Giving the subject an adequate opportunity in which to respond to the allegations.
- Making conflict of interest (COI) declarations at the time of first contact with a matter, and regularly re-assessing throughout the investigation. This ensures the investigator and decision makers are impartial and free of conflict from the beginning of the process. Further information on COI's is provided later in the course.
- Maintaining confidentiality of information related to the investigation as far as practicable. Confidentiality is explored in more detail in Module 4.
- Supporting parties who are involved in the investigation. Further information will be provided later in the course.
- Acting in a timely manner. Investigations should be completed as quickly as possible however this must be balanced with the need to collect all relevant evidence, noting that relevant witnesses may have scheduled leave or reasons which prevents them from being unable to attend an interview;
- Ensuring that conclusions are supported with logically probative evidence gathered in the course of the investigation.
- Updating the complainant as frequently as is reasonable in the circumstances, of the progress of their complaint, and advising them of action taken in relation to the issue. This is also legislated per section 40TA(2) of the AFP Act.

We hope you find this training useful and informative. At the completion of the course, we would appreciate your feedback to assist with future course improvements.

Module 2 - Categorisation

Slide 1 – Module overview

Welcome to Module 2. In this module we will be discussing the different categories of conduct, and how these are handled.

Slide 2 - Categories of Conduct

The AFP Act requires that the AFP categorises breaches of the Code of Conduct depending on their seriousness.

Pursuant to section 40RK of the Act there are four categories of conduct: Category 1, Category 2 and Category 3, and conduct giving rise to a corruption issue, often referred to as Category 4. If conduct would belong to more than one category, it is taken to belong to the highest of those categories. The category to which conduct belongs may change as more information is obtained during the investigative process.

The types of conduct relating to Category 1, 2 and 3 are referenced in the following sections of the AFP Act at:

- Section 40RN – Category 1
- Section 40RO – Category 2
- Section 40RP – Category 3

Corruption issues are defined in the National Anti-Corruption Commission Act 2022 (Cth).

The Categories of Conduct Determination is a legislative instrument which is jointly agreed to by the AFP Commissioner and the Commonwealth Ombudsman to determine what kind of conduct relates to each category. The Categories of Conduct Determination provides examples of what type of issues fit into each category, and will assist you in assessing and applying categorisation. Depending on when the alleged conduct occurred, it may be necessary to refer to the Categories of Conduct Determination 2013 or the Categories of Conduct 2023.

It is important to note that one complaint may include multiple conduct breaches. An overall Category 3 complaint may include not only Category 3 breaches, but also Category 1 or Category 2. The highest category on the complaint determines the overall categorisation.

When complaints are accepted, they are categorised and allocated for investigation. However, during the course of your investigation additional conduct breaches may arise that you will be required to categorise and investigate, or the initial conduct breach categorisation may change. It is important that investigators are familiar with the relevant Determination and understand the different categories in order to apply appropriate categorisation.

All complaints are received by the Workplace Issues and Complaints Resolution Team (WICR). Complaints with an overall category of Category 1 or 2 are managed and investigated by WICR. Previously, this was the role of Complaint Management Teams (CMTs). Conduct issues with an overall category of Category 3 are managed and investigated by the PRSIU in accordance with Part V of the AFP Act and CO2. Category 4 corruption issues are managed and investigated by PRS and/or NACC in accordance with Part V of the Act, CO2 and National Anti-Corruption Commission Act 2022 (Cth) and as agreed between the AFP Commissioner and the Integrity Commissioner.

Let's look at how to categorise a matter.

Slide 3 – Category 1 and Category 2

In simple terms, Category 1 issues are minor management, customer service issues, or conduct which reveals a need for improvement in the performance of an AFP appointee. Category 1 matters can be dealt with informally (pursuant to section 40SC of the AFP Act) or formally.

Some examples of allegations that may be classed as Cat 1 are:

- Customer Service issues, examples of which may include:
    - Failure to provide service or facility in an adequate, professional or appropriate manner
    - Failure to provide appropriate or correct advice
    - Unreasonable delay in dealing with an issue or providing a service
    - Failure to take appropriate action in relation to an issue where action is warranted in the circumstances
    - Discourteous behaviour
- Failure to comply with AFP governance where the failure relates to customer service or involves a minor management issue, an example of which may include:
    - Failure to respond to a query within a time frame specified in AFP governance

Category 2 matters are defined as minor misconduct and primarily focus on behavioural based issues. Some examples of Category 2 matters are:

- Breach of Commissioner's Orders, National Guidelines or Best Practice Guides that does not, and could not, result in a breach of operational or national security, harm to an individual or reputational damage to the AFP
- Failure to comply with the Code of Conduct that results in a failure to meet the standards of behaviour reasonably expected of an AFP appointee that goes beyond minor mismanagement or a customer service issue but
    - does not, and could not, result in
        - a breach of operational or national security,
        - harm to an individual or
        - reputational damage to the AFP
- Sexual harassment, discriminatory conduct or workplace bullying or harassment where
    - The statements/behaviour is not repeated;
    - The alleged victim wants the matter dealt with informally (such as conciliation) and
    - The conduct does not constitute criminal conduct and is not otherwise of such a serious nature as to require formal intervention
- Failure to report an actual, potential or perceived conflict of interest that does not, and could not; affect
    - A decision-making process or
    - The functions and interests of the AFP
- Traffic misconduct which would not result in criminal charges

Repeated Category 1 conduct may also be treated as Category 2 due to its repeated nature.

Slide 4 – Category 3

Category 3 matters, which do not give rise to a corruption issue, are defined as serious misconduct. Category 3 matters raise the question of whether an AFP appointee's employment should be terminated. The relevant Categories of Conduct Determination provides detail as to what types of behaviour are Category 3. Some examples are:

- Conduct that involves a serious breach of criminal law
- Conduct that involves serious neglect of duty
- Conduct that is deliberate and/or is so serious as to demonstrate wilful or reckless indifference to CO2
- Breaches of Commissioner Order 3 regarding operational safety which relate to
    - Use of firearm
    - Use of weapon (other than a firearm) or other use of force which results in harm or danger to a person;
    - Use of excessive force against a person or animal
- Breaches of Commissioner's Orders or unauthorised departure from AFP National Guidelines and Better Practice Guides, that result or could result in a breach of operational or national security, harm to an individual or reputational damage to the AFP
- Sexual harassment, discriminatory conduct or bullying where
    - the alleged victim wants the matter dealt with formally; or
    - the conduct is of such a serious nature as to require formal intervention
- Failure to report a conflict of interest which could affect
    - A decision-making process
    - The functions and interests of the AFP
- Domestic and Family violence
- Mishandling or misuse of prescribed information
- Misconduct relating to drugs and alcohol
- Serous traffic misconduct

Slide 5 – Corruption Issue (Category 4)

Corruption issues are referenced colloquially by the AFP as 'Category 4'.

The National Anti-Corruption Commission Act (2022) (Cth) provides the following definitions relevant to corruption.

Section 8 which defines 'corrupt conduct' as

- Any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:
    - The honest or impartial exercise or performance of any public official's

powers, functions or duties as a public official

- Any conduct of public official
    - that constitutes or involves a breach of the public trust
    - That constitutes, involves or is engaged in for the purpose of abuse of the perron's office as a public official
- Or former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official

and Section 9 which defines a 'corruption issue' as an issue of whether a person:

- Has engaged in corrupt conduct; or
- Is engaging in corrupt conduct; or
- Will engage in corrupt conduct

The AFP must report any allegations of corruption which are either serious or systemic in nature to the NACC.

Slide 6 – Managing Category 1 and 2 complaints

While generally these matters will not be investigated by the PRSIU, we will very briefly touch on how Category 1 and 2 matters are dealt with.

Category 1 and 2 matters are managed by WICR and are investigated by a dedicated team of workplace investigators. Category 1 complaints can also be dealt with informally and are referred by WICR to an appropriate member within the relevant work area.

Where a formal category 1 or 2 complaint is contained in an overall Category 3 matter, these are addressed by PRS as part of the broader investigation

In some instances, a matter may commence with WICR as a Category 1 or 2, however during the investigation more serious conduct may be identified. In such instances, the matter is referred to the Professional Standards Operations Committee (OC) for review and determination as to an upgrade to a Category 3 or a corruption issue. If upgraded, PRS will take over the management and investigation of the matter.

Sanctions that can be applied to established Category 1 or 2 matters are outlined in sections 40TI and 40TJ of the AFP Act. Category 1 conduct can only result in training and development action as defined by section 40TC, and Category 2 conduct can only result in training and development action as defined by section 40TC and/or remedial action as defined by section 40TD.

Slide 7 - Managing Category 3 or Corruption issues (Category 4)

Where a matter is assessed as being Category 3 or a corruption issue, it is referred for review by the Professional Standards (PRS) Operations Committee (OC). We will discuss the role of the PRS OC in the next slide.

If accepted by the PRS OC, a Category 3 matter will usually be managed and investigated by PRS.

When a corruption issue is accepted, it must also be notified to the NACC if it is either serious or systemic. Corruption matters may be investigated solely by the AFP, solely by the NACC, or jointly by the AFP and the NACC.

A critical point to remember is with workplace and criminal corruption investigations there must be a sterile corridor with information. This means that you cannot use information obtained under administrative powers in a criminal matter, however the reverse can apply. That is, evidence obtained through criminal powers can (in most circumstances) be used for administrative purposes. This will be discussed in greater detail later in this module.

Sanctions that can be applied to established Category 3 conduct or corruption issues are outlined in section 40TR of the AFP Act. Termination action can be considered for established Category 3 conduct or corruption issues pursuant to section 40TE of the Act. We will explore the application of sanctions in later modules.

In Module four we will explore conducting the investigation.

Slide 8 – The role of Professional Standards Operations Committee (OC)

The Professional Standards (PRS) Operations Committee (OC) meet on a weekly basis to holistically review complaints assessed as involving harmful workplace behaviours, Category 3 conduct, or corruption issues (Category 4). The OC comprises key stakeholders from PRS and other business areas such as People Services, Workplace Relations, Security and Organisational Health.

The PRS OC:

- Is responsible for assessing, accepting/not accepting and categorising each matter referred for review
- Determines appropriate actions/pathways for matters not accepted
- Considers risk and applies risk mitigation strategies where appropriate
- Allocates accepted Category 3 and 4 matters for investigation
- Considers any welfare issues for parties involved in an investigation
- Considers practice issues which arise during the course of an investigation

We will now move on to issues relevant to PRS Investigations.

Module 3 - Issues relevant to AFP Investigations

Slide 1

In this module, we will be going through the specific issues that are relevant to AFP Administrative Investigations. Whilst a lot of the matters we will discuss apply to workplace investigations generally, there are a number of requirements that are specific to the AFP that you need to be aware of for your investigations.

The purpose of this module is to introduce you to those requirements and highlight some important things to keep in mind when you are conducting your investigations. We would strongly encourage you to also review guidance documents that will assist you in this process, which we will mention a bit later on.

Slide 2 - Sources of Powers and Resources for PRS investigators

These five documents provide PRS investigators with their powers, and/or provide guidance in relation to how they should go about their work. It is important that you are aware of the obligations and powers contained in these documents.

The AFP Act 1979

In particular, Part V of the Act deals with professional standards and AFP conduct and practices issues. It also requires the establishment of a unit (which comprises the PRS investigations teams) to deal with more serious allegations against AFP appointees. The AFP Act provides the powers for PRS investigators and the following legislation effectively expands on the powers that are provided for in the AFP Act.

The National Anti-Corruption Commission (NACC) Act (2022)

This Act is only generally relevant when issues of corruption are raised. It defines corrupt conduct (corruption) and the definition of a corruption issue. In all matters involving allegations of corruption which meet the usual definition of serious or systemic, the NACC is required to be notified, and in some cases will be consulted when managing such issues. The decision on which matters are serious or systemic is normally made by the PRS OC when a matter is first considered. However, if a corruption issue is identified in the course of any PRS investigation then consideration needs to be given to notifying the NACC.

The AFP Categories of Conduct Determination (the Determination)

As we discussed in Module 2, there are four categories of AFP conduct issues pursuant to section 40RK the AFP Act. The Determination is a legislative instrument jointly determined by the AFP Commissioner and the Commonwealth Ombudsman in accordance with section 40RM of the AFP Act to determine what kind of conduct relates to each category. The Determination is a very useful document when determining categorisation of alleged conduct. As we covered in the previous Module, Category 3 complaints and corruption issues are initially categorised and accepted by the PRS OC. However, during the course of an investigation additional conduct breaches may arise that you will be required to categorise, or the initial conduct breach categorisation may change. It is important to be familiar with the Determination and understand the different categories in order to apply appropriate categorisation. The 2013 Determination was superseded in September 2023 by the 2023 Determination, and it is important to ensure you reference the Determination

relevant to the date of the alleged conduct you are investigating.

Commissioner's Order on Professional Standards (CO2) and the Code of Conduct

CO2 sets the AFP professional standards to maintain the good order and discipline of the organisation. It also sets out the AFP Core Values which must be adhered to by all AFP appointees. Additionally, CO2 outlines how to manage and deal with allegations that the standards have been breached.

Included in CO2 is the Code of Conduct (the Code). Adhering to the Code is fundamental to complying with the professional standards of the AFP and a breach of the Code is a breach of AFP professional standards. It is important to be aware that the Code can apply even when an AFP appointee is off duty.

The AFP National Guideline on complaint management and resolution of grievances

This National Guideline is part of the AFP's professional standards framework. It details the obligations for AFP appointees when dealing with complaints and grievances, enables the AFP to mitigate the risks associated with allegations and/or breaches of the AFP professional standards and inappropriate workplace behaviours and details the obligations for AFP appointees to manage and resolve complaints and grievances.

Slide 3 - Powers of the Investigator (Part V, Division 5, Investigative Powers)

The investigative powers available to instrumented PRS investigators for Part V investigations are located in Part V, Division 5 of the AFP Act.

The AFP Act gives the investigator of Category 3 and Corruption issues wide scope in conducting their investigation. Division 5, Section 40VB (1) of the AFP Act states that the investigator can conduct the inquiry or investigation in such a manner as they see fit.

We will now discuss some of the specific powers granted to PRS investigators.

Slide 4 - Powers of the Investigator – Issuing directions to AFP appointees

One of the specific powers given to an instrumented PRS investigator is the power, under section 40VE to issue directions to AFP appointees, for the purpose of the investigation enquiry to:

- give information in specified manner and form; or
- produce a document or thing; or
- answer a question; and
- do anything else reasonably necessary for the purposes of obtaining evidence.

Failure to comply with such a direction is an offence against subsection 40VH (1) and carries a penalty of 6 months imprisonment. Note: the section does not apply if the appointee has a reasonable excuse (refer section 13.3 (3) of the Criminal Code Act 1995 (Cth) – Evidential burden of proof – defence.

Section 40VG(4) of the Act states an appointee is not excused from complying with the

direction:

(a) On the grounds that answering the question:
    (i) Would be contrary to the public interest; or
    (ii) Might make him or her liable to a penalty; or
(b) On the grounds that the answer to the question might tend to incriminate him or her; or
(c) On any other grounds.

Slide 5 – Powers of the investigator – Entering and searching AFP premises

PRS investigators also have the power to enter and search an AFP premises in accordance with section 40VF of the Act. This section states an **investigator may enter and search** AFP premises (which includes a place, vehicle, vessel and aircraft) to:

- examine any document or thing on the premises;
- take extracts or copy any document or thing on the premises; and
- retain any document or thing for a period as is necessary for the investigation.

Slide 6 – Commissioner's command powers - Drug testing

Division 8 of Part IV of the AFP Act provides powers to 'prescribed persons' to direct members to undertake alcohol screening tests, breath tests and/or provide a body sample of a kind specified in a written direction for a prohibited drug. Commander/Manager PRS, a PRS Superintendent/Coordinator and PRS Sergeants/Team Leaders are all authorised to direct an AFP appointee to undergo a drug test (and alcohol test, if not conducted by State and Territory Police).

All AFP employees MUST comply with this direction. These powers are found at section 40LA, 40M and 40N of the AFP Act.

- Under section 40LA, authorised managers may require AFP appointees to undergo alcohol screening tests
- Under section 40M, prescribed persons may require AFP appointees to undergo alcohol screening tests, alcohol breath tests or prohibited drug tests etc.
    - Direction can be given to an AFP appointee, who is on duty, to:
        - Undergo an alcohol screening test
        - Undergo a breath test
        - Provide a body sample of a kind specified in the direction for a prohibited drug test
- Section 40N relates to alcohol screening tests, alcohol breath tests and prohibited drug tests after certain incidents

Incidents can include persons killed or seriously injured in an incident involving a motor vehicle or vessel or while in police custody. The direction can be given whether the appointee or special member is ON or OFF duty (sec 40N (3))

Likely scenarios in which this power may be used include where an AFP appointee is:

- involved in a car accident while on duty
- involved in an incident involving a firearm or use of force that results in death or serious injury while in police custody or in the company of an AFP employee who is on duty.

Serious injury is defined in CO2 as an injury which, by its nature, is likely to:

- be life threatening
- require emergency admission to a hospital and significant medical treatment
- result in permanent impairment or long-term rehabilitation
- constitute grievous bodily harm.

Slide 7 - Duties of the Investigator

Here are some duties and responsibilities that an investigator has when undertaking their investigation. Pursuant to section 40TR of the AFP Act, an investigator may make recommendations in relation to sanctions that may be applied to an established conduct issue. However, the final decision regarding sanction rests with the Delegate/Chair of the Professional Standards Panel (the PRS Panel). We will discuss the PRS Panel in Module five.

Drafting allegations

Drafting allegations is a skill of vital importance. A poorly drafted allegation can result in the whole investigation being derailed. We will talk more about drafting allegations in Module Four.

Conducting Interviews

Another vital tool in any investigator's arsenal is the ability to conduct interviews that garner useful information.

Evidence can be gathered from numerous sources, using a number of the powers we discussed earlier.

Procedural Fairness

This is an important facet not just to AFP investigations, but to all workplace investigations. Without it, it is likely that all your hard work will be thrown away if the matter is ever challenged. This should be at the forefront of your mind as you go about your investigation. Many facets make up procedural fairness and it will continually come up all through the modules. Providing the subject appointee and the complainant an adequate opportunity to be heard is an important element of procedural fairness. This is also legislated per section 40TH of the AFP Act for Category 1 and 2 conduct issues, and under section 40TQ(2)(a) for Category 3 and corruption issues. The obligation to provide procedural fairness is also an administrative law requirement.

Complainant Contact

As per section 40TA(2) of the AFP Act, the investigator must, as far as practicable, ensure the complainant is updated as frequently as is reasonable as to the progress of the investigation. At a minimum, contact should be made with the complainant initially, then once a month and/or when significant changes occur with the case, or as agreed upon with the complainant. In some cases, the complainant may request updates be provided only at

significant milestones or at the completion of the investigation. It is essential that all contacts are recorded contemporaneously on the case record, and details such as request arrangements be documented.

At the completion of all investigations, the complainant must also be provided with an outcome. Generally, the outcome is provided by letter, however individual circumstances may warrant the outcome being provided via other means, for example if the complainant is vision impaired. A good outcome letter will provide clear reasons for the decision, and state the evidence relied upon. The complainant is not provided with specific details of the sanctions applied.

Make findings of fact

We will talk in another module about how to consider and determine which evidence holds greatest weight. Again, this is a skill that is vital for all investigators.

Decide whether an allegation is established or otherwise

At the end of the day, this is the reason the investigation is undertaken. So, it is important that this finding is defensible and based on logical and reliable evidence. If it isn't, again there is a risk that all your hard work will be for nothing.

Consider whether investigation raises AFP practice issues

This is another requirement provided under the AFP Act. It relates to matters which may arise during an investigation that reveal the potential need for the practices and procedures of the AFP to be reviewed and possibly amended in light of what you have found. Section 40TA of the Act relates to the Commissioner's Orders about how AFP conduct or practice issues are dealt with. You should keep this in mind when undertaking the investigation to ensure that you are alive to this issue should it arise.

Slide 8 - Considerations of suspension during investigation

Sections 40H and 40J of the AFP Act deal with the suspension of an AFP appointee from their duties. Section 8 of the AFP Regulations permits the suspension of an employee with or without remuneration. The circumstances in which a decision is made are detailed in the *AFP Better Practice Guide (BPG) on Redeployment or Suspension of AFP employees in relation to AFP Conduct Issues*. It is recommended you familiarise yourself with the BPG in the event the issue of suspending a member during an investigation arises.

The AFP Regulations state that an AFP employee may be suspended from duty if the Commissioner (or their delegate) believe on reasonable grounds that the employee may have engaged in conduct that contravenes the professional standards, or is corrupt conduct. They may also be suspended if they are charged with a summary or indictable offence and the Commissioner (or their delegate) believe that it would be inappropriate for them to continue their employment until the charge has been determined. This suspension can be with or without pay. Alternatively, redeployment may be considered a suitable option in the circumstances. The suspension or redeployment is not intended to be a form of punishment or sanction. Some considerations for suspension are provided below.

Seriousness of the allegation against the member

The BPG outlines some situations where suspension may be considered appropriate, including where the conduct poses a risk to AFP employees or stakeholders, where misuse of resources or revenue is alleged, or where the allegations could undermine the confidence of

the public in the administration of the AFP's operations. The BPG provides guidance for decision makers when deciding whether suspension or re-deployment is required. It's important to remember that suspension is not a punishment or a finding on the matter. It's an administrative decision based on the criteria in the principles contained in the BPG.

With or without pay

Suspension without pay will normally turn on whether or not the alleged conduct could reasonably lead to termination of employment, where it will serve the purpose of protecting:

- the AFP workplace and its employees
- the interests of the AFP and/or
- the public interest

Effect on member

During all suspension matters it is usual process to notify AFP Welfare to be on stand-by or request their attendance should the member require welfare support. A decision to use the services of AFP Welfare is at the discretion of the subject of suspension.

Work Health and Safety Obligations

The AFP, and its "officers" under the meaning in the Work Health and Safety Act, have the responsibility to, as far as reasonably practicable, ensure their own health and safety, and those around them at work. For this reason, it is possible that suspension from duties may be necessary, if for example, a complainant and subject work in the same team or area. Redeployment may also be appropriate whilst the investigation is being undertaken.

It is important that this is considered as failure to do so may leave some employees personally liable to prosecution should they be officers and it be found they did not discharge their WHS obligations in the appropriate manner.

Module 4 - Conducting the investigation

Slide 1

In this module, we will be discussing how a workplace investigation should be conducted. The techniques we discuss in this module apply not just to AFP investigations, but workplace investigations more broadly.

We will be discussing:

- Conflict of interest
- How to draft allegations
- Putting together an investigation plan
- How to best gather evidence and identify useful witnesses
- The difference between conducting workplace and criminal interviews
- Maintaining confidentiality and its importance in preserving the integrity of the report
- Managing bias

Slide 2 - Conflict of Interest Declaration

The management of conflicts of interest is essential to maintaining the integrity of an investigation. As soon as you are allocated a matter for investigation, and before you commence any enquiries or investigative actions, you must make a conflict of interest (COI) declaration and record this within the relevant case.

It is a breach of the AFP Code of Conduct for an AFP appointee to not disclose, or take reasonable steps to avoid, any conflict of interest (actual, perceived or potential) connected to their AFP duties or employment.

If you don't have a conflict, all you need to do is make a declaration that says that! If you have, or think you may have, a conflict, make your declaration and record the details. You must also discuss this with your team leader/Sergeant.

Having a conflict does not automatically mean that you cannot conduct the investigation. Conflict declarations are reviewed by an appropriate delegate, and a decision will be made as to whether you can continue to be involved. For example, it may be that the conflict is able to be managed, or a risk treatment, such as having another member conduct a particular witness interview, might be put in place. This would be documented within the case record. Of course, there may be circumstances where the conflict is unable to be managed or mitigated, and you would be unable to do the investigation.

Sometimes, conflict may be managed by the appointment of investigator from an AFP area outside of PRS, or even by outsourcing to an external agency, such as a law firm.

Even if you don't have a conflict initially, it is also important to reassess things throughout your investigation and make a new declaration should new conflict or bias arise.

The Commonwealth Ombudsman oversights the AFP's administration of Part V of the AFP Act. Under section 40XA of the AFP Act, the Ombudsman's Office conducts at least one inspection of Part V records annually. Declaration and management of conflict of interest is reviewed during the inspection.

Slide 3 – What is conflict of interest?

So, what is a conflict of interest?

Conflict of interest means a conflicting obligation, loyalty or other improper influence to which an individual is subject to in the course of a relationship or activity. A conflict of interest refers to the conflict between public duties and private interests, or between two or more public duties or the commitment of time between fulfilling a public duty and an outside professional activity. It may involve an actual, perceived or potential conflict:

- between an AFP appointee's responsibilities in serving the public interest/official AFP duties, and the AFP appointee's private interests (a conflict of interest); or
- between an AFP appointee's legal or ethical obligations to the AFP and their legal or ethical obligations to another organisation, agency or public office/duty (a conflict of duty); or
- of a commitment of time between an AFP appointee's engagement in a non-AFP professional activity, paid or unpaid, and their ability to fulfil their obligations to

the AFP (a conflict of commitment).

Conflict of interest can arise from both avoiding personal losses and gaining personal advantage – whether financial or otherwise.

There are three types of conflict of interest.

Actual, **perceived** and **potential** conflicts of interest all present personal, operational and organisational risks and therefore need to be identified, reported, assessed and managed appropriately.

- **Actual** conflict of interest is where there is a direct conflict between an appointee's private interests and official AFP duties.
- **Perceived** conflict of interest is where there might appear to be a conflict between an appointee's private interests and official AFP duties which could be seen to influence the appointee in performing those duties, whether or not the influence actually occurs.
- **Potential** conflict of interest is where an appointee's private interests could give rise to a conflict with their AFP official duties or AFP's interests in the future.

Slide 4 – Assessing conflict of interest

In assessing whether you have a conflict of interest here are some things to consider:

- are you linked in any way to the conduct of the complaint?
- have you ever had a personal or family relationship with any party involved in the complaint?
- do you have any knowledge of any party involved in the complaint which may adversely affect your decision making?
- could you be influenced by factors including but not limited to personal, religious, political, social or cultural values?
- do you have any other personal or professional bias that may lead others to believe you have an actual, perceived or potential conflict of interest?
- will you be involved in the implementation of sanctions or outcomes related to the complaint?

Slide 5 - Allegation drafting

The very first step an investigator needs to do when they are assigned a matter is to review the complaint information and draft the allegation.

This first step is vital to the success of any investigation. All too often, vague, ambiguous or poorly particularised allegations result in it being very difficult to provide a subject enough information on which they may respond, leading to procedural unfairness; this may threaten the validity of any findings made. In some cases, it may be necessary for you to amend an allegation or allegations if new information comes to light or further particulars are discovered. If this is the case, the subject be provided with the details of the amended and/or new allegation as part of procedural fairness which provides them with an opportunity to respond. Providing as much detail as possible can help avoid ambiguity or confusion regarding what the subject is answering or responding to.

Taking your time to prepare a considered, specific allegation will also help direct your inquiries and conclusions and it will save you a lot of headaches in the future.

Slide 6 - Common problems

Some common problems encountered in the allegation drafting stage include:

Too many allegations

Often, complainants will provide a great deal of information with varying degrees of specificity. It is important the allegation is particularised enough to allow the subject the opportunity to respond.

Vague allegations

Imprecision around dates, time or other details can be very problematic and may require further particulars being provided before a decision to investigate is made. It is therefore important to state, with as much particularity as is possible, the alleged events that make up the allegation. Use of words such as "on or around" give you a bit more room to move when it comes to temporal matters.

Stale allegations

These allegations do become difficult to investigate, especially if the primary source of evidence is to be from witnesses (as opposed to documents), as time erodes memory. Witnesses may have forgotten, or discussed the issue with others, which may compromise the integrity of their evidence. In circumstances where multiple allegations are made, with some being quite some time ago, it is best to rely on the most recent as the evidence will be in the most useable state.

Rumours

The problems with allegations made on rumour or not supported with evidence are obvious. There is no way to determine the veracity of what is claimed and the risk is that the subject is dragged through an investigation process without a finding in their favour at the end. It is obviously important to remember however to not easily discount an allegation outright without trying to garner more information from the complainant first. Section 40TF of the AFP Act is a provision that allows the Commissioner or their delegate, the discretion not to take no further action in certain circumstances. You may consider relying on this section in a number of circumstances, for example, such as where the information is frivolous or vexatious - 40TF(2)(f), or trivial - 40TF(2)(e), or not given in good faith - 40TF (2)(h), or the investigation, or further investigation, of the issue is not warranted having regard to the circumstances - 40TF(2)(k).

Slide 7 - Tips for drafting allegations

So, what should our allegations include? The allegations should refer back to the alleged breach of the Code of Conduct, policy or procedure, such as "you breached section 8.9 of the AFP Code of Conduct, which states…)".

Once you have outlined that, it is important that you provide the subject with the particulars of their alleged misconduct. The more specific the better, including a date, time, location, what was said and anything else relevant that you have. The famous ‘five Ws and one H’ (Who, What, When, Where, Why and How) is very relevant here. If you can tick most or all of these off in an allegation, chances are, it is well drafted.

For example, instead of saying

'On 1 May 2022, Constable John is alleged to have breached section 8.11 of the AFP Code of Conduct when he spoke rudely to a member of the public', provide detail about 'what was alleged to have been said' and 'who the person was' and 'where the incident was alleged to have occurred'.

The additional detail allows the subject, in this case Constable John, to recall exactly which incident the matter relates to.

There may be more than one event that makes up an allegation. If that's the case, go through that process with all of the alleged incidents.

Once you have drafted the allegations, this should be provided back to the complainant to confirm that it captures the essence of their complaint. Generally, complainants don't provide allegations in a consistent or logical manner, so you as the investigator may have to take the information you have been provided and format them in an appropriate way.

Once the allegations have been settled, and you are ready to interview the subject, you should ensure they are given adequate time to consider the allegations before the interview, unless there is the risk of loss of evidence. An allegation should not normally be given to a subject just before they enter an interview room.

Slide 8 – Investigation planning

There is no set formula for what should be in a plan, or an investigative strategy if a formal plan is not used, and each investigation plan may be different depending on the circumstances. Some common things that should be considered for inclusion are:

Summary of the task

What are the allegations? What policy or procedure was allegedly breached? What is the scope of your investigation? Putting these things down in your plan will ensure you stay on track and keep in scope.

Timeline

It is important that any investigation is conducted methodically, but in an appropriate time. An investigation process that meanders along slowly runs the risk of denying the subject procedural fairness. That's why it is always good to have your deadline front of mind whilst conducting your investigation.

Crucial to the success of the AFP's complaint management is compliance with benchmarks. Benchmarks do not apply to Corruption issues, but the benchmark for Category 3 investigations is 256 days. Some delays can be unavoidable, particularly for investigations where criminal conduct is involved, however, where circumstances are within your control, it is best to keep delays to a minimum. Putting key milestones on a timeline will keep you informed as to how you are travelling. Bulk up the timeline with other events that you need to do and you will be in a very good position to complete your investigation in a timely manner.

List of documents that need to be given to people and when

Utilising 'SOPS', workflows and guides, and making a list of the required documents (for example, Directions, outcome notifications and correspondence to third parties such as

NACC) will reduce the risk of anything being overlooked. Utilise approved templates to ensure accurate information is provided in the appropriate format.

Places of information deficiency

If you are commencing an investigation, it is probably because you have, on face value, enough information on which to reasonably suspect the alleged conduct may have occurred. It is extremely important to consider that evidence and highlight which aspects of the allegation you need more information on. It might be that after your enquiries, nothing else is found, but you should go through this process in order to be sure. This will also guide your interviews and questioning. The test of relevance and reliability also applies to administrative investigations as it does to criminal matters.

Interview Schedule

Arranging interviews can be a surprisingly difficult task that may take a lot of preparation. It's important to keep a few days clear to conduct interviews, as it will ensure you can work around your interviewee and their availability. Any schedule should also anticipate how long you intend to spend with each interviewee.

It is worth considering if an interview is actually required or whether or not the same evidential outcome could be achieved through the Direct Engagement Investigative Strategy (DEIS). We will discuss DEIS in more detail later in this module.

Steps to secure evidence

This is particularly important when allegations of misuse of technology are raised. It is important that employees who are suspected of wrongdoing do not have time to destroy valuable evidence. Whilst it is true that most things, especially when it comes to work computers, can be recovered, it may come at a cost or time. That's why it is best to put these things in place at the start of the investigation to ensure this does not become a headache.

Securing evidence can also come in the form of directing witnesses not to discuss allegations with each other. The risk is that if they talk to others about their evidence, it may contaminate it and become less reliable. It should be made clear to witnesses that failure to follow such a direction may lead to disciplinary action being taken against them.

Slide 9 - Gathering evidence

It is important that the evidence you gather is reliable and relevant to the allegations. Without this, your investigation will not achieve its purpose.

There are a number of ways an investigator may gather the evidence that they will use in their investigations. The most obvious being by conducting interviews. The benefit to conducting interviews is that it gives you the chance to assess not only the interviewee's answers to the questions you have posed, but to examine their non-verbal responses as well. An interview also provides you with an opportunity to assess credibility.

There is no limit on the number of interviews you can conduct, however these must be reasonable. It may be that after the initial interview you have further clarifying questions, however it may be appropriate that these are asked through a directed minute, or a follow-up call. It is worth always remembering that the administrative threshold is the balance of probabilities, so there is no need to interview every person who may have knowledge of the conduct.

In addition to this, other general searches can garner a lot of information. Things such as reviewing emails and employee access records may be the smoking gun that takes your investigation to the next step. It will also be important to get these documents prior to meeting any interviewees, so you are in a position to put any adverse evidence to them for response.

The Direct Engagement Investigative Strategy (DEIS) is the default investigative approach for PRS and should be used to progress the matter in the most expediated way possible. Using DEIS you, as the investigator can go directly to the subject without the need to approach witnesses. Usually this means there is sufficient information already within the complaint file for you to understand the nature of the allegation and be able to put it to the subject for a response. In some cases, there may a relatively small number of inquiries needed, but ultimately the intention is to put the allegation to the appointee as quickly as practicable.

DEIS can involve either an interview or directed minute. The member is still subject to secrecy provisions and must not discuss the matter without approval from an appropriate delegate. A DEIS does not prevent a PRS Investigator from making further inquiries if warranted in the circumstances.

When considering matters, the PRS OC may make an initial determination that a matter is unsuitable for DEIS, and this will be recorded on the PRS OC decision. Should your matter become more complex, it may be appropriate for you to divert from the DEIS and this should be discussed with your leadership team.

Slide 10 - Interviews - Who should be interviewed?

Interviews will get you the most content to consider for your investigation, but at the same time, it can be a time-consuming process to prepare, conduct and consider interviews. That's why it's important to select carefully who you intend to interview.

Consideration should be given to interviewing the subject should the circumstances be warranted, particularly where there are complex, complicated or protracted allegations. Where concerns for a person's well-being are held, these can be best met through an interview process noting the evidential requirements that need to be satisfied. This is for two interrelated reasons. Firstly, you are required under section 40TQ the AFP Act, to give the subject an "adequate opportunity to be heard" in relation to the allegations against them. Secondly, principles of natural justice require the subject of an investigation to be provided with any adverse information that an investigator may intend to rely upon.

In non-complex or relatively straight forward matters these grounds may also be satisfied through a directed minute.

Also pursuant to 40TQ of the AFP Act, the complainant must be given an adequate opportunity to be heard. Complaints will often be submitted initially in writing; interviewing can allow for further detail to be obtained. You may also wish to interview key witnesses.

PRS interviews can be made in the format of a traditional audio / video recording or by way of a written minute response, at the discretion of the investigator.

Be mindful of operational members' ability to attend interviews given their rosters. Members are also entitled to have a legal representative, interview friend and/or welfare support present. Although the legislation does not stipulate this, it is part of the PRS process

to allow for a fair and transparent process.

Slide 11 - Tips for conducting interviews

Here are some tips for conducting interviews as part of your investigations. We also remind you of the availability of the training on conducting interviews, which outlines some procedures and tips to assist you. This slide is intended to be a high-level snapshot of what you should do in an interview and it is recommended that you refer back to the interview training for more specific information.

It can be difficult to proffer information from a reluctant interviewee, but other witnesses will be like an open book. It is important that you know how to deal with both.

Firstly, it is important to make the interview subject feel comfortable answering your questions. This can be started by clearly advising them who you are, what your role and the role of PRS is, and providing them with an overview of the process.

There are a number of preliminary questions that you should ask at the start, such as "are you aware of Commissioner's Order 2 and the AFP Code of Conduct?", "How long have you been at the AFP?", "What role are you in?". Once these are out of the way, you can commence the interview proper.

From there, you can begin to ask your questions. It really is a matter of getting the subject in your interview to tell you about what they did, saw, heard or otherwise perceived during the time in which the alleged conduct was said to take place. To do this, it is best to adopt a funnel style approach (start broad and end narrow). Following this, you may wish to unpick specific parts of their timeline and put the other evidence to them that you have gathered as alternatives. You should start with open ended questions that allow the subject to expand on their recollections and drill down later on in the interview with more closed questions.

Closed questions may be more useful if, for example, you have a hostile interviewee and you need to obtain as much information from them as possible.

It is particularly important, when interviewing the subject of a complaint, to put to them all the alleged particulars that may be used to make an adverse finding against them. This is a crucial step in affording procedural fairness, and courts and tribunals do not look favourably on investigations that do not do this. Generally, failure to follow this step is fatal to any investigation. After all, should the matter be eventually disputed in court, all the investigation report is good for is showing that procedural fairness was afforded to the relevant parties. You should still start with the funnel technique we discussed earlier, but short of a fully-fledged admission, questions such as "it is alleged that at X you did Y, do you have any reason to dispute this recollection?" will satisfy the procedural fairness requirements. This process should be undertaken for the particulars of each allegation.

One thing that is often not considered in conducting interviews is the manner in which we respond to answers given. It is important not to use language which may imply agreement. Words like "yes", "I see" or "you're right" imply that you may be on their side, even if you are just simply communicating that you have understood what they have said. You may avoid this misunderstanding by carefully choosing your words "I understand what you are saying" or by making a short statement at the beginning of the interview advising that you saying encouraging words is not an indication of your acceptance of the evidence given. You should also not make comment on how you think the interviewee went or speculate on the outcome of any aspect of the investigation.

At the conclusion of the interview, you should explain what will happen next, for example. “I will be conducting further interviews and writing a report of my findings”. Be mindful however to not commit to timeframes as these can be impacted depending on your enquiries. You should ensure that you reinforce the confidentiality of PRS matters and ensure you remind the interviewee to not disclose the contents of the interview with anyone or even to discuss the investigation more generally.

Good interviewing technique is a skill and the only way you get better is to keep practising. If you get time after an interview, it is always a good idea to review the manner in which you went about your interview with a critical eye, with a view to improving for the next time.

Slide 12 - Conducting criminal v administrative interviews

Whilst most of the skills you may have learnt as a criminal investigator will translate to administrative workplace investigations, there are a few differences that need to be discussed.

Firstly, unlike criminal matters, in an administrative investigation it is generally not as important to garner the subject's state of mind at the time of the alleged events. This is because most of the time, breaches of workplace policies or code are strict liability. That is, if it happened, it doesn’t matter what was going through the subject’s mind. However, that being the case the investigator may raise with the subject whether there are any mitigating circumstances that may explain their conduct. This does not mean intention is not relevant to the investigation or in determining the outcome. Rather, it is considered in the broader context of making a finding as opposed to a specific element which needs to be satisfied.

It is also important to remember that in a workplace investigation, you will likely be the "judge and jury" and will determine the categorisation of the matter (having regard to the relevant Categories of Conduct Determination) and whether the incidents occurred and the breaches are established. You may also make recommendations as to sanctions that may be applied. For that reason, impartiality is important. This goes back to the previous slide where it was mentioned to not give any indication to the interview subject how they fared.

As discussed in Module 1, the standard of proof in a workplace investigation is on ‘the balance of probabilities’, and not ‘beyond reasonable doubt’.

Slide 13 - Not all evidence is created equal

Not all evidence is created equal, and this is where a weighing exercise comes into play. It is important that within their report, the investigator describes the evidence they have relied upon to come to their conclusions, and the weight they have placed in it. More on this is discussed in Module Five.

Briefly, eyewitness evidence is generally the most reliable. It is a person's account of what they saw, heard or otherwise perceived. If they were at the alleged place at the alleged time that the alleged events took place, they will be a witness you will want to talk to. It is also important you act in a timely manner to ensure that their recollection is the best it can be, and not risk it becoming stale. You may also ask the person if they have any documented evidence, such as contemporaneous file notes of what they observed, upon which a lot of weight may be able to be placed.

Any evidence that corroborates other people's version of events is also of use and may be used to tip the investigator to one conclusion or another.

Hearsay evidence is a difficult one to grapple with. It is evidence from a person who did not witness an event but was told about it by someone else. Ideally, you will get evidence from the person who told them about the event, but sometimes this is not possible.

The use of tendency evidence has for a long time been a topic of some contention. Tendency evidence is evidence of past conduct that is not the subject of the investigation at hand, which suggests that the subject may have a propensity or tendency to act in such a manner. If the allegations that are the subject of the investigation are substantially similar, it may reasonably conclude that, on the balance of probabilities these allegations also occurred. The controversy for this type of evidence is that it is highly prejudicial towards the subject. If in doubt, seek legal advice before accessing or relying on this type of evidence.

The question that must be asked is whether evidence of this type actually helps to prove that the actions that are specifically alleged occurred. Generally, if you have other evidence, it is preferred that this is given more weight, as opposed to any tendency evidence.

Again, it is always important to put any evidence that will be relied upon to the person whom it may be used against.

Slide 14 - Documenting evidence and record keeping

In the course of your investigations, you will be provided with a lot of documents that you will need to consider. It is important that you keep track of who gave you what and when. Document management can, in some cases, be just as important as the investigation itself.

It is also important that your case file, both electronic and physical, are kept up to do date, and are complete at the end of your investigation so as to ensure that legal requirements such as those under the *Archives Act 1983* (Cth) are met. Remember, your case may be reviewed for various reasons. Record keeping is reviewed and commented upon during Commonwealth Ombudsman annual inspection of records. Your case may also be reviewed by external bodies such as courts, the Fair Work Commission records be required for compulsory processes, for example, subpoenas, summons and Freedom of Information requests.

Slide 15 - The importance of confidentiality

The importance of confidentiality of the investigation process should not be understated. There are many reasons why and these are just a few.

Firstly, it protects the reputation of all parties. This includes the complainant, subject, witnesses and the AFP as an organisation. In relation to the complainant, it will prevent them from being the subject of victimisation as a result of making a complaint. Under section 40YA of the AFP Act it is an offence to cause, or threaten to cause, detriment to another person involved in an investigation (such as by criticising, threatening, or embarrassing them for being involved in the investigation).

For the subject, it will ensure that they are given the benefit of the doubt until a finding is made. The old adage, innocent until proven guilty, is applicable here.

From the AFP's perspective, confidentiality will ensure people feel comfortable to make complaints. This in turn will ensure the workforce is engaged and satisfied. It will also mean that sensitive issues will be appropriately dealt with internally in a timely manner as opposed to becoming a potentially damaging public relations matter.

It also preserves the integrity of evidence both that has already been provided, and that which is yet to be provided, in the investigation by avoiding collusion. It is an offence to give false or misleading information in a Part V investigation.

It is important to be aware that secrecy and confidentiality of information is legislated. For example, section 60A of the AFP Act relates to secrecy, and a breach of 60A is an offence that attracts a penalty of up to two years imprisonment. Section 28 of the AFP Regulations (2018) relates to unauthorised disclosure of information specifically related to Part V matters.

However, section 18.3 of Commissioners Order 2 gives PRS delegates (such as a PRS Superintendent or Coordinator) the power to authorise the disclosure of certain information relevant to the investigation. This may, for example, be for the purposes of talking to support people, welfare officers, or their spouse.

Slide 16 - Managing bias

Finally, we'll now touch briefly on the concept of bias as part of investigations. It is a fact of life that we as humans are vulnerable to bias affecting what should be an objective process of investigation. It is therefore important for workplace or PRS investigators to identify the potential for bias and work towards eliminating it.

The diagram outlines whom biases may be held for or against as part of an investigation. Those in blue are AFP appointees, and those in red are other members of the public. The image of the funnel represents the risk that, once a bias is held, it can be very difficult for it to be remedied or negated and this can cause an investigation to be flawed and defective.

Let's discuss conscious and unconscious bias:

Conscious bias relates to prejudices or stereotypes that one can readily identify within themselves. For example, if you were asked to investigate someone whom you had worked closely with previously and have a good relationship with, your ability to adjudicate on their conduct is tainted by the fact that this relationship exists. This may actually affect your ability to conduct an appropriate investigation, or, even if it doesn't, there will still be a perception that the investigation and/or your finding, was tainted with bias, therefore diminishing its authority.

Unconscious bias is far more difficult to identify. It refers to the prejudices or stereotypes that are developed unknowingly as a result of the stimuli around us, such as the news, social media and other societal factors. These biases are far more difficult to identify (as people may not know they even hold them), and as such, are challenging to deal with. Unconscious bias may exist in relation to the way, for example, that you prefer evidence of an AFP appointee over a member of the public. The risk in unconscious bias is that it may hinder your ability to conduct a thorough investigation, leading to infected findings that are susceptible to challenge.

There are things that you can do to address any biases you may have, including asking yourself:

- what biases do I hold?
- how can I address them?
- which ones can't I remove?

In undertaking investigations, you can manage bias by:

- being aware of its existence
- allowing the evidence to guide your findings, rather than your preferred finding guiding your evidence gathering
- constantly assessing your ability to act impartially and, if required, ask to be taken off an investigation
- having a peer review your report to ensure your conclusions are logical and defensible.

There are many ways in which the risk of bias may be mitigated. The best way is for you to be alive to the issues, identify both conscious and unconscious bias that may impact you and declare this.

This brings us to the end of this Module. You can now jump into Module Five where we will be discussing the investigation report.

Module 5 - The investigation report

Slide 1 - (Title page) Module 5 – The investigation report

In this module, we will be considering how the investigator actually goes about drafting a report in an investigation.

The purpose of this module is to introduce you to some ideas about structuring your report, weighing up the evidence and finding facts in relation to each allegation.

Slide 2 - What must be in the report?

While your report must address the key question of whether the complaint was established, there are a number of additional areas that need to be covered off in any investigation report you do.

It is important that all administration investigation reports demonstrate the investigator has followed procedures fairly and stayed within the scope of the terms of reference or allegation. A well-documented investigation is critical, because it closes off the opportunity for findings to be appealed on the basis of inadequate investigative procedures.

Detail in relation to the investigation procedure should also be included in the report. This could include:

- Acknowledging information was obtained through interviews, witness accounts, email audits, phone records, documentary evidence, close circuit TV or body-worn camera footage. If there is a concern about releasing investigation methodology the investigator may not include this in the report.
- Outlining what other evidence was collected and relied upon. If parties involved in the investigation provided any evidence after their interviews this should be stated.
- Identification of the evidence that is relied upon for the purposes of the report.

Slide 3 - A good investigation report

A good investigation report will:

- Be clear and concise
- Include terms of reference: the scope and objectives of the investigation
- State the allegation and complaint received
- Outline known facts
- Outline evidence collected: State any uncontested or contested evidence
- State any mitigating circumstances/factors
- Analyse information
- Clearly state what evidence relied upon, the weight the evidence was given, and why, on the balance of probabilities
- Clearly articulate the finding of the investigating officer based on the evidence
- Where, applicable, reflect on practices issues
- Include, if appropriate, the investigating officer's recommendations for next steps.

Slide 4 – Structuring the investigation report

Your report will provide most assistance for the reader if it is structured clearly around the allegations that were made, and the evidence you relied on when making findings of fact in relation to the allegations. From your report, the reader should be able to understand the evidence you gathered in relation to each allegation and the weight you gave it in your assessment to ultimately make a finding of fact. When conclusions are drawn, they should be clear and succinct. This will enable the reader to assess the findings you have made and give them appropriate weight when using your report. Ultimately, only the necessary information should be included in the report.

One suggested report format is to state the allegation, followed by uncontested evidence (or known facts), followed by contested evidence. Then, it may be relevant to detail any mitigating circumstances. At the conclusion of the report, an assessment is made as to whether the alleged conduct has been found on the balance of probabilities, to have occurred. Finally, an analysis of the information occurs, and a finding is concluded. This approach should be followed for each allegation that you investigated.

Stylistically, most investigation reports are written in the third person, for example: 'In relation to X, PRS find that…..' The length and format of your investigation report will to some extent be determined by the number of allegations you are required to investigate. It is crucial that all reports include the key information and that the reader understands your report and can use it, rather than it being a prescribed length.

Slide 5 –Weighing up the evidence

It is important that findings in your report are supported by evidence – do not rely on your 'gut feeling' or 'intuition'. Intuition can be both beneficial and detrimental in the context of workplace investigations. While as humans, we rely on intuition in decision making processes in our lives regularly, it is important to ensure that as an investigator you are acting and making decisions on the basis of the evidence gathered in a fair, transparent and unbiased manner.

It is also important to not let any personal feelings you may have in relation to the subject matter influence your decision making. Critical thinking about the weight of evidence will be helpful in making your assessment. In your report, it should be clear what evidence you have relied upon, the weight that the evidence has been given and why it has been given that weight. Keep in mind that the finding must withstand external scrutiny should the matter be challenged e.g. by the Commonwealth Ombudsman should the subject seek a review or by a relevant court or the Fair Work Commission.

Rules of evidence are to be considered including the reliability, credibility and relevance of information, hearsay evidence or witness accounts. Although hearsay evidence is allowed in a workplace investigation, caution should be applied and the information considered to ensure the account is relevant, credible and reliable and is not vexatious or biased to the point of not being reliable.

Key factors to consider when you are determining the strength and reliability of a piece of evidence include:

- Whether evidence can be corroborated. Where witnesses have substantially similar accounts, this is corroborative evidence and suggests that their evidence

should be given more weight. While corroborative evidence can be determinative in making findings of fact on the balance of probabilities, it is important to also consider the source of the corroborative evidence. For example, if the evidence comes from two friends, it will be important to ensure that they are not colluding.

- The credibility of the person who gave the evidence
- The impact of trauma on the memory of the complainant or witnesses
- The relevant burden of proof.

Slide 6 – Witness credibility - factors to consider

A witness's credibility will affect the weight that you can place on their evidence when making findings of fact.

Some key areas that you might question when making a witness credibility finding include:

- Were they clear and concise or unsure in their account?
- Did they have any contemporaneous notes?
- Whether they appear to have been truthful in what they have told you, in terms of internal consistency with their own evidence
- Would they have a motive to mislead you with the evidence that they provided?
- Does the way they answered your questions suggest they are seeking to sway you in a particular direction? For example, did they answer your questions directly or were they emotive, did they exaggerate or were they evasive?
- What was their demeanour and body language during the interview?
- Is there any relationship between witnesses?
- Does the witness have a known bias?
- Does the witness have knowledge or skills that are relevant to their observations, interpretation and account, for example, are they a subject matter expert on the issue?

It may also be appropriate to have regard to the impact of trauma on the memory of the complainant or witnesses in certain circumstances.

When weighing up credibility, it is important to remember that the assessment should also be made logically and in a transparent/unbiased manner.

Poor recollections

When using a witness's poor recollection as justification for a finding of low credibility, it is important to consider that recollection can be affected by a range of issues. These include time, illness, age of the witness and significance of the event in the witness's life.

Lying

If you suspect that a witness is lying, you should examine what has caused you to hold this view. It might also help to consider the relationships between the different parties involved, and if there is a motive for the witness being untruthful.

Inconsistency

Where there is internal inconsistency within a witness's evidence, you can rely on this

inconsistency when you are making findings of fact in your report. Generally, the more consequential the inconsistency, the more weight it should be given. Minor inconsistencies are not as relevant to a witness's credibility, as they may be able to be logically explained.

In your investigation report, when a credibility finding is used to justify the weight that you give to a particular witness's evidence, this should be expressly stated and made on a clear and logical basis. State why you think the witness is credible, or not, and why you may give more or less weight to their account.

Slide 7 - Has the Code of Conduct been breached?

Once you have made decisions in relation to the facts, you may need to consider whether there is also a breach of policy or the AFP Code of Conduct.

Often, making a decision in relation to this might be a value judgment, however the prescriptive nature of the AFP Code of Conduct and Values make this judgement easier.

It will be important when making this conclusion to consider:

- What does the Code say?
- What is your judgement in relation to the allegations of fact?
- Then reach a conclusion in relation to the breach

What does the Code say?

- You may have to interpret the meaning of some of the words in the Code or policy

Determining whether there has been a breach

- When determining this question, you should assess the behaviour or conduct, as found, against any examples provided (the Determination is particularly helpful in this regard) or any directions given by the AFP Commissioner.
- Making a decision on this is different from any fact finding, because it will involve a subjective assessment of the facts in relation to the policy.

Slide 8 - Making a finding

Making a finding is often a very daunting part of conducting investigations! But, all you have to do is think rationally and critically about the evidence that you have gathered, consider its weight, and ultimately make a call in relation to the allegation or question of fact.

You must also take care to avoid common biases, as these are likely to influence you to make the wrong finding. It is important to think critically at this point and check yourself to ensure that you are not being influenced by any bias. Think about whether you will be able to defend your finding on a rational and logical basis; if not, it may be open to challenge.

You may recall we discussed managing bias in Module 4. We'll now talk about the types of bias you may encounter when you are making a finding. There are a range of biases that can influence you as an investigator, whether you are conscious of them or not. It is important to be aware of the different biases, and when they may be affecting your investigation.

Anchoring bias refers to the tendency to heavily rely on, or "anchor" on one piece of evidence only. For example, an investigator may use one piece of evidence to evaluate all the other evidence, instead of evaluating each piece of evidence individually on its own merits.

Confirmation bias refers to the propensity for investigators to interpret evidence in a way that accords with the investigator's own preconceptions or hypotheses. This is problematic because it can lead to logical errors. Where an investigator has a pre-existing hypothesis in relation to an investigation, it can mean that they are less likely to seek out evidence that may challenge their hypothesis, or give such evidence inappropriate weight. This can pose obvious problems for the integrity of an investigation.

Familiarity can also be a risk for investigators when reaching a decision. The familiarity principle refers to the human tendency to like things, ideas or people the more that we are exposed to them. This is not a rational basis for a finding. When reaching a finding, investigators need to be cautious of reaching a view on the basis of familiarity.

Slide 9 - Types of finding

Findings must be logical and reasoned. There are two types of finding that you can make as an investigator.

For each allegation you need to make a finding on the balance of probabilities:

- That the conduct did occur (was established); or
- That the conduct did not occur (was not established).

We don't do 'part' established – an allegation is either established or not established. However, an allegation may have a number of a particulars or incidents, such as conduct of a repetitive nature such as bullying or harassment. This may result in an allegation being established overall even if some but not all of particular events are made out by the evidence available.

Where conduct is found to be established, it means that you consider that the evidence shows that it is more probable than not that the behaviour or conduct occurred.

Allegations are not established where, on the balance of probabilities, it is less than 50% likely the behaviour or conduct occurred. It should be noted that a finding that an allegation is not established is not the same as a finding that the conduct did not occur. For example, the conduct may have occurred, however it may not constitute a breach of the Code of Conduct, therefore the finding that a breach of the Code of Conduct occurred may be not established.

If one of more findings are proposed to be adversely established against a subject, they must be provided with an opportunity to comment or respond (a 'natural justice response' or 'NJR'). Any response provided must be reviewed and considered prior to any final finding being recommended. In some cases, further enquiries may need to be conducted as a result of matters raised by the subject in the NJR.

Slide 10 – Discretion to take no further action

In some circumstances you may determine that investigation, or further investigation of an allegation is not warranted. As such, you may recommend that no further action is taken pursuant to section 40TF of the AFP Act. Section 40TF is a provision that allows the Commissioner or their delegate, the discretion to take no further action in certain circumstances. Within PRS, the delegation rests with PRS Coordinators or Superintendents, Commander/Manager PRS, or the Head of Unit. You may recommend that a 40TF discretion is applied, but only a delegate can make the decision to exercise the discretion.

There are a number of subsections to 40TF. Some commonly used subsections include:

- 40TF(2)(b)(i) – appropriate action has already been taken against the AFP appointee in relation to the conduct;
- 40TF(2)(k) – the investigation, or further investigation of an issue is not warranted having regard to all the circumstances; and
- 40TF(2)(a) – the person became aware of the conduct or the practice or procedure, more than 12 months before the person gave the information under section 40SA.

It is important to note that if relying on section 40TF(2)(a), that this can only be utilised if a complainant became **aware** of the conduct **more** than 12 months before reporting it. It does not relate to the age of the information. For example, if an incident happened in 2019, but the complainant only became **aware** of it some years later and subsequently reported it, section 40TF(2)(a) cannot be applied.

At the investigation stage the use of 40TF should be limited. If there is sufficient evidence to make a finding, then the finding should be made. There is no requirement to speak to the appointee before making a finding of Not Established particularly when the evidence strongly supports such a decision. Noting the requirement for a subject to be heard in relation to the allegations, it would be appropriate to record the decision and the rationale not to interview them or send them a directed minute.

Slide 11 – Withdrawing a complaint

From time to time, and at any point in your investigation, a complainant may indicate a desire to withdraw their complaint in its entirety, or certain elements within it. If this occurs, you must ensure that you are complaint with requirements set out in the National Guideline on complaint management and resolution of grievances. It is important to note that a request for withdrawal doesn't preclude further investigation, and the relevant delegate must assess whether there is any merit in progressing the investigation. It may be determined the investigation should progress if the complaint involves:

- wider conduct implications
- significant public interest
- repetitive poor conduct
- practice and procedure issues.

Care must always be taken to ensure that complainants are not pressured or made to feel compelled to withdraw a complaint. Where the request to withdraw is received orally, you should request the complainant submits the request in writing. If the complainant refuses or fails to comply with the request, this should be recorded within your case, along with any reasons provided.

The Commonwealth Ombudsman has provided some tips on good complaint handling practice in relation to withdrawal requests:

- An explanation of the complaint withdrawal process is provided where appropriate and details of this explanation recorded in the case
- If a complainant's understanding of the complaint process appears unclear, clarification is provided or sought
- If it is unclear if a complainant wants to withdraw their complaint, for example

stating they are now happy with the action taken, or that they don't wish to discuss the matter further, clarification is sought as to if they wish to proceed with, or withdraw, their complaint

- Contemporaneous records are made, and kept in the relevant investigation case, of any discussion or request related to withdrawal of complaints.

Slide 12 – The Professional Standards Panel (the PRS Panel)

Where a Category 3 conduct issue or corruption issue is established against an AFP appointee at or below the Senior Executive Service (SES) Band 1 level, the matter is referred to the Professional Standards Panel (the PRS Panel). If the subject appointee is at the SES Band 2, Assistant Commissioner (AC) or National Manager (NM) level, the matter is referred to the SES Professional Standards Panel (the SES Panel).

The PRS Panel/SES Panel considers information including the investigation report, any natural justice response to the finding of fact and the subject appointee's antecedents, and then meet to reach a preliminary view on an appropriate sanction. The subject appointee is notified of the proposed sanction and is provided with an opportunity to comment or respond. Any response from the subject is then considered by the Panel before a final decision on sanction is made.

The purpose of sanctions is to protect the interests, resources and reputation of the AFP to ensure that the trust and confidence of the public, our stakeholders and government is maintained.

Where, in a PRS investigation, there are no established Category 3 or Corruption issues, but there are established Category 1 or 2 matters, these proceed to a panel of Coordinators/Superintendents within PRS for sanction determination. Sanction determination for Category 1 or 2 matters handled by WICR is made by the appropriate delegate.

The available sanction or disciplinary action which can be applied is dependent on what category the conduct falls into. For example, termination can only occur for established Category 3 or corrupt conduct.

Module 6 - Avenues for review

Slide 1

Welcome to Module 6 of the AFP Administrative Investigation Training: Avenues for review.

This session will take about 30 minutes and will examine the various ways in which an AFP appointee might challenge the outcome of an investigation through an application for review.

Let's get started.

Slide 2 – Overview

As mentioned, in this module we will cover the various options of review open to an AFP appointee following an investigation into their conduct which amounts to a breach of the AFP Code. Such avenues of review include:

- Seeking an internal review (for Category 1 or 2 conduct issues only) pursuant to the AFP National Guideline on complaint management and resolution of grievances
- Following an internal review, making a complaint to the **Commonwealth Ombudsman**.
- Seeking **judicial review** of the decision following the investigation on the basis that it is not administratively sound;
- If the matter resulted in termination of the AFP appointee's employment, making an application in the **Fair Work Commission** (FWC) for unfair dismissal or a breach of the general protections provisions based on adverse action or other prohibited reason. This cannot occur if a section 40K Declaration of Serious Misconduct has been made by the Commissioner, as per section 69B of the Act;
- Making a **public interest disclosure** about the way the investigation was handled, although the available outcomes are slightly different.

We will also consider some things that you can do to mitigate the risk of an unfavourable or adverse finding against the AFP if an AFP appointee challenges a decision made from an investigation into their conduct.

Slide 3 - Internal Review

A complaint subject may seek an internal review of the findings of Category 1 or 2 conduct issues only. In order to seek a review, the investigation must be finalised and the subject must have been notified of the final outcome. The request must be submitted in writing within 30 calendar days of receiving the final outcome, and must articulate the grounds on which the review is being requested.

The delegate for internal review is Commander PRS (for matters investigated by PRS) and Manager People Services (for matters investigated by the Workplace Issues and Complaint Resolution Team). The delegate may assign an independent reviewer to conduct the review on their behalf, but the delegate must make the final decision.

Complainants cannot seek an internal review, they must approach the Commonwealth Ombudsman with their concerns.

Slide 4 - Commonwealth Ombudsman

The Commonwealth Ombudsman has a wide range of investigative powers under its enabling legislation, the *Ombudsman Act 1976* (Cth).

A subject of a Category 1 or 2 conduct issue can seek a review by the Ombudsman, however they must have first sought an internal review and have been notified of the outcome.

If a subject of a Category 3 conduct or corruption issue is dissatisfied with the way the investigation was handled, they may complain to the Commonwealth Ombudsman. The Ombudsman will not investigate unless a complaint has been finalised and the subject has been advised of the outcome.

The Ombudsman's Office has broad discretion to decline to investigate and, if they are of the view that an investigation is not warranted, they will exercise that discretion. If they decide to investigate, they look at the administrative process used, and whether the outcome was reasonable considering the evidence that was available.

If they find an issue with either the process or the finding, they may suggest certain actions are taken to rectify the problem. Any suggestion/recommendation from the Ombudsman is not binding but is usually followed.

Complainants for all categories of complaint may also seek a review by the Ombudsman.

The Ombudsman has the power to obtain documents considered necessary for the purposes of any investigation into a complaint, including documents that are protected by legal professional privilege (refer section 9 of the Ombudsman Act).

The Ombudsman also has oversight of the Public Interest Disclosure Scheme, which can be another way of raising grievances with an investigation process.

Slide 5 - Judicial review

A subject AFP appointee can seek redress of a decision made about their employment as a result of an investigation into their conduct by lodging a request for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

While such requests are rare due to the expense involved in bringing the matter to the Federal Court, applications for judicial review do occur and we need to be aware of the relevant grounds of review when decisions are made about an AFP appointee's employment.

An AFP appointee must establish that an error of law has occurred in order to be successful in judicial review.

The onus of proving an error of law rests with the applicant (the AFP appointee) which they must prove to the civil standard of the balance of probabilities.

Slide 6 – Fair Work Commission - Unfair Dismissal

An investigation into the conduct of an AFP appointee may result in a finding that warrants termination of their employment.

If this occurs, an AFP appointee may lodge an application with the Fair Work Commission for unfair dismissal. An AFP appointee only has 21 days from the date the dismissal takes effect to lodge their application.

If an AFP appointee decides to pursue a claim of unfair dismissal, they must convince the FWC that the dismissal was harsh, unjust or unreasonable.

If an AFP appointee succeeds in an unfair dismissal claim, they could be reinstated to the job they held before their employment was terminated, or be awarded up to 6 months compensation, or both. If the FWC is satisfied that the AFP appointee engaged in misconduct, they may reduce any award of compensation that would otherwise be payable.

Slide 7 - FWC - Unfair Dismissal

The following cases demonstrate that a sound investigation and report will put AFP in the best position to prove that the resulting decision to dismiss an AFP appointee was not harsh, unjust or unreasonable. This is important to bear in mind when drafting your findings; you need to ensure that an established finding is supported by logically probative evidence. That is, based on the objective evidence before you (CCTV, photos, file notes, emails, records of

interview etc.) it is more probable than not that the conduct in question occurred and the allegations are substantiated.

The following case examples demonstrate just some of the evidentiary issues that come up before Tribunals and Courts:

Zisopoulos v Commissioner of Police

Facts

Mr George Zisopoulos was a Sergeant at NSW Police. He had an unblemished career for a minor complaint when he was a Probationary Constable.

On 16 April 2015, Mr Zisopoulos was randomly drug tested which returned a non-negative result based on his urine sample. He was then required to provide a hair sample for testing. The hair sample returned positive results for MDMA and methylamphetamine. He was suspended with pay on 16 May 2015. On 30 March 2016, Mr Zisopoulos was served with a notice alleging that he had consumed a prohibited drug which resulted in the positive test result and contravened the *Police Act 1990* (NSW) (Police Act). Mr Zisopoulos responded on 6 June 2016. He denied he ever consciously consumed illicit drugs and argued that the positive results from testing his hair was because of "environmental contamination" (at [11]).

As part of Mr Zisopoulos' response, his lawyers provided two reports from Mr John Farrar, a Forensic Pharmacologist, which discussed the possibility of external contamination of his hair, stating *"in my opinion the available information does not support the allegation of consumption of methylamphetamine and [MDMA] by Mr Zisopoulos"* (at [8]). Mr Farrar expressed this opinion on the basis that he considered it was *"not possible to interpret the presence of methylamphetamine and [MDMA], as the concentrations of those drugs in the hair sample are below the specified cut-off limit and there is no evidence of the presence of their respective metabolites"* (at [9]).

This is at odds with the opinion of the experts provided by NSW Police (Dr Lewis and Dr Lindsay) which state that while the test results could be ascribable to use of illicit drugs by Mr Zisopoulos, each expert agrees it is possible that the levels of drugs reported could have been due to external contamination.

Despite this, on 19 December 2016, Mr Zisopoulos was removed from the NSW Police in accordance with s181D(1) of the Police Act and on the basis that the NSW Police Commissioner had lost confidence in his suitability to remain a police officer. Mr Zisopoulos then lodged an unfair dismissal claim in the NSW Industrial Relations Commission (NSWIRC).

Issue

Whether Mr Zisopoulos' removal from the NSW Police was harsh, unreasonable or unjust under s181E of the Police Act. Commissioner Murphy was required to consider the factors set out in s181F of the Police Act, including:

- the reasons for removing Mr Zisopoulos from the NSW Police;
- the case presented by Mr Zisopoulos as to why the removal was harsh, unreasonable or unjust; and
- the case presented by NSW Police in response.

Decision

Commissioner Murphy accepted Mr Zisopoulos' claim and ordered that he be reinstated to the NSW Police at the same rank and pay he held before the date of his removal.

Commissioner Murphy reached this view taking into account the following:

- the doubt cast by Mr Zisopoulos on the finding by NSW Police that he had consumed prohibited drugs, which shifted the burden of establishing that fact to NSW Police (at [142]);
- in particular, the evidence of Professor Fu, Dr Robertson, Mr Farrar, Ms Lindsay and Mr Kostakis, who were all of the opinion that the results do not exclude contamination as an explanation. The only witness who took an opposing view was Dr Lewis (at [131]). Commissioner Murphy further accepted the evidence of Dr Robertson that the low concentration level in the hair sample was consistent with either occasional use and/or environmental contamination and it cannot be reliably differentiated which of these alternative scenarios is more or less likely than the other (at [169]). Further, there was no evidence that Mr Zisopoulos actually ingested the substance (at [170]);
- the decision by NSW Police to remove Mr Zisopoulos because he consumed prohibited drugs was not based on logically probative evidence (at [151]). In particular, based on the evidence before the Commission, there were a number of occasions in the period leading up to the hair test when it was likely Mr Zisopoulos came into contact with the two substances through carrying out his duties at work (at [162]); and
- the procedures and practices used to wash the hair sample before testing are not entirely settled and could not reliably exclude environmental contamination as a possible cause for presence of illicit drugs in the sample (at [173]).

Based on the aforementioned reasons and the combination of expert evidence that favours Mr Zisopoulos' explanation that environmental contamination was the cause of the positive test result, Commissioner Murphy found that NSW Police did not satisfy the evidentiary burden of proving, on the balance of probabilities, that Mr Zisopoulos used prohibited drugs.

Slide 8 - FWC - Unfair Dismissal

Farah v Australian Federal Police

Mr Farah commenced employment with the AFP in 2002. He was employed as a sworn officer in the ACT and then Sydney. Between July 2008 and November 2009 he breached the AFP Code of conduct by receiving requests to provide certain information and agreeing to provide that information, and failing to report those approaches to his superiors. He also requested another officer access a particular database for lawful purposes when no such purpose existed. He also used an Australian Government diplomatic bag to send personal mail to a relative overseas.

Mr Farah's conduct was investigated by ACLEI, during which time he was suspended for more than two years. Ultimately, he was dismissed from his employment. Mr Farah filed an unfair dismissal claim in the FWC but was not successful. The FWC was satisfied that the AFP had a valid reason for the dismissal and that it was not harsh, unjust or unreasonable due to Mr Farah being afforded procedural fairness throughout (despite the delay while Mr Farah was suspended). Mr Farah sought appeal of this decision by the Full Bench, however leave to appeal was not granted. In reaching its decision, the Full Bench was satisfied that it was open to the FWC Commissioner to apply different parts of the AFP Act to determine that a valid reason for dismissal was present. It said a member of the Commission may use

evidence in proceedings for a purpose other than the purpose for which it was adduced. Although that being said, the Commissioner in this instance did not come up with an entirely new valid reason and the factual basis for the reason was largely consistent. On this basis, Mr Farah was not denied procedural fairness.

Slide 9 - Risk Management Strategies

While there are many possible avenues that an AFP appointee may pursue if they are dissatisfied with an investigation or a decision arising from it, there are ways we can address the risk of these as we progress our investigations.

These include:

- Ensuring bias and conflicts of interest are declared and managed in a timely manner;
- Continuing our practice of taking contemporaneous records of interview (both file notes and audio recordings) to ensure the integrity of the evidence that we receive;
- Ensuring records are available on the case file/record;
- Ensuring that the findings we make are based on logically probative evidence (that is, the relevant standard of proof is satisfied and based on evidence that is credible, relevant and significant) and are properly articulated in our investigation reports so our findings are clear;
- Ensure the relevant decision maker is independent and separate from the investigation process in case they are required to give evidence about how they reached their decision;
- Ensuring our investigation reports are standalone documents that explain the investigation process, evidence and findings without having to interrogate the author of it.

Slide 10 – In summary

In summary – Internal review is conducted for Category 1 and 2 matters. A review of Category 1 and 2 matters that have already been subject to internal review may be conducted by the Commonwealth Ombudsman.

The Commonwealth Ombudsman may review a Category 3 matter. External review may also be sought from the relevant court or Fair Work Commission.

AFP

AUSTRALIAN FEDERAL POLICE

POLICING FOR
A SAFER AUSTRALIA

Key Principles of Administrative Law in Part V Investigations

AFP AUSTRALIAN FEDERAL POLICE

Natural Justice/Procedural Fairness

- **Right to know the case against you**.
  - Allegations must accurately reflect the conduct in issue and relevant part of the AFP Code of Conduct.
  - Evidence or the substance of evidence which is adverse, relevant and credible must be put to the Subject for comment.
- Where it is one person's version of events against that of another person (little or no documentary or supporting evidence is available), preliminary findings of credibility need to be made and put to the person being investigated for response.

Procedural Fairness Cont'd...

- **Right to have a reasonable opportunity to be heard or to respond.**

➢ Provide subject with a reasonable opportunity in the circumstances to respond to the allegations and case against them (there is no legal requirement as to the particular period for a response). Can be at interview, in writing or both.

➢ Individual circumstances may warrant a longer period or extension of time.

➢ Where there are ongoing reasons for not responding, such as illness, a judgement call may need to be made as to whether to proceed without a response as there is no prospect of a response being received within a reasonable period. Each case must be assessed on the individual circumstances.

Procedural Fairness cont'd...

- **Right to be heard without bias**.
- Investigator and decision-maker must not have any connection with the person being investigated or the subject matter that would give rise to a reasonable apprehension of bias.

- Give open and unbiased consideration to any response received.

- Only relevant evidence should be considered.

Procedural Fairness cont'd...

- Other elements of procedural fairness include:
- Providing adequate information about the allegations, generally in written form, and the potential consequences if the employee is found to have engaged in the alleged behaviour;
- Permitting a reasonable amount of time for the employee to respond to the allegations;
- Allowing a support person to be present during interviews and providing adequate notice to the interviewee to arrange a support person of their choice;
- Ensuring that the investigator as well as the ultimate decision-maker is unbiased and objective;
- Ensuring that decisions effecting the employee are based on evidence.

Standard of Proof

- There are only 2 standards of proof – the criminal standard (beyond reasonable doubt) and the civil standard (balance of probabilities).
- Civil standard:
  - More likely than not, more than 50% likely.
  - Briginshaw:
    - *"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 effect the answer to the question whether the issue has been proved."*
- Not a new standard - only means that where the matter is serious (e.g. employment suitability is in issue), the evidence must be clear and cogent.
- Merely reflects the principle that the nature of the issue necessarily affects the process by which "reasonable satisfaction" is attained (*Duhbihur v Transport Appeal Board* [2005] NSWSC 811).

Sanction

- Must be appropriate to the seriousness of the conduct, not punitive (purpose is to address the conduct not punish).
- Matter of judgement in the particular case – what is reasonable in the circumstances or what would a reasonable person consider appropriate?
- Consider any mitigating circumstances.

Additional Issues

- Only investigate:
  - Issues relevant to the allegations.
  - As far as is required to determine if allegations are either established or not established on the balance of probabilities.
- Listen to and consider response from the subject of investigation (the preliminary investigation report should not be treated as inflexible).
- Past conduct (antecedents) is only relevant to sanction - not relevant to whether the current allegations are established.
- Be mindful of Legal Professional Privilege.

AUSTRALIAN FEDERAL POLICE

Additional Issues cont'd…

- Ensure that you link evidence back to the allegation and to the breach of the AFP Code of Conduct.
- Consider all elements in s.40RO when considering categorisation.
- Be mindful when using terms that have a specific legal meaning.

AFP
AUSTRALIAN FEDERAL POLICE

Significant Cases of 2020/21

- Margherita Donelan v Commissioner of the Australian Federal Police (U2020/8395)
- Martin John Barlow v Commissioner of the Australian Federal Police (U2019/13642)
- Tuan Nguyen v Adelaide Fencing and Steel Supplied Pty Ltd [2020] FWC 79 (30 January 2020)

AFP AUSTRALIAN FEDERAL POLICE

Questions

AFP
AUSTRALIAN FEDERAL POLICE

AFP

AUSTRALIAN FEDERAL POLICE

POLICING FOR
A SAFER AUSTRALIA

Admin Law

Outline

Administrative law is the body of law that regulates government decision making. Access to review of government decisions is a key component of access to justice.

The key principles of admin law:

- Ensuring a fair process
- Applying the right evidentiary standard
- Ensuring that our process and our decisions are not irrational
- Natural Justice

Admin Law

Standard of proof

≠ beyond reasonable doubt (criminal)
= on the balance of probabilities (civil)

Investigator need only be satisfied that it is *more likely than not* that the conduct complained of is true to make a finding of Established

Briginshaw Principle – standard of proof

If the finding is likely to produce grave consequences, the evidence should be of a high probative value.

Sliding scale of evidence

The more serious the likely sanction, the stronger evidence required.

Procedural fairness

Bias Rule	Hearing Rule	No Evidence Rule
A decision maker must be (and be seen to be) unbiased and independent when making a decision	A person must have an adequate opportunity to present their case where a decision may affect their interests	Decisions should be based on logical, probative evidence

Click here to access: Administrative Review Council's *Best Practice Guide: Evidence, Facts and Findings*

AFP

Sexual Harassment Investigations

s 47E(c)

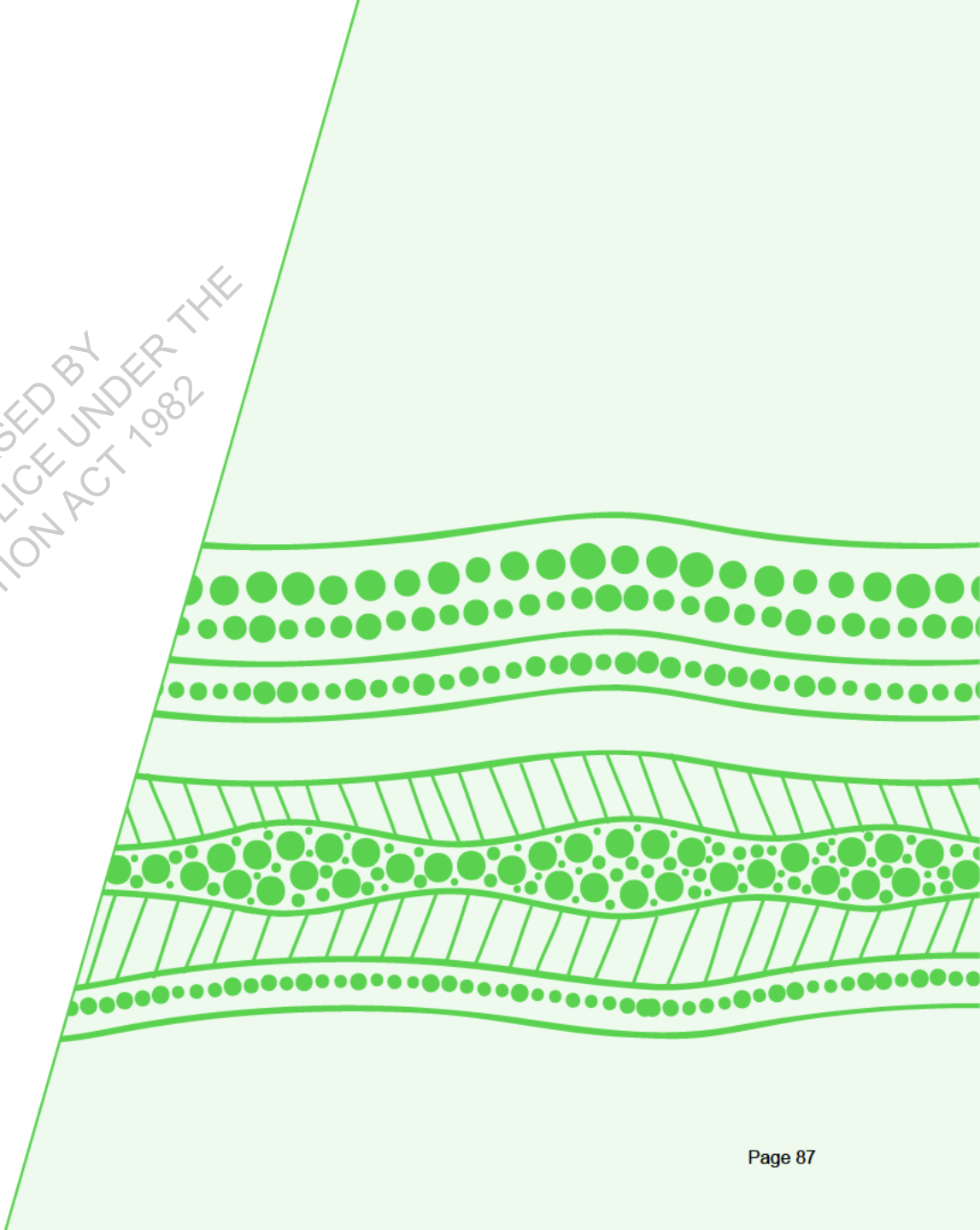
CCQA - PRS

14 May 2024

Acknowledgement of Country

The Australian Federal Police acknowledges the Traditional Owners and Custodians of Country throughout Australia and acknowledges their continuing connection to land, sea and community.

We pay our respects to the people, the cultures and the Elders past, present and emerging.



Important Developments

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- 'Respect@Work' report – March 2020 - Sex Discrimination Commissioner, Kate Jenkins
- *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work Act) 2022*
- *Fair Work (Secure Jobs, Better Pay) Act 2022, Fair Work (Secure Jobs, Better Pay) Act 2022,*

The Prohibitions

What is sexual harassment? SD Act s 28A and FW Act s 527D

Sexual harassment occurs in the following circumstances:

(a) there is conduct of a sexual nature; (this is a factual matter)

(b) it is unwelcome (this is a subjective test/impact on victim);

based on the ordinary meaning of the words that the conduct is not welcome in contrast to conduct that is either consensual or voluntary;

(c) a reasonable person having regard to all the circumstances would anticipate the possibility find that such conduct is offensive, humiliating or intimidating (this is an objective test);

(d) the victim or complainant is offended, humiliated or intimidated.

These concepts are now specified in s28A of the SDA and s527D of the FW Act.

Offence, humiliation or intimidation means the loss or lowering of dignity at work. Intimidation essentially includes the misuse of power.

The Prohibitions cont'd. . .

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The 'circumstances' include - s 28A(2B)

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

((1) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Location of workplace and work hours is broad, can extend to social events, after parties, events at hotels and not purely confined to the physical location of the work (see Ewin v Vergara).

'Work' applies to carrying out of any functions relating to the work whether on site or off site. In the case of Ewin, the harasser Vergara was a contractor but they were still engaged in work-related communications.

Examples of Sexual Harassment

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Examples of sexual harassment can include:

- inappropriate physical contact, such as unwelcome touching
- staring or leering
- a suggestive comment or joke
- a sexually explicit picture or poster
- an unwanted invitation to go out on dates
- a request for sex
- intrusive questioning about a person's private life or body
- unnecessary familiarity, such as deliberately brushing up against a person
- an insult or a taunt of a sexual nature
- a sexually explicit email or text message.
- Important to note that some forms of sexual harassment can constitute criminal conduct e.g. sexual assault

Reasonable Person?

What is the reasonable person test? Objective

.This is an objective test. See the decision of Beesley & Hughes and also sections 28A of the SD Act.

In considering the possibility that a complainant has suffered from conduct that is offensive, humiliating or intimidating, it is an objective test and the motives or intention of the harasser are irrelevant. To rely on the fact that someone may have made a joke or considered it to be harmless or affected by alcohol is no excuse.

Whether an advance is 'sexual' is a question of fact. In the case of Beesley & Hughes referred to above, the act of hugging and asking for a massage on a frequent basis were considered to be sufficient to constitute sexual advances. The Court in that matter found the conduct of the harasser to be 'outrageous'. On appeal, the Federal Court confirmed the award of

compensation of $170,000 (general damages $120,000 / aggravated damages $50,000). In doing so, the Full Court noted also the power imbalance plus the harasser's knowledge and exploitation of the complainant's anxiety disorder as aggravating factors.

Vicarious liability of Employers – s 106 SD Act and s 527E of the FW Act

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Section 527E of the FW Act replicates section 106 of the SD Act which is that an employer will be liable for any act done:

- by an employee or agent;
- in connection with the employment

However, employers will not be liable if they can demonstrate that they took **all reasonable steps** to prevent employee/agent engaging in such acts. The onus is on the principal asserting that all reasonable steps were taken.

The Prohibitions cont'd. . .

What is sex-based harassment (SBH)? – SD Act s 28AA (not in FW Act)

SBH was introduced to the SD Act in 2021 as part of the Coalition Government changes.

Originally, SBH required unwelcome conduct of a 'seriously demeaning' nature. However the Labor Government reduced the threshold, removing the work 'seriously' in December 2022 so that SBH may occur where such conduct is 'demeaning'.

The Prohibitions cont'd. . .

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Section 28AA Meaning of harassment on the ground of sex

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

(i) the sex of the person harassed; or

(ii) a characteristic that appertains generally to persons of the sex of the person harassed; or

(iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a demeaning nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The Prohibitions cont'd. . .

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(2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who engaged in the conduct;

(c) any disability of the person harassed;

(d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;

(e) the seriousness of the conduct;

(f) whether the conduct has been repeated;

(g) any other relevant circumstance.

(3) In this section:

conduct includes making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing.

The Prohibitions cont'd. . .

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SBH is therefore conduct that is:

(e) unwelcome,

(f) of a demeaning nature (this means that it may debase or degrade a person);

(g) the conduct is by reason of the person's sex;

(h) it is subject to a reasonable person test as with S/H.

The Prohibitions cont'd. . .

What is a hostile work environment (HWE)? – SD Act s 28M (not in the FW Act)

A HWE which is now prohibited by s28M of the SD Act, reflects a person being subject to detriment or being treated less favourably due to their sex.

Section 28M Hostile workplace environments

(1) It is unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.

(2) A person (the first person) subjects another person (the second person) to a workplace environment that is hostile on the ground of sex if:

(a) the first person engages in conduct in a workplace where the first person or the second person, or both, work; and

(b) the second person is in the workplace at the same time as or after the conduct occurs; and

(c) a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of:

(i) the sex of the person; or

(ii) a characteristic that appertains generally to persons of the sex of the person; or

(iii) a characteristic that is generally imputed to persons of the sex of the person.

Positive Duty on Employers

The Positive Duty under the SDA (not in the FW Act)

The Positive Duty is a requirement for an employer to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and conduct that subjects another to an HWE (as far as possible).

The Duty came into effect from 13 December 2022 with the amendments to s47C of the SD Act. This reinforces the existing prohibitions on discrimination as follows:

- sex discrimination (ss 14, 17);
- sexual harassment (s 28A);
- sex-based harassment (s 28AA)
- hostile work environment (s 28M);
- victimisation (s 94).

Current (or Concurrent) Anti-Discrimination & WHS/OHS Duties

However, it should be borne in mind that the Positive Duty in respect of S/H is not entirely new. See s 19 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) that mandates a positive duty for an employer to *'ensure, so far as is reasonably practicable that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking'*.

Relevant considerations – Case Law

Does the sexual harassment have to be at work?

- No. Sexual harassment in the workplace arises where there is a 'connection with work': *McManus v Scott-Charton* [1996] FCA 904

Can a single incident constitute sexual harassment?

- Yes : *Keron v Westpac Banking Corp*

What is conduct of a sexual nature?

- This is a question of fact.

What is unwelcome conduct? Is it unwelcome if the complainant puts up with it?

- The court or tribunal is only concerned with the victim's reaction not with the intent of the harasser. *Beesley & Hughes Lawyers v Hill* [2020] FCAFC 126 (Collier, Reeves, Perram JJ)
- No. Conduct can still be found to be unwelcomed even if the complainant puts up with it: *Collins v Smith*[2015] VCAT 1992 (Jenkins J); *Aldridge v Booth* [1988] FCA 170
- This is a subjective assessment.

Relevant Considerations – Case law cont'd. . .

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Not intended? Its only a joke?

- The intent of the harasser is not relevant: *Vitality Works & Sydney Water* v *Yelda* [2019] NSWCATAD 203; [2021] NSWCA 147
- Jokes or banter can constitute conduct of a sexual nature: *Richardson v Oracle* [2014] FCAFC 82 (Kenny, Besanko, Perram JJ)

What about a failure to report the complaint to police?

- This does not necessarily undermine the claim. In *Kerkofs v Abdallah* [2019] VCAT 753 such circumstances some victims do not necessarily want the trauma of going through a criminal investigation and eventual court proceeding.

Vicarious Liability - Investigation gone wrong?

- *Kerkofs v Abdallah*[29] [2019] VCAT 259

Compensation

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1985: *Hill v Water Resources Commission NSW* – $25,000 for sex discrimination;

1988: *Aldridge v Booth* – $7,000 Qld for sex discrimination;

1989: *Hall v Sheiban* – Full Court Federal Court overturned EOC judgement nil compensation;

2008: *Tan v Zenos* - VCAT general damages of $100,000 for S/H;

2009: *Poniatowska v Hickinbotham* - Federal Court $90,000 general damages for S/H (total $466,000);

2013: *Ewin v Vergara* - Federal Court $110,000 for S/H (total $403,000);

2013: *GLS v PLP* - VCAT $100,000 for S/H;

2014: *Richardson v Oracle* - Full Court Federal Court $100,000 for S/H (total $130,000) – increase from $18,000;

2015: *Collins v Smith* - VCAT $180,000 for S/H (total $332,000);

2019: *Kerkofs v Abdallah & PMP* - VCAT $150,000 (130 gen damages and 20 for aggravated damages)

2020: *Hughes v Hill* – Full Court Federal Court $170,000 ($120,000 general damages and $50,000 aggravated damages)

2021: *Vitality Works & Sydney Water v Yelda* – NSW Court of Appeal - $200,000 S/H.

The Investigation

Things to keep in mind

- Informal v formal complaints
- Familiarise yourself with the applicable legislation and AFP governance requirements –*AFP NG on bullying, harassment and discrimination*; AFP CoC Determination, AFP Values (Respect, Fairness); AFP Code of Conduct (s.8.4. s. 8.5, s.8.11)
- The parties must be given an opportunity to be heard and respond to the complaint/allegations
- The investigator must act impartially, honestly and without bias
- Importance of maintaining confidentiality
- Cover the "who, what, where, when and how" questions first to establish a clear sequence of events. Ask for specific details of location, time, incident and conversations.
- When interviewing the alleged harasser, remain objective and unbiased. You are investigating to find out the truth, establish the facts on the balance of probabilities (or beyond reasonable doubt if considering sexual assault) not to prove their guilt or innocence
- Do not use emotive language. Keep language neutral
- Ensure that parties, including witnesses are advised and receive any required support. Offer support but be careful not to become biased or give the perception of being biased e.g. "I'm sorry you experienced that" can help them feel heard and supported. . .
- Be sensitive to the stressful nature of the situation and the potential repercussions of the investigation for <u>each</u> party
- Interview the complainant and the alleged harasser with care – trauma focused approach.

The investigation cont'd. . .

What should you consider when assessing credibility?

- Consistency
- Memory
- Corroboration
- Plausibility
- Demeanour
- Motive
- Embellishment
- Contemporaneous Nature of the Evidence
- Patterns of Behaviour (exercise caution/seek advice)

Things to keep in mind cont'd. . .

Internal Pathways, External Pathways and IRPs

- **Internal Support Pathways**
  - Confidant Network and Safe Space
  - SHIELD
  - Welfare Officer Network
- **Information on external referral pathways specific to sexual harassment**
  - AHRC or relevant state/territory HRC e.g. ACT Human Rights Commission
  - Fair Work Commission
  - Fair Work Ombudsman
  - Comcare

For more information visit https://www.respectatwork.gov.au/external-pathways

ISPs

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- **As an investigator you need to be aware and consider what the Immediate Response Plan (IRP) is**
  - IRPs are being developed by the lead portfolios (WICR/SHIELD) who will develop and implement an immediate response plan which will provide a structured approach for first responders to reports of sexual harassment to assess the nature of the situation, provide support to the people involved, ensure safety, and effectively de-escalate if required. Lead (WICR/SHIELD) will share this plan with PRS and any other support area involved. Immediate Response Plan will be included in WON database against client for record keeping and awareness.

Useful Resources

More information and resources are available about how to prevent and respond to reports of sexual harassment in the workplace from:

Respect@Work website

Fair Work Commission:

- Sexual harassment
- Sexual harassment at work online learning module

Safe Work Australia – Workplace sexual harassment

Federal, state and territory work health and safety regulators.

Sexual assault support services

1800RESPECT is the national domestic, family and sexual violence counselling, information and support service. If you or someone you know is experiencing, or at risk of experiencing, domestic, family or sexual violence, call 1800RESPECT on 1800 737 732 or visit 1800RESPECT.org.au.

Questions /
Thank you

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The AHRC Jenkins report 2022 *Respect@Work*

In March 2020, the Sex Discrimination Commissioner, Kate Jenkins, delivered her 'Respect@Work' report (**Report**) to the Federal Government arising out of the inquiry that she had conducted in 2018-19 on sexual harassment (**S/H**) in the workplace.

The inquiry arose out of a number of issues, including the 2018 survey conducted by the Australian Human Rights Commission (**AHRC**), which revealed that despite increased awareness and regulatory prohibitions against S/H over the preceding 40 years, it remained a serious societal problem, particularly within Australian workplaces. The data disclosed persistently high levels of S/H experiences, incidents and complaints despite the passing of four decades from the commencement of the *Sex Discrimination Act 1984* (Cth) (**SD Act**)

Jenkins' inquiry and eventual Report were conducted in the context of high-profile media attention on the sexual misconduct and criminal activities undertaken by prominent wealthy Americans, including Harvey Weinstein and Jeffrey Epstein. The Weinstein allegations had triggered the '#MeToo Movement', which drew attention to the rampant misuse of power and prevalence of S/H in the film and entertainment industry in particular, which ultimately resulted in the criminal prosecution, convictions and jailing of Weinstein. Furthermore, in Australia, media and political focus had zeroed in on the allegations of sexual assault by a Federal Parliamentary staff member, Brittany Higgins and Grace Tame, alleged victims of sexual harassment and assault.

The Report also found that despite the existence of anti-discrimination legislation and processes to prohibit S/H in the workplace, the ongoing problems demonstrated a fundamental structural flaw in such regulation as it focused on the individual taking action, rather than the organisation responsible for the offending environment.

Victims of S/H in the workplace had traditionally been required to initiate a complaints-based process under various anti-discrimination laws, effectively condemned to 'go it alone' as individual complainants to issue and conduct legal proceedings arising out of any alleged incidents. This in turn placed unreasonable expectations on those individuals, in most cases understandably intimidated by the complaint process, the scrutiny of their allegations, their credit, the legal issues, the cost and stress associated with such allegations.

In contrast, the Report concluded that the more effective means to combat S/H in the workplace and other forms of discrimination based on sex were to change that complaint structure, shift the onus from individual complainants and place responsibility squarely on the employer. This was a fundamental and inspired change in direction, as Jenkins effectively took the focus from 'You' to 'Us' by imposing a new positive legal duty on employers to not just address S/H but to seek to *eliminate* S/H in a proactive manner – similar to existing work health and safety (**WHS**) duties.

There was another concerning aspect of the operation of the S/H prohibitions in that complainants needed to demonstrate that there was conduct of a 'sexual' nature. In many cases of S/H, there is no such 'sexual' conduct, merely discriminatory or negative treatment of an individual (in the majority of cases females) that denigrate or demean them due to their sex. This includes such things as mistreatment, lack of opportunities for promotion, lower pay, exclusion, isolation, being dealt with in an unfavourable way with negative, belittling or patronising comments that essentially relate to their sex or characteristics attributed

To address this issue, Ms Jenkins sought to implement new provisions in the anti-discrimination legislation, which would prohibit not only S/H but also introduce broader provisions prohibiting 'sex-based harassment' (**SBH**) and exposure to a 'hostile work environment' (**HWE**) in the SD Act.

Initial Legislative Change – 2021

In partial response to the Report, the Federal Coalition Government introduced legislation in September 2021 that picked up on some, but not all of the Report's 55 recommendations. These included adding SBH as a prohibited ground in the SD Act (section 28AA), although the conduct had to be of a 'seriously demeaning' nature. Time limits for making complaints under the SDA were also increased from 6 to 24 months.

The Coalition's 2021 changes also introduced a new 'stop sexual harassment' process in the Fair Work Commission (**FWC**), which was incorporated into the anti-bullying jurisdiction in Part 6-4B of the *Fair Work Act 2009* (Cth) (**FW Act**) and commenced 11 November 2021.

Additional changes to the FW Act included adding 'sexual harassment' as a component of 'serious misconduct' under the Fair Work Regulations[1] and a legislative footnote in section 387 of the FW Act specifying that S/H could provide a valid reason for termination of employment.[2]

Labor Government Changes - 2022

After the change in Federal Government in May 2022, the incoming Labor Government took an aggressive and robust approach to adopting the recommendations of the Jenkins Report. These included the following fundamental changes:

- changes to the SD Act to specifically impose a positive duty on employers to eliminate S/H in the workplace from December 2022 (section 47C);
- introduction of a prohibition on subjecting a person to a 'workplace environment that is hostile on the ground of sex' (**HWE**) - section 28M SD Act;
- a new detailed Part 3-5A in the FW Act defining S/H and vicarious liability (s 527);
- extending S/H obligations in the FW Act beyond 'employers' by adopting the broader WHS definitions of 'persons conducting a business or undertaking' (PCBU) and 'workers'. This extends the reach to contractors, self-employed persons, interns, volunteers, work experience students etc;
- changes to the FW Act to provide for a new jurisdiction for the FWC to address complaints of S/H in seeking 'stop Orders' or to 'otherwise deal with disputes' arising out of S/H in the workplace. This replaced the 'stop bullying' process which had been in place from November 2021. The new process commenced from 6 March 2023;
- permitting unions to issue proceedings under s 527F FW Act on behalf of complainants;
- introducing civil penalties for S/H breaches pursuant to s 539 of the FW Act; and
- amending the powers of the AHRC under the *Australian Human Rights Commission Act 1986* (Cth) to provide for powers to undertake enquiries and powers to issue compliance notices to employers in respect of SD Act obligations, which commence from 6 December 2023.

The changes to the SD Act were set out in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work Act) 2022*, which was passed with effect from 13 December 2022.

[1] *Fair Work Regulation 1.07*

[2] Section 12 of the FW Act adopts the definition of 'sexually harass' from s 28A of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021.*

The changes to the FW Act were contained in the *Fair Work (Secure Jobs, Better Pay) Act 2022*, which was passed on 13 December 2022 and with effect to commence from 6 March 2023.

The Prohibitions

What is sexual harassment? SD Act s 28A and FW Act s 527D

S/H occurs in the following circumstances:

(a) there is conduct of a ***sexual*** nature; (this is a factual matter)

(b) it is ***unwelcome*** (this is a subjective test/impact on victim);

based on the ordinary meaning of the words that the conduct is not welcome in contrast to conduct that is either consensual or voluntary;

(c) a ***reasonable person*** having regard to ***all the circumstances*** would ***anticipate*** the ***possibility*** find that such conduct is offensive, humiliating or intimidating (this is an objective test);

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These concepts are now specified in s28A of the SDA and s527D of the FW Act.

Offence, humiliation or intimidation means the loss or lowering of dignity at work. Intimidation essentially includes the misuse of power.

The 'circumstances' include - s 28A(2B)

(a) *the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;*

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Location of workplace and work hours is broad, can extend to social events, after parties, events at hotels and not purely confined to the physical location of the work (see *Ewin v Vergara* below).

'Work' applies to carrying out of any functions relating to the work whether on site or off site. In the case of Ewin, the harasser Vergara was a contractor but they were still engaged in workrelated communications.

Examples of Sexual Harassment (refer to slide)

What is the reasonable person test? Objective.

This is an objective test. See the decision of *Beesley & Hughes* and also sections 28A of the SD Act.

In considering the possibility that a complainant has suffered from conduct that is offensive, humiliating or intimidating, it is an objective test and the motives of the harasser are irrelevant. To rely on the fact that someone may have made a joke or considered it to be harmless or affected by alcohol is no excuse.

Whether an advance is 'sexual' is a question of fact. In the case of Beesley & Hughes referred to above, the act of hugging and asking for a massage on a frequent basis were considered to be sufficient to constitute sexual advances. The Court in that matter found the conduct of the harasser to be 'outrageous'. On appeal, the Federal Court confirmed the award of compensation of $170,000 (general damages $120,000 / aggravated damages $50,000). In doing so, the Full Court noted also the power imbalance plus the harasser's knowledge and exploitation of the complainant's anxiety disorder as aggravating factors.

Vicarious Liability of Employers

Vicarious liability of Employers & PCBUs – s 106 SD Act and s 527E of the FW Act

Section 527E of the FW Act replicates section 106 of the SD Act which is that an employer/PCBU will be liable for any act done:

- by an employee or agent;
- in connection with the employment

However, employers/PCBs will not be liable if they can demonstrate that they took **all reasonable steps** to prevent employee/agent engaging in such acts. The onus is on the principal asserting that all reasonable steps were taken.

In considering what is 'reasonable' it is clear that **all** reasonable steps must be taken not just 'some reasonable' steps. In this respect, the decision of the Full Court of the Federal Court *Von Schoeler v Boral Timber*[3] is momentous, carrying on the approach of the Federal Court in *Oracle* that an employer's obligation to take 'all reasonable' steps is indeed an onerous task. This decision reinforced the requirement for an employer to take preventative action. This includes the need to ensure the content of policies and training are adequate, that such policies are not only available but also communicated and reinforced within the business.

Vicarious Liability - Investigation gone wrong?

As noted above, in *Kerkofs v Abdallah*[29] [2019] VCAT 259 the complainant Ruby Kerkofs was awarded $150,000 in damages ($130,000 general damages and $20,000 aggravated damages) for S/H under the Victorian *Equal Opportunity Act*. The damages order was jointly made against both Abdallah and the employer, PMP.

Ms Kerkofs worked for only 12 days with PMP during which time she was subject to an extraordinary barrage of S/H including being called 'sexy' or 'honey', being leered at, having sexual comments made about her body and given massages on the neck and shoulders while Mr Abdallah and others provided a rating on her appearance based on a figure out of 10. When Ms Kerkofs fell sick at work one day and needed to go home, her manager directed Mr Abdallah to drive her home. While at Ms Kerkofs' home, Mr Abdallah attempted to make sexual advances to her and allegedly assaulted her. Mr Abdallah denied the claims.

Subsequently Ms Kerkofs made complaints to her employer but nothing was done. The company claimed that it undertook its own investigation and found no basis for the allegation. Despite only working for 12 days, the damage to Ms Kerkofs' mental health was significant and she suffered significant post-traumatic stress disorder. Contrary to the company's conclusions on

[3] *Von Schoeler v Allen Taylor & Company Ltd trading as Boral Timber* [2020] FCAFC 13 (Flick, Robertson, Rangiah JJ) [29] VCAT (2019) 259

the allegations, Judge Harbison of VCAT found that the allegations were made out and she accepted the evidence of Ms Kerkofs over Mr Abdallah who was found to be evasive and disruptive to the VCAT process. This undermined his credit and reliability of his evidence. She also held PMP vicariously liable, remarking that she was quite disturbed that no proper and independent investigation was carried out into the allegation.

What is sex-based harassment (SBH)? – SD Act s 28AA (not in FW Act)

SBH was introduced to the SD Act in 2021 as part of the Coalition Government changes. Originally, SBH required unwelcome conduct of a '**seriously** demeaning' nature. However the Labor Government reduced the threshold, removing the word 'seriously' in December 2022 so that SBH may occur where such conduct is 'demeaning'.

Section 28AA Meaning of harassment on the ground of sex

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

(i) the sex of the person harassed; or

(ii) a characteristic that appertains generally to persons of the sex of the person harassed; or

(iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

*the person engages in unwelcome conduct of a **demeaning nature** in relation to the person harassed; and*

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who engaged in the conduct;

(c) any disability of the person harassed;

(d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;

(e) the seriousness of the conduct;

(f) whether the conduct has been repeated;

(g) any other relevant circumstance.

(3) In this section:

conduct includes making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing.

SBH is therefore conduct that is:

(e) unwelcome,

(f) of a demeaning nature (this means that it may debase or degrade a person);

(g) the conduct is by reason of the person's sex;

(h) (h) it is subject to a reasonable person test as with S/H.

What is a hostile work environment (HWE)? – SD Act s 28M (not in the FW Act)

A HWE which is now prohibited by s28M of the SD Act, reflects a person being subject to detriment or being treated less favourably due to their sex.

Section 28M Hostile workplace environments

*(1) It is unlawful for a person to subject another person to a **workplace environment that is hostile** on the ground of sex.*

(2) A person (the first person) subjects another person (the second person) to a workplace environment that is hostile on the ground of sex if:

(a) the first person engages in conduct in a workplace where the first person or the second person, or both, work; and

*(b) the second person is **in the workplace at the same time** as or after the conduct occurs; and*

(c) a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of:

(i) the sex of the person; or

(ii) a characteristic that appertains generally to persons of the sex of the person; or

(iii) a characteristic that is generally imputed to persons of the sex of the person.

It is important to remember that Hostile Work Environment is not about 'sexual' conduct as such. It is a broader or untargeted form of conduct. A significant factor is that it does not have to be addressed to a particular person.

The Explanatory Memorandum published by the Government at the time of debate on the new legislation was that HWE would include such matters as derogatory remarks, making comments about 'traditional roles' of women, comments about appearance, use of pornography in the workplace, directions or other comments about clothing worn by other employees.

The most common examples of HWE have been found in cases where victims, predominantly female, are abused verbally or subject to an environment that is threatening, for example the depiction of pornographic images or general sexualised conversation in the workplace.

The Positive Duty under the SDA (not in the FW Act)

The Positive Duty is a requirement for an employer to take ***reasonable and proportionate measures*** to eliminate discrimination, sexual harassment and conduct that subjects another to an HWE (as far as possible).

The Duty came into effect from 13 December 2022 with the amendments to s47C of the SD Act. This reinforces the existing prohibitions on discrimination as follows:

- sex discrimination (ss 14, 17);
- sexual harassment (s 28A);
- sex-based harassment (s 28AA)
- hostile work environment (s 28M);
- victimisation (s 94).

Some Relevant Issues to consider: The Case Law

Does the S/H have to be at work?

Sexual harassment in the workplace arises where there is a 'connection with work'.

In the 1996 case of *McManus v Scott-Charlton*,[4] Justice Finn of the Federal Court dealt with a disciplinary complaint by a public servant. McManus, an employee at AusAid had been counselled regarding sexual harassment of a female co-employee. The complaint had been made about McManus making phone calls and harassing messages outside of work hours. Other comments around the workplace expressed affection using such phrases as '*I wouldn't mind marrying you*'. The attention and the comments were not reciprocated. Finn J concluded that such conduct amounted to S/H – it was of a sexual nature; it was unwelcome; and it had an impact on the performance and realties with other employees.

In 2013, the Federal Court of Australia dealt with the matter of *Ewin v Vergara*[5] in which there were a number of incidents that occurred between two workers physically within the workplace and outside. One incident occurred where the harasser (a contractor) was working late at night with the complainant, turned off the lights in the office. After some words were exchanged in the office, the complainant suggested that the two leave the office and go to a nearby hotel for a drink ostensibly so that she would feel safer being in a more open environment[6].

In the pub discussion, the complainant had informed the harasser that she was not interested in any relationship. Despite this he then attempted to kiss her in the street after they left the pub. As these incidents occurred on a street; in public; and outside the office environment, the trial judge, Bromberg, J had to consider whether the incident was connected with the work and therefore the claim of S/H could be made out by the complainant.

He concluded that the phrase 'in connection with' used in s 28B(7) definition of 'workplace' is a phrase of wide import. The words require a mere relation between one thing and another. He found that:

[4] [1996] FCA 904
[5] [2013] FCA 1311 (Bromberg J); [2014] FCAFC 100 (North, Pagone, WhiteJJ)
[6] The pub was the Waterside Hotel, King Street, Melbourne

> *'[the office lights incident was workplace harassment] and that the workers moved to the pub to deal with that incident. Those matters establish a sufficient connection to the workplace to render [the pub] a 'workplace' for the purposes of s 28B(6) [of the SD Act].*[7]

Another incident occurred two days later back after the complainant became heavily intoxicated at a work function and the harasser had sex with her in a corridor outside the office. The complainant alleged that she had not been capable of forming any consent. While there were no police charges or conviction arising out of the intercourse, the Court was still able to find that this also was non-consensual activity. It was an unwanted sexual advance and therefore also constituted S/H.

On the issue of whether the corridor was the 'workplace', Bromberg J found;

> *The definition of a 'workplace' is cast in wide terms. It is not confined to the place of work of the participants but extends to a place at which the participants work, or otherwise carry out the functions in connection with being a workplace participant. The fact that the activity occurred out of working hours or that attendance was not for a work-related purpose, does not affect the corridor's characterisation as the workplace of both [complainant/harasser]*[8]

The Federal Court ordered compensation of $477,000 to the complainant essentially as she had suffered significant psychological injury as a result of the incidents, including post-traumatic

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stress disorder. This case was important for establishing that a 'workplace' could go beyond the traditional work environment and may extend to other locations, for example, a hotel, a taxi.

Can a single incident constitute Sexual Harassment? Yes

The decisions also confirm that a single incident can constitute S/H. See for example *Hall v A&A Sheiban.* [9]

In the 2022 decision of the FWC in *Keron v Westpac Banking Corp*., Deputy President Binet dealt with an unfair dismissal claim by Mr Keron. Mr Keron had been an employee of 30 years standing and after a training day with co-workers, which was subsequently extended by drinks for which the company had paid, Mr Keron touched an employee who later complained about his conduct. Mr Keron was terminated from his employment after due investigation and bought a claim for unfair dismissal. DP Binet dismissed his claim finding that the S/H was a valid reason for termination of employment.

What is conduct of a sexual nature?

This is a question of fact.

Not intended?

In *Vitality Works & Sydney Water* v *Yelda* [10] Reem Yelda was an employee of Sydney Water who had been asked to participate in an advertising program and to have a photograph taken for use in posters promoting WHS in the workplace. The campaign was about spinal safety and mobilisation. After the photos were taken the posters were distributed around the workplace with the slogan *'Feel great – Lubricate'*. The posters were placed inside men's toilets and the work lunchroom.

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[7] Para 230
[8] Paras 38 and 463
[9] 85 ALR 503
[10] [2019] NSWCATAD 203; [2021] NSWCA 147

The implications of the wording (which had not been disclosed to Yelda before they were distributed) implied a sexual connotation and by her participation in the photo this also indicated her apparent willingness to engage in lubrication which in turn implied some degree of sexual activity. Yelda was successful with her complaint of S/H and SBH and received compensation awards totalling $200,000 against her employer Sydney Water and the advertising company Vitality.

When the matter went to the Court of Appeal in New South Wales, the Court found that 'conduct of a sexual nature' had a broad meaning and could be constituted by innuendo, horseplay or any hints of sexualising conduct. Again, the Court emphasised that the intent of the harasser is not relevant. Conduct of a sexual nature does not have to be just simply sexually explicit.

The Court of Appeal found that the design, publication, display and distribution of the materials were sufficient to constitute conduct of a sexual nature. It was irrelevant that Vitality Works did not intend to sexually harass Yelda.

It's only a Joke?

In *Richardson v Oracle*[11] Rebecca Richardson was successful in her claim against her employer Oracle for the sexual harassment of a fellow employee by the name of Tucker. Richardson and Tucker worked together on a bid team which frequently required late hours and weekend work. During the period from April to November 2008 they worked together and Tucker made persistent sexual advances and inappropriate comments to Richardson. For example, Tucker made comments such as '*you know we fight so much that we must have been married in the last life. I bet then the sex was hot*'.

Richardson complained to her manager who passed it on to HR who undertook an investigation. Despite this, Richardson was forced to continue to work with Tucker which included engagement through conferences and emails. The investigation finding supported Richardson's allegations but Tucker was only issued with a warning. Richardson then resigned in March 2009 and lodged a complaint of sexual harassment. Tucker's defence was that he was only making jokes. It was 'blue' banter in a fairly 'robust' environment and that his comments had been taken out of context.

The Federal Court rejected Tucker's defences and found that his conduct was deliberate and systematic course of conduct sufficient to constitute S/H as unwelcome conduct of a sexual nature.

In addition, the employer Oracle was also found to be liable. Its defence failed as the Court found that their policies were inadequate and their global online training system was deficient. No statements had been made that S/H was contrary to the law. The policies and the training did not specify the legislation nor did they specify that any such conduct was contrary to company policy and therefore potentially subject to discipline.

Despite all this at trial in February 2013 Richardson only received an award of compensation of $18,000. On appeal the Full Court overturned that decision and found that the general damages award was manifestly inadequate and increased the damages to $130,000 of which $100,000 was for pain and suffering. The Full Court found that the damages awarded initially at trial may have reflected an existing range of between $12-20,000 for such matters, that did not reflect community expectations. Higher value ought be attributed to pain and suffering.

This case highlights that jokes or banter can constitute conduct of a sexual nature. The intent of the harasser is irrelevant. The Court will assess the overall course of the conduct.

[11] [2014] FCAFC 82 (Kenny, Besanko, Perram JJ)

What is unwelcome conduct – subjective assessment?

This essentially depends on the attitude of the victim.

The court or tribunal is only concerned with the victim's reaction not with the intent of the harasser. *Beesley & Hughes Lawyers v Hill.*[12]

This was a case where a principal of the law firm made several unwelcome advances to a paralegal who had only recently commenced work with the firm in 2015. The complainant was a single mother and in a regional town, Bangalow NSW and hoping to commence legal study to become a practitioner. Multiple advances were made by the principal of the legal practice before she resigned, suffering also from substantial psychological trauma as a result.

Is it unwelcome conduct if the complainant puts up with it?

In *Collins v Smith*[13] VCAT found in favour of the applicant, Amanda Collins in respect of a claim for S/H by her employer David Smith who ran a licensed post office in Geelong West, Victoria. After being employed for nearly two years, the applicant Collins was subjected to a sustained period of sexual harassment including being touched by Mr Smith, subjected to repeated attempts to kiss and hug her, repeated propositions for sex, demands for sex to allow her to work overtime and earn more money and being subjected to social media and phone messages that were sexually explicit.

Collins resigned from her employment and suffered severed post-traumatic stress disorder, depression and anxiety disorder which resulted in the need for ongoing medical and psychological treatment and also impacted her marriage.

On 23 December 2015, the Tribunal made an award of damages of $332,280 plus costs. General damages were assessed at $180,000 and aggravated damages of $20,000. Loss of earnings and super were calculated at $60,000; future loss was assessed at $60,000 and expenses were at $12,200

Is conduct welcome if it is endured by the complainant? No

In *Aldridge v Booth*[14], Lyn Aldridge was a 17 year old shop assistant in her first job after being placed in the role in a cake shop through a Government scheme. Aldridge was young and vulnerable. She worked with one other person, Mr Booth who was the owner of the shop, the 'Tasty Morsel' in Brisbane. Mr Booth frequently made suggestive comments, sexual advances, physically touched her and on one occasion had intercourse with the complainant. She later made a complaint to HREOC and was successful.

This case was a classic example of the power imbalance. Aldridge was fearful of losing her job but could no longer take the pressure and so resigned from the job. She had the onus to prove that the behaviour was unwelcome and she satisfied that requirement, even though putting up with it for a long period. The damages awarded were $7,000 reflecting minimal award standards for the time, 1988.

What about failure to report the complaint to police?

In *Kerkofs v Abdallah*[15] the complainant Kerkofs worked for a period of two weeks with the harasser. During this period Abdallah called the complainant multiple nicknames, calling her 'sexy' or 'honey', made multiple comments about her body, general comments about sex, touched her and discussed her appearance and that of other women on a frequent basis. One

[12] [2020] FCAFC 126 (Collier, Reeves, Perram JJ)
[13] [2015] VCAT 1992 (Jenkins J)
[14] [1988] FCA 170
[15] [2019] VCAT 753

day when Kerkofs was ill, her manager asked Abdallah to drive her home and while there at her house sexually assaulted her. Kerkofs made a report three days later and subsequently developed PTSD.

VCAT found that sexual harassment had been made out and that the employer PMP was also vicariously liable. While there was considerable dispute over what happened in relation to the alleged sexual assault, Judge Harbinson found that Abdallah had been particularly evasive and that he had interfered with evidence. This undermined his credit, leading her to accept the complainant's allegations.

While the victim had not made any police report the Tribunal found that this did not undermine her claim. It was noted that in such circumstances some victims do not necessarily want the trauma of going through a criminal investigation and eventual court proceeding. The Tribunal also noted that while there were some inconsistencies this is to be expected and that on the finding of the balance of probabilities the conduct complained of probably happened and was unwelcome. The Tribunal ordered $150,000 in damages comprising general damages of $130,000 and aggravated damages of $20,000.

Compensation – included to illustrate the changing societal expectations

The Investigation – not in order of importance

The Sex Discrimination Act does not prescribe any particular type of procedure, so employers have the flexibility to design a system that suits the organisation's size, structure and resources.

Employers can establish a specific procedure for sexual harassment complaints or, alternatively, use the procedure that is in place for other types of employee complaints. Because of the variables that can arise in sexual harassment cases, it is advisable to offer both informal and formal mechanisms for dealing with complaints.

The parties must be given the opportunity to be heard and respond to the complaint or allegations. The decision-maker must act impartially, honestly and without bias

(a) Informal complaint procedures Informal procedures emphasise resolution rather than factual proof or substantiation of a complaint. Informal ways of dealing with sexual harassment can include the following actions. The individual who has been harassed wants to deal with the situation themselves but may seek advice on possible strategies from their supervisor or another officer such as human resource personnel.

(b) The individual who has been harassed asks their supervisor to speak to the alleged harasser on their behalf. The supervisor privately conveys the individual's concerns and reiterates the organisation's sexual harassment policy to the alleged harasser without assessing the merits of the case. A complaint is made, the harasser admits the behaviour, investigation is not required and the complaint is resolved through conciliation or counselling of the harasser.

(c) A supervisor or manager observes unacceptable conduct occurring and takes independent action even though no complaint has been made. Informal action is usually appropriate where: the allegations are of a less serious nature but the individual alleging the behaviour wants it to cease nonetheless the individual alleging the behaviour wishes to pursue an informal resolution the parties are likely to have ongoing contact with one another and the complainant wishes to pursue an informal resolution so that the working relationship can be sustained. An employee

should not be required to exhaust informal attempts at resolution before formal action commences.

Formal complaints

Employees have the right to formalise their complaint or approach an external agency, such as the Commission at any stage. (c) Formal complaint procedures Formal procedures focus on proving whether a complaint is substantiated. They usually involve: investigation of the allegations application of the principles of procedural fairness making a finding as to whether the harassment occurred submitting a report with a recommended course of action to the appropriate decisionmaker (senior management) implementation of an appropriate outcome.

Formal procedures are usually appropriate where: informal attempts at resolution have failed the complaint involves serious allegations of misconduct and informal resolution could compromise the rights of the parties the complaint is against a more senior member of staff the person alleging sexual harassment also alleges victimisation the allegations are denied, the person who claims to have been harassed wishes to proceed and investigation is required to substantiate the complaint the person alleging sexual harassment wishes to make a formal complaint.

To ensure consistency and fairness, employers should document the steps involved in a formal complaint and clearly inform the parties about the processes involved in considering a complaint in advance.

Harassment complaints can be challenging to investigate and prove due to factors such as lack of physical evidence, conflicting evidence (“he said vs. she said”), and the subjective nature of harassment behaviours.

When it comes to workplace investigations, few things are as difficult to get right as a 'he said, she said' scenario. Picture this: two people present completely different stories about an allegation of sexual harassment, with no witnesses to corroborate either account. There's always more to the story, but uncovering the complete picture requires a careful and nuanced approach.

Can you make a finding without evidence?

It is a common misconception that in these types of matters, findings can never be made due to a lack of evidence as there is nothing to 'tip the balance' in favour of either version of events. However, that is not the case.

While workplace investigators are not required to apply the principle espoused in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (Briginshaw principle), it is best practice that they do.

In applying the Briginshaw principle, the seriousness of the alleged misconduct (which is the subject of the workplace investigation) will impact the strength of evidence required to prove such allegation. That is, the more serious the allegation, the more compelling the evidence needs to be to substantiate the allegation e.g. if investigating a sexual assault under the CoC rather than criminally the evidence will need to be closer to beyond reasonable doubt but must stop short of such.

So how do you approach a 'he said, she said' case?

Rarely is there a scenario with no other evidence to rely on other than 'he said, she said'. In these cases, documentary evidence such as rosters or security logs can be crucial – and so can looking beyond the direct evidence to what would be expected if either version was true. For example, the absence of witnesses in a busy thoroughfare might raise a red flag.

When evidence fails to favour one version of events, or when there is little to no direct evidence, credibility becomes crucial. Workplace investigations rely on probabilities – what's more likely to have happened? Assessing the credibility of parties and their evidence is key to making these factual findings. But how do you determine if someone is credible?

It is less about who you believe and more about whose evidence you think is more credible, reliable and/or plausible. However, it is rarely that straightforward. Credibility relates to an individual's sincerity and truthfulness, while reliability concerns the accuracy of their evidence and their ability to recall events accurately. In other words, someone can be credible but provide unreliable evidence. Conversely, if they lack credibility, their evidence cannot be deemed reliable.

What should you consider when assessing credibility?

When navigating these situations, it is essential to avoid relying solely on personal factors like body language or demeanour to assess credibility, as these can be tainted by unconscious bias. Consider:

- **consistency**: Consistencies and inconsistences will either bolster or diminish a party's credibility. Gather comprehensive information and probe for specific details at interviews, as even small nuances may reveal important inconsistencies (factual or in the narrative) later in the investigation process
- **memory:** Ask whether the party has a consistent and accurate recollection of the events. Where relevant, consider factors that could impair their recollection, such as the passage of time
- **corroboration:** Consider whether there is any evidence that supports of refutes their version of events, even if there are no direct witnesses
- **plausibility:** Evaluate whether their story is plausible or believable, considering all available evidence. For instance, consider if a party denies hearing or seeing something they should have, or if they had the chance to act as claimed
- **demeanour:** Assess the party's openness and honesty. Were they forthcoming with relevant information and answered questions directly and/or acknowledged possible shortcomings in their recollection? Or were they hesitant, evasive or vague?
- **motive:** Consider whether either party has a vested interest in the outcome that could potentially compromise their honesty such as financial gain, employment opportunities or intent to harm the other party
- **embellishing:** Ask if either party tends to embellish evidence, or has a reason to do so
- **contemporaneous records/accounts**: Ask if there are any contemporaneous records or reports, including any verbal reports to another person. Examples can include evidence that the person alleging harassment discussed his or her concerns with a family member, friend, co-worker, medical practitioner or counsellor supervisor's reports and personnel records (for example, unexplained requests for transfer or shift changes, sudden increase in sick leave) complaints or information provided by other employees about the behaviour of the alleged harasser records kept by the person claiming to have been harassed

Can you rely on hearsay in a 'he said, she said' case?

Hearsay evidence, which refers to information gathered from second hand sources rather than direct observation or experience, is often prevalent in workplace investigations.

While relying solely on hearsay evidence can compromise the integrity of the investigation and undermine the credibility of the findings, investigators are not prohibited from relying upon it – unlike in a courtroom. However, investigators must carefully consider the circumstances and assign appropriate weight to hearsay evidence as it is considered less reliable due to its potential for inaccuracies and bias.

Hearsay evidence can also provide valuable context and potential avenues for further inquiry in these types of cases. For instance, if one party confided in or reported the alleged behaviour to another individual, their evidence could enhance the credibility of that party.

It is important to recognise that evidence adduced in workplace investigations involving 'he said, she said' situations need to be weighed accordingly.

Patterns of behaviour
Any proven patterns of behaviour could be relevant e.g. from past antecedents or HR records.

Exercise caution and seek advice before obtaining/considering this type of material as careful weighting is required.

Internal Pathways, External Pathways and IRPs – refer to slide

Conclusion

This area of legal regulation continues to evolve in an attempt to improve our society. The changes implemented through the period from 2021 to December 2023 are a breakthrough, signalling a major structural shift that rightly changes the focus from complainants to the workplace, to our management and to our culture and behaviours.

[HIGH COURT OF AUSTRALIA.]

BRIGINSHAW . . . . . APPELLANT;
PETITIONER,

AND

BRIGINSHAW AND ANOTHER . . . RESPONDENTS.
RESPONDENT AND CO-RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1938.

MELBOURNE, *May* 18, 19; *June* 30.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ

Divorce—Evidence—Adultery—Standard of proof—Marriage Act 1928 (*Vict.*) (*No.* 3726), *secs.* 80, 86.

The *Marriage Act* 1928 (Vict.) provides, by sec. 80: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged," and, by sec. 86: "Subject to the provisions of this Act the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage."

Held that, on a petition for divorce on the ground of adultery, the standard of proof required by the Act was not that of proof beyond reasonable doubt which obtains in respect of issues to be proved by the prosecution in criminal proceedings.

Decision of the Supreme Court of Victoria (*Martin* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Frederick Joseph Briginshaw sought a dissolution of his marriage with Clarice Briginshaw on the ground of her adultery with one Crawford. In giving judgment *Martin* J. said:—"The case depends entirely on various conversations. There is no written admission, and

no writing of any sort. I have read the evidence several times, and the more I read it the more difficult the case seems." His Honor then considered the evidence and concluded his judgment by saying :— " I do not know what to believe. I have been very troubled. I think Lamprill " (a person whom neither party called as a witness) " holds the key. It seems he may have held the pistol at both parties' heads. I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." His Honor accordingly dismissed the petition.

From that decision the petitioner appealed to the High Court.

Ashkanasy and *Smithers*, for the appellant. Whatever may be the onus of proof the trial judge should have found in favour of the petitioner. This court is in as good a position as the trial judge to determine what is the correct conclusion to be drawn from the evidence, because the trial judge said he could not draw any adverse inference in respect of any of the witnesses because of their demeanour. The trial judge said, if this had been a civil case he might have found the probabilities in favour of the petitioner, but that he was not satisfied beyond reasonable doubt. The standard of proof applied by the trial judge was incorrect. He should not have required to be satisfied beyond reasonable doubt. In divorce cases, even where the ground is adultery, the standard of proof required is the same as in civil cases, remembering always the gravity of the offence charged. The standard required in divorce cases is not proof beyond reasonable doubt. Secs. 80 and 86 of the *Marriage Act* 1928 only require the court to be " satisfied " that the case of the petitioner is established. The *Marriage Act* draws no distinction between proof of adultery and desertion. The test in criminal cases is stated by *Dixon* J. in *Sodeman* v. *The King* (1). The rule in ecclesiastical cases which required two or more witnesses has fallen into abeyance since the uncorroborated confession of a wife was accepted (*Williams*

(1) (1936) 55 C.L.R. 192, at p. 216.

H. C. OF A. 1938

BRIGINSHAW v. BRIGINSHAW.

v. *Williams and Padfield* (1)). In New South Wales the Supreme Court has held that adultery must be proved beyond reasonable doubt (*Godfrey* v. *Godfrey and Wilson* (2) ; *Tuckerman* v. *Tuckerman and Hogg* (3); *Doherty* v. *Doherty* (4)). The English cases are to the contrary. In *Statham* v. *Statham* (5) the stricter rule was applied in the proof of sodomy, but by implication the rule was restricted to such cases. In civil cases where proof of a crime is relevant, the civil standard of proof is applied (*Motchall* v. *Massoud* (6)). But adultery is not even a crime, though a presumption of innocence applies. In *Burrows* v. *The King* (7) the distinction was drawn between substantial doubt and reasonable doubt. In America the only requirement is a preponderance of evidence in favour of the proposition (*Wigmore* on *Evidence*, 2nd ed. (1923), vol. v., p. 473, par. 2498, (2) (1)). In England there is no decision that in cases of adultery proof must be beyond reasonable doubt. *Ross* v. *Ross* (8) was treated as a civil case so far as the onus of proof was concerned (See *Gaskill* v. *Gaskill* (9) ; *In the Estate of L.* (10)). The trial judge had it in his mind that the criminal onus was the one applicable to the present case. There are only two degrees of proof —proof on the balance of probabilities and proof beyond reasonable doubt. *Doherty* v. *Doherty* (4), *Godfrey* v. *Godfrey and Wilson* (2) and *Tuckerman* v. *Tuckerman and Hogg* (3) are inconsistent with the English decisions and were wrongly decided. In *Edmunds* v. *Edmunds and Ayscough* (11) *Lowe* J. regarded the distinction between proof beyond reasonable doubt and circumstances which lead to proof by fair inference as a necessary conclusion as more a matter of words than of substance. *Lange* v. *Lange and Thomas* (12) does not support the application of the criminal rule in cases of adultery. *Rayden and Mortimer* on *Divorce*, 3rd ed. (1932), p. 84, secs. 98-100, does not support a different standard of proof in cases of adultery, nor do the text-books on evidence such as *Phipson*, *Best*, *Stephen* and *Taylor* mention any such rule, and the absence of any mention of any such

(1) (1865) L.R. 1 P. & D. 29.
(2) (1907) 24 W.N. (N.S.W.) 57.
(3) (1932) 32 S.R. (N.S.W.) 220 ; 49 W.N. (N.S.W.) 59.
(4) (1934) 34 S.R. (N.S.W.) 290 ; 51 W.N. (N.S.W.) 89.
(5) (1929) P. 131.
(6) (1926) V.L.R. 273.
(7) (1937) 58 C.L.R. 249.
(8) (1930) A.C. 1.
(9) (1921) P. 425.
(10) (1919) V.L.R. 17 ; 40 A.L.T. 153.
(11) (1935) V.L.R. 177, at p. 183.
(12) (1923) S.A.S.R. 127.

rule is a strong ground for denying its existence. This court is in as good a position as the trial judge to determine this matter and should hold that adultery has been proved (*Scott* v. *Pauly* (1); *London Bank of Australia Ltd.* v. *Kendall* (2); *Kellway* v. *Kellway* (3)). [Counsel also referred to *Boileau* v. *Boileau* (4).]

Mark Lazarus and *Joan Rosanove*, for the respondent.

Mark Lazarus. The decision of the Supreme Court is substantially right even if the judge's wording is loose (*Dearman* v. *Dearman* (5)).

Joan Rosanove. The *Marriage Act* 1928, sec. 80, does not affect the standard of proof of adultery. The court must satisfy itself according to established principles. There is no difference between a preponderance of probability and proof beyond reasonable doubt. There is no evidence against the respondent that could lead to the conclusion that she has been guilty of adultery.

H. Woolf (with him *Adam*), for the co-respondent. The trial judge has not found that he is satisfied that the petitioner's story is true. He says that if it were a civil case he might well have found adultery proved, but he does not say that he would have done so even then. The relevant provisions are secs. 80 and 86 of the *Marriage Act* 1928. These sections simply require the court to be "satisfied" that the allegations have been established. The word "established" was first introduced in 1915. "Establish" means to place beyond dispute.

[LATHAM C.J. referred to *Gibbs* v. *Gibbs and Heathcote* (6).]

There is a common statutory basis in New South Wales and Victoria. There are three standards of proof, the criminal standard, the ordinary civil standard and the ecclesiastical standard. Either the criminal standard should be adopted or one not substantially different from it (*MacQueen* on *Husband and Wife*, 2nd ed. (1860),

(1) (1917) 24 C.L.R. 274, at p. 278.
(2) (1920) 28 C.L.R. 401, at p. 406.
(3) (1937) 58 C.L.R. 173, at p. 175.
(4) (1933) The *Herald* (Melbourne), 3rd October.
(5) (1908) 7 C.L.R. 549, at p. 553.
(6) (1920) 123 L.T. 206, at p. 208.

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pp. 202-205; *Edmunds* v. *Edmunds and Ayscough* (1); *Bishop* on *Marriage and Divorce* (1891), vol. 2, pp. 311, 312). Sec. 109 of the *Marriage Act* imports the ecclesiastical rules of proof in cases of judicial separation based on adultery, and it would be strange if there were a less stringent rule in suits for dissolution of marriage. *Tuckerman* v. *Tuckerman and Hogg* (2) is correct (*Halsbury's Laws of England*, 2nd ed., vol. 10, p. 660; *Allen* v. *Allen* (3)). The evidence in this case consists wholly of confessions, and confessional evidence is unsatisfactory (*Williams* v. *Williams and Padfield* (4); *Woolcott* v. *Woolcott* (5)). Kissing alone will not support an inference of adultery (*Lange* v. *Lange and Thomas* (6)). If there exists any reasonable doubt, the benefit of it should be given to the respondent. The trial judge was not satisfied either beyond reasonable doubt or at all. As to whether divorce proceedings are civil or quasi-criminal, see *Mordaunt* v. *Mordaunt* (7), and on appeal *sub nom. Mordaunt* v. *Moncreiffe* (8), and *Redfern* v. *Redfern* (9).

Smithers, in reply. The only interpretation that can be put upon the learned judge's words is that he said he had to be satisfied as to the higher standard of proof, but if the lower standard of proof applied he thought he would have been satisfied. Either he found that on the probabilities he was satisfied, or he did not find that, and in that event there must be a new trial. The probabilities are all in favour of the petitioner, and whatever is the degree of proof required the evidence was sufficient to satisfy it.

Cur. adv. vult.

June 30.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of *Martin* J. whereby the appellant husband's petition for divorce on the ground of adultery was dismissed. The appeal is based upon the following grounds: (1) That the learned judge wrongly decided

(1) (1935) V.L.R., at p. 183.
(2) (1932) 32 S.R. (N.S.W.), at pp. 231, 239.
(3) (1894) P. 248.
(4) (1865) L.R. 1 P. & D. 29.
(5) (1930) N.Z.L.R. 236, at pp. 227, 238.
(6) (1923) S.A.S.R. 127, at p. 129.
(7) (1870) L.R. 2 P. & D. 109, at pp. 121, 130, 131, 141, 142.
(8) (1874) L.R. 2 Sc. & Div. 374, at pp. 384, 393, 394.
(9) (1891) P. 139, at pp. 145, 149.

that he could not hold that adultery was proved unless he was satisfied of the fact of adultery beyond reasonable doubt; that is, that it was wrongly held that the criminal standard of proof should be applied in divorce proceedings, at least in relation to a charge of adultery; (2) that the reasons for judgment given by the learned judge showed that he was satisfied of the fact of adultery according to civil standards of proof, that is, upon a preponderance of probabilities, and that therefore the petition should have been granted; (3) alternatively, that upon the evidence the learned judge should have been so satisfied; (4) alternatively, a new trial is sought.

The question of the standard of proof required in order to establish adultery in divorce proceedings has been expressly considered in three cases in the Supreme Court of New South Wales. The cases are *Godfrey* v. *Godfrey* (1), *Tuckerman* v. *Tuckerman and Hogg* (2) and *Doherty* v. *Doherty* (3).

In the former two cases it was held that, in a suit for dissolution of marriage, a charge of adultery must be proved to the satisfaction of the judge or jury beyond reasonable doubt, and this principle was applied in the third case in relation to proceedings for variation of a maintenance order under the *Deserted Wives' and Children's Act* 1901. It is argued for the respondent that a charge of adultery should be treated in the same way as a criminal charge, and that this proposition is established by the principles applied in the ecclesiastical courts in relation to such charges.

The ecclesiastical courts had no jurisdiction to pronounce a decree of divorce *a vinculo*, but questions of adultery arose in suits for divorce *a mensa et thoro*, and in other courts in proceedings involving legitimacy of issue. In *Dillon* v. *Dillon* (4), which was a suit for divorce *a mensa et thoro*, Dr. *Lushington* said that where a charge of adultery was made against a wife the proceeding was in effect a criminal proceeding, and that, if there were any reasonable doubt, she was entitled to the benefit of it. He dismissed the suit because he was unable to say that the evidence was free from reasonable doubt. Dr. *Lushington*, however, described the case as "a case of

(1) (1907) 24 W.N. (N.S.W.) 57.
(2) (1932) 32 S.R. (N.S.W.) 220; 49 W.N. (N.S.W.) 59.
(3) (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.
(4) (1842) 3 Curt. 86; 163 E.R. 663.

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grave doubt" (1). Therefore, in this case, the question did not really arise as to any difference between civil and criminal standards of proof, although the language used tends rather towards the adoption of the criminal standard. In more recent times, after the *Matrimonial Causes Act* 1857, there is but little authority on the subject, and what there is is not very satisfactory in character. In *Allen* v. *Allen* (2) the Court of Appeal approved the words of Sir *William Scott* in *Loveden* v. *Loveden* (3): "In every case almost the fact" (of adultery) "is inferred from circumstances that lead to it by fair inference as a necessary conclusion." The judgment of the Court of Appeal proceeds:—"To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated" (4).

I am unable to regard either *Loveden* v. *Loveden* (3) or *Allen* v. *Allen* (2) as conclusive of the question which arises. In the first place, the phrase "circumstances which lead to it by fair inference as a necessary conclusion" is not very informative. The phrase combines in one sentence two quite different ideas. A "necessary conclusion" is one thing—a conclusion reached by what is generally described as "fair inference" is another thing. A "necessary conclusion" partakes of the character of a conclusion reached by mathematical demonstration. "Fair inference" is a phrase which is more properly descriptive of a process of thought leading to a

(1) (1842) 3 Curt., at p. 117; 163 E.R., at p. 674.
(2) (1894) P. 248.
(3) (1810) 2 Hag. Con. 1; 161 E.R. 648.
(4) (1894) P., at p. 252.

conclusion which, on the whole, is regarded as justifiable as a proper conclusion, but which cannot be said to be absolutely demonstrated. Further, the subsequent reference in *Allen* v. *Allen* (1) to "the infinite variety of circumstantial evidentiary facts" suggests reasonable inferences rather than "necessary conclusions" in such infinitely varying cases. The final advice that a jury should exercise its judgment "with caution, applying their knowledge of the world and of human nature to all the circumstances" is a statement which tends against the requirement that any conclusion should be a necessary conclusion in the ordinary logical sense. On the other hand, the question with which the quotation which I have made concludes, namely, whether the circumstances are capable of any other reasonable solution than that of guilt, is a statement which rather supports the applicability of the criminal standard of proof, which involves the exclusion of any other reasonable hypothesis than that of guilt (*Wills' Circumstantial Evidence*, 5th ed. (1902), p. 262). Thus, I am unable to regard *Allen* v. *Allen* (1) as decisive of the questions raised.

In the case of *Ross* v. *Ross* (2) there was a difference of opinion in the House of Lords upon an appeal on facts on the subject of adultery. None of the learned Lords, however, suggested that the rule of proof beyond reasonable doubt was applicable in such a case. The matter was determined in exactly the same way as any appeal in a civil case upon a question of fact would have been determined. But the question of the proper standard of proof was not raised, and the case can hardly be regarded as a decision upon that point.

There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal

(1) (1894) P. 248. (2) (1930) A.C. 1.

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will naturally vary in accordance with the seriousness or importance of the issue—See *Wills' Circumstantial Evidence* (1902), 5th ed., p. 267, note *n*: "Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same."

In criminal cases it has long been established that there must be a moral certainty of the guilt of the accused; the presumption of innocence must be definitely displaced either by direct evidence of facts which constitute the offence charged or by evidence from which the jury can draw an inference which satisfies the mind beyond reasonable doubt. The difference between the civil standard of proof and the criminal standard of proof has been examined and explained in this court in the case of *Brown* v. *The King* (1). Accordingly I am not prepared to adopt the view, which was suggested in argument, that the difference between the criminal and civil standards of proof is really only a matter of words.

What, then, is the rule to be applied to proof of adultery in proceedings for divorce? In the first place, I am of opinion that little attention should be paid to any decisions of the ecclesiastical courts upon such a matter and that they should not be accepted as binding. The jurisdiction in divorce, conferred in England by the *Matrimonial Causes Act* 1857, and in the various States of Australia by similar legislation, was a new jurisdiction. The ecclesiastical courts had never had power to pronounce a divorce *a vinculo*. Such a divorce could only be obtained by legislative procedure. The new legislation not only permitted divorce to be obtained by legal proceedings, but also gave persons a right to obtain a divorce if the conditions of the statute were satisfied. The legislation was strongly resented in many quarters. It was evidently feared by Parliament that the old rules of the ecclesiastical courts, belonging to an entirely different order of ideas, might be used so as to impede the exercise of the new jurisdiction and to deprive the public of its benefits. Accordingly, sec. 22 of the Act of 1857, while providing that in other matters the new court established by sec. 6 should proceed and act and give relief on principles and rules as nearly as might be

(1) (1913) 17 C.L.R. 570. See particularly at pp. 584 et seq. and pp. 595, 596.

conformable to those on which the ecclesiastical courts had theretofore acted and given relief, expressly excepted from this provision "proceedings to dissolve any marriage." The section corresponding to sec. 22 of the English Act is to be found in the Victorian *Marriage Act* 1928, sec. 109, and also in the New South Wales *Matrimonial Causes Act* 1899, sec. 5. Therefore, prima facie, any special principle according to which the ecclesiastical courts acted in relation to proof of adultery in proceedings for divorce *a mensa et thoro* or other proceedings is irrelevant and not applicable in proceedings for divorce *a vinculo* in the new jurisdiction.

Next, the House of Lords has stated in most explicit terms that the new jurisdiction is not a criminal jurisdiction and that it is to be exercised according to the provisions of the applicable statute and not in accordance with any analogy derived from the administration of the criminal law. In *Mordaunt* v. *Moncreiffe* (1) the House of Lords took the opinion of the judges with respect to the question of the power of the court to grant a decree of divorce where the respondent was insane. It was held that, by the law of England, "adultery, though a grievous sin, is not a crime; and the analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal" (Headnote). *Brett* J. regarded divorce proceedings as criminal in character, but Lord Chief Baron *Kelly*, *Denman* and *Pollock* BB. and *Keating* J. took the opposite view, being of opinion that divorce proceedings were civil in character. Lord *Chelmsford* said that it was unnecessary to consider whether proceedings for a divorce were of civil or quasi-criminal nature and that no aid to the consideration of the Act could be obtained from analogies applicable to cases of those different descriptions respectively. He said: "It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of a marriage for adultery, by the decree of a newly-created court of law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised" (2). Lord *Hatherley* said: "The procedure in divorce is not a criminal procedure" (3).

(1) (1874) L.R. 2 Sc. & Div. 374. (2) (1874) L.R. 2 Sc. & Div., at p. 384.
(3) (1874) L.R. 2 Sc. & Div., at p. 393.

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and, referring to the *Divorce Acts*, said: "Every enactment indicates an analogy to civil and not criminal process" (1).

Accordingly, in order to determine the principles regulating the standard of proof in the divorce court, it is necessary to go to the provisions of the statute, which in this case is the *Marriage Act* 1928. Sec. 80 of that Act is as follows: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged and also to inquire into any countercharge which may be made against the petitioner."

Sec. 86 is in the following terms: "Subject to the provisions of this Act the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage."

The phrase "it shall be the duty of the court to satisfy itself, so far as it reasonably can" is also used in sec. 81 with reference to a petitioner being accessory to or conniving at or condoning adultery. In secs. 82 and 83 the word "find" is used in relation to collusion and the other matters mentioned. In sec. 84 (1) it is provided that the court shall not be bound to pronounce a decree of dissolution of marriage if it "finds" that the petitioner has during the marriage been guilty of adultery. The same word is used in sec. 84 (2), but with reference to desertion.

The sections which are directly relevant to the present case are secs. 80 and 86. Sec. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce—adultery, desertion, &c. So far from the legislature having used the phrase "satisfy itself beyond reasonable doubt" or any similar phrase, the legislature has simply used the word "satisfy." It can be assumed that the legislature was aware of the difference between the civil standard of proof and the criminal standard of proof. It would not be a reasonable interpretation of sec. 80 to hold that the words "satisfy itself" meant "satisfy itself beyond reasonable doubt." But the actual phrase is not merely "satisfy itself" but "satisfy itself, so far as it reasonably can." The addition of the words "so far as it reasonably can" strongly supports the view that the legislature did not intend the court to reach that degree

(1) (1874) L.R. 2 Sc. & Div., at pp. 394, 395.

of moral certainty which is required in the proof of a criminal charge. The words are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words of description for the criminal standard of proof. In sec. 86 the words are simply: "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi." These words, like those in sec. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in the case of adultery, they also require that standard of proof in the case of desertion—a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings, subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established. This view is supported by the decision of this court in *Dearman* v. *Dearman* (1)—an appeal on facts in a divorce suit where adultery was the ground of the petition. *Barton* J. stated the rule which he applied in the following words: "Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery" (2). *Isaacs* J. adopted language from *Grant* v. *Grant* (3) as "an authoritative statement as to what is sufficient to establish the charge of adultery" (4): "The court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other" (5). Accordingly, I agree with the contention of the appellant that it is not the law that adultery in a divorce proceeding must be proved beyond reasonable doubt; that is, in my opinion, the criminal standard is not applicable in such a case.

It is next argued for the appellant that the learned judge stated in his reasons for judgment that, according to the civil standard of proof, he was satisfied that adultery had been committed. In my opinion the words of the learned judge will not bear this construction.

(1) (1908) 7 C.L.R. 549.
(2) (1908) 7 C.L.R., at p. 557.
(3) (1839) 2 Curt. 16; 163 E.R. 322.
(4) (1908) 7 C.L.R., at pp. 562, 563.
(5) (1839) 2 Curt., at p. 57; 163 E.R., at p. 336.

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The reasons for judgment show, in my opinion, that the learned judge was left in a state of complete uncertainty on the issue of adultery. He was not prepared to accept or to act upon the evidence of any witness in the case. His Honour said: "I have read the evidence several times, and the more I read it the more difficult the case seems." He then recited the evidence against the co-respondent. He said: "In fact all the witnesses gave their evidence well, and I could gather nothing adverse to them from their demeanour." Coming to the case against the respondent he recited the relevant evidence, referred to discrepancies, and said: "I am unable to draw any certain conclusions from the discrepancies." He added: "Then there is a total denial by the" wife "on oath, and there was nothing in her demeanour in the box to suggest that she was lying." The nearest approach to a definite finding of fact is the statement of his Honour that the account of a particular conversation given by the co-respondent was "the more feasible."

His Honour concluded his judgment by saying:—"I do not know what to believe. I have been very troubled." After a reference to a witness who was not called, the learned judge said:—"I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The appellant relied upon the statement, "If this were a civil case I might well consider that the probabilities were in favour of the petitioner." But this statement, in the whole of the context to which I have referred, cannot be regarded as a finding that the witnesses for the petitioner or any of them were to be accepted as having spoken the truth. I am unable to discover in the reasons for judgment any finding of any fact. It therefore cannot, in my opinion, be said that the learned judge has made findings upon which the petitioner is entitled to a decree.

It is then argued for the petitioner that, even if this be so, the learned judge should have been satisfied by the evidence for the petitioner that adultery had been committed, and emphasis is placed upon his Honour's statement that he could gather nothing adverse

to the witnesses from their demeanour. It is, therefore, urged that this court is in as good a position as the learned judge to determine all questions of fact and that it should accordingly do so. For myself, in the absence of any findings of fact by any tribunal I should be most reluctant, save in a quite exceptional case, to find any person guilty of adultery upon conflicting evidence of conversations (as in this case) when I could not see the parties and other witnesses who gave evidence. If one regards only the evidence given (there being no findings of fact based on that evidence), this is an ordinary case of a conflict of evidence, with probabilities and improbabilities on both sides. The learned judge has been unable to make up his mind on the issue of adultery. The petitioner carries the onus of persuading a judge to make up his mind in his favour. If he does not succeed in so persuading a judge, he fails in his petition and the matter is at an end.

There is, however, in my opinion, a special circumstance in this case which makes it proper that a new trial should be ordered. That special circumstance is to be found in the fact that the learned judge (in my opinion, wrongly) considered that he was bound to be satisfied of the fact of adultery beyond reasonable doubt, that is, according to the criminal standard of proof. He regarded the following statement at the end of his judgment as decisive of the case: "I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." Accordingly the learned judge did not actually consider the evidence according to the relevant and proper standard of proof. It is true that he says: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner." This statement is, however, discarded by the learned judge as irrelevant, and there is no actual decision according to the probabilities of the case. There ought to have been such a decision, with, as I have already stated, a realization of the serious nature of the charge made against the wife. His Honour limits himself to saying: "I might well consider." He did not actually direct his mind to a consideration of the evidence upon a proper basis. The petitioner is entitled to have his case considered and decided upon such a basis.

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I am, therefore, of opinion that there should be an order for a new trial.

RICH J. The divorce and matrimonial jurisdiction of the Supreme Court of Victoria depends upon legislation which substantially reproduces the English legislation of 1857-1858 (20 & 21 Vict. c. 85 and 21 & 22 Vict. c. 108). By sec. 80 of the *Marriage Act* 1928, which is taken from sec. 29 of the English Act it is provided that "upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged." 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 (*Mordaunt* v. *Moncreiffe* (1); *Branford* v. *Branford* (2); *Sims* v. *Sims* (3); *Tickner* v. *Tickner* [*No.* 2] (4)).

The appeal in the present case raises what is purely a question of fact. In deciding it *Martin* J. gave effect to the burden of proof and used expressions which are said to show that if he had not applied the criminal standard of proof he might or would have found that adultery had been proved. I do not think that this is a correct interpretation of his judgment. No doubt he demanded a high degree of certainty, and it is not surprising that the inclination of his mind was towards the view that the balance of probabilities made it

(1) (1874) L.R. 2 Sc. & Div. 374.
(2) (1879) 4 P.D. 72, at p. 73.
(3) (1878) 1 S.C.R. (N.S.) (N.S.W.) (D.) 1.
(4) (1937) N.Z.L.R. 802, at p. 805.

more likely than not that adultery had been committed. But I gather from his judgment that he did not feel reasonably satisfied that adultery had been committed, that he had no definite and clear opinion of the truth of the charge. We had the benefit of a full discussion of the evidence in the case, and I must acknowledge that my mind felt the full force of the considerations advanced by counsel for the appellant that as a court of appeal we should reverse the finding of fact. But, in spite of what *Martin* J. says about the demeanour of the witnesses, the personality and the characteristics of the parties and of the witnesses remain a very important factor in considering such a case as the present, depending, as it largely does, upon admissions alleged to have been made out of court and on admissions made in the witness-box. I have not been able on the mere printed record to satisfy myself that adultery was in fact committed.

STARKE J. This is an appeal on the part of a husband from a decision of the Supreme Court of Victoria dismissing his petition praying the dissolution of his marriage on the ground of the adultery of his wife.

The *Marriage Act* 1928 (Vict.) provides, in sec. 80, that upon any petition for the dissolution of marriage it shall be the duty of the court to satisfy itself so far as it reasonably can as to the facts alleged and, in sec. 86, that, subject to the provisions of the Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for the dissolution of marriage.

The trial judge examined the evidence given in the cause with some care and finally concluded :—" I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." One might think, on such a grave charge as adultery, that " no reasonable or just man " ought to infer guilt unless the evidence satisfied him beyond reasonable doubt of the truth of the charge. We, however, listened over two days to arguments directed to the point that the measure of proof

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required by the judge was too high and that he ought to have been satisfied on a balance or preponderance of probabilities. Even on the argument addressed to us the matter is one of degree: it depends upon "the strength of conviction that must be produced in the mind of the tribunal." Sir *James FitzJames Stephen*, referring to the rule that a criminal offence must be proved beyond all reasonable doubt, observes:—"The word 'reasonable' is indefinite, but a rule is not worthless because it is vague. Its real meaning, and I think its practical operation, is that it is an emphatic caution against haste in coming to a conclusion adverse to the prisoner" (*A General View of the Criminal Law of England*, 2nd ed. (1890), p. 183). Professor *Thayer* in his *Preliminary Treatise on Evidence* (1898), pp. 552 and 337, says: "In civil cases it is enough if the mere balance of probabilities is with the plaintiff but in criminal cases there must be a clear, heavy, emphatic preponderance." *Phipson* (*Evidence*, 7th ed. (1930), p. 11) states the proposition in a few words: "Civil cases may be proved by a preponderance of evidence; criminal charges must be proved beyond reasonable doubt." (See also *Motchall* v. *Massoud* (1).) The difference in measure has never been defined (*Sodeman* v. *The King* (2)).

Matrimonial causes are in their nature civil proceedings, but the method in which judges have from time to time dealt practically with the proof of adultery and other charges in matrimonial cases is instructive. In *Loveden* v. *Loveden* (3) Sir *William Scott* said:—"In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion." "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." In 1894 the Court of Appeal cites the case with approval (*Allen* v. *Allen* (4)). In 1842, in *Dillon* v. *Dillon* (5), Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence, perhaps, may preponderate in favour of the

(1) (1926) V.L.R. 273.
(2) (1936) 55 C.L.R., at p. 233.
(3) (1810) 2 Hag. Con., at pp 2, 3; 161 E.R., at pp. 648, 649.
(4) (1894) P., at p. 252.
(5) (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

husband, but I cannot say that it is free from reasonable doubt." It is strange to find so near a parallel in Dr. *Lushington's* language to that used by the judge in the present case.

Adultery was not indictable at common law, though it exposed the guilty party in other days to ecclesiastical censure and to penance. But Dr. *Lushington* regards the effect and not the actual character of the proceeding. In modern times we find the Lord Chancellor *Birkenhead* saying that an allegation of adultery is a serious allegation which must be strictly proved (*Gaskill* v. *Gaskill* (1)); and in a case praying a decree of nullity on the ground of impotency the Lord Chancellor stated that the petitioner must remove all reasonable doubt, "for the charge . . . is . . . a grave and wounding imputation" (*C.* v. *C.* (2)). Again, the Supreme Court of New South Wales invariably requires that a matrimonial offence be established beyond reasonable doubt (*Doherty* v. *Doherty* (3)). And in *Edmunds* v. *Edmunds and Ayscough* (4) *Lowe* J. made the common-sense observation that the distinction was "more a matter of words than of substance." (See also *Ross* v. *Ross* (5); *Statham* v. *Statham* (6).) The truth is that civil causes may, not must, be decided on a balance of probabilities. If the proof brings no strength of conviction to the mind of the tribunal or, what is much the same thing, does not satisfy the tribunal beyond reasonable doubt of the truth of the fact alleged, especially in the case of serious allegations such as adultery or fraud or crime, then the allegation remains unproved, or, to use the language of the *Marriage Act*, which is the test in this case, the court is not satisfied as to the facts alleged and the case for the petitioner is not established. But this was the position of the judge in the present case, though I do not understand why he did not keep to the words of the *Marriage Act*, especially as this court is so meticulous in its scrutiny of the language used in judgments and in charges to juries. Even if the probabilities of the case preponderated in favour of the petitioner's allegations, they brought no strength of conviction to the judge's mind and did not satisfy him beyond reasonable doubt of the truth of the allegation

(1) (1921) P. 425, at p. 431.
(2) (1921) P. 399, at p. 400.
(3) (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.
(4) (1935) V.L.R., at p. 183.
(5) (1930) A.C., at pp. 17, 23, 25.
(6) (1929) P. 131.

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of adultery. Consequently the court was not satisfied of the fact alleged or that the petitioner had established his case. Looking at the evidence printed in the transcript I am not surprised. Both the respondent and the co-respondent denied adultery on oath, and all that the petitioner relied upon was the evidence of paid agents of statements made by the respondents which were wholly denied by them in all essential matters. Such evidence does not necessarily lead the "guarded discretion of a reasonable and just man to the conclusion" that the adultery charged in this case is proved. And the appeal should be dismissed.

DIXON J. The decree from which this appeal is brought dismissed a husband's petition for dissolution of marriage on the ground of adultery.

At the time of the marriage, which took place in 1932, the husband was twenty-three years of age and the wife twenty-one. There are no children of the marriage. For three years husband and wife lived together in a flat. Then, in July 1935, the wife took up her residence in a boarding-house and the husband went to live with a relative. But the termination of their domestic relations seems to have been considered an appropriate occasion for establishing an association of a business nature. The husband and his father carried on a manufacturing business together, and the wife forthwith entered into their employment as a female clerk. She was paid an ordinary wage, but she also received a weekly allowance from her husband. After about six months the relation of employer and employee was found no more satisfactory than that of husband and wife and she left the service of the firm. Her allowance was increased somewhat, but in course of time her husband's payments became irregular. During the period from the end of January 1936, when the wife's employment in her husband's business ended, until April 1937, when she took up work at Devonport, Tasmania, their estrangement steadily increased. He made some complaint about the freedom of her conduct at the boarding-house; she resorted to the law to secure her maintenance. About the time of her departure for Tasmania, of which she did not inform her husband, she obtained

an order requiring him to pay a weekly sum of thirty-five shillings for her upkeep.

At Devonport she was employed as a hairdresser at a store. She lived at an hotel, under her maiden name, as an unmarried woman. Soon after her arrival she went out to some dances with other people staying at the hotel. At one of these, held on 19th June 1937, she met the co-respondent, and it is alleged that after the dance they committed adultery. The evidence relied upon to prove the fact consists of admissions said to have been made by the respondent and by the co-respondent, a bank clerk twenty-one years of age. *Martin* J., who heard the suit, decided the case entirely on the burden of proof, and dismissed the petition because he was not sufficiently satisfied of the adultery. The husband's appeal is based upon the contentions that the learned judge set too high a standard of proof or persuasion and that, in any case, the inference of adultery ought to be drawn from the evidence.

The version given by the respondent and co-respondent of the nature and extent of their relations makes a convenient starting point in the discussion of the evidence on which these contentions arise. According to their version, the respondent and co-respondent first met at a dance. They were introduced by a man living at the hotel in whose company she had come. During the evening this man got drunk. The co-respondent and a friend gave him some attention and resolved to take him home to his hotel. He had come in his car, and to take him home meant that the co-respondent should drive the car and its drunken owner to the hotel while the friend followed in his own car to bring the co-respondent back to the dance. The respondent appeared while they were still doctoring up the drunken man, and she offered to accompany them. When they got to the hotel their charge revived sufficiently to say that he would not spoil the night and to give the co-respondent the keys of his car. The respondent sat in the car while the two men put its owner to bed. Then she drove back with the co-respondent to the dance. It finished about midnight, and the co-respondent drove her home to the hotel, in front of which they sat in the car for about twenty minutes talking. He kissed her twice, but in his own phrase, " she did not appear very interested.

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She did not wait for more but got out and walked into her hotel." Except for passing one another in the street, they did not meet for about a month afterwards. Then, on 17th July, he took her in a car to another dance, from which he drove her home. On this occasion, before reaching the hotel, he stopped the car and put his arm around her and tried to kiss her. She objected. According to the co-respondent, she said: "I don't want you to kiss me, I have turned over a new leaf and I am going to live very quietly." So he drove her home and she went into her hotel.

Four days earlier two persons had come to Devonport for the purpose of obtaining evidence on behalf of her husband against the respondent. One of these, an inquiry agent, put up at the same hotel. Another, a young woman, said to be a friend of the petitioner's sister, had volunteered for the work. The respondent learned of their visit and its purpose, and it may have been for that reason that she said that she had turned over a new leaf. The professional inquiry agent apparently met with no success. But the amateur says she secured an admission or confession from the co-respondent. The petitioner obtained for her a letter of introduction to a resident of Launceston named Lamprill, who, in turn, introduced her to the co-respondent. The introduction took place on 22nd July 1937. Her mission was candidly stated to the latter at the outset. According to him, he lent his assistance by mentioning the names of three young men as having taken the respondent out and admittedly he gave an account of what took place between himself and the respondent on the nights of 19th June and 17th July 1937. He says that he gave the same version of what occurred as that already stated. But the young woman who received his confidence swore that his story went much further and included an unmistakable admission that, on the night of 19th June 1937, he had sexual intercourse with the respondent. On the following day, the young woman returned to Melbourne and reported the result of her inquiries. On 9th August 1937 she arrived back at Devonport accompanied by the petitioner and by another inquiry agent. Next day, she began work by inducing the co-respondent to meet the inquiry agent. The interview took place in a car standing in the street at about half-past four in the afternoon. If the evidence of the inquiry agent and his ally is to be believed, upon

the former's stating that he understood that the co-respondent had admitted to the latter his misconduct with the respondent, the co-respondent returned an answer which could hardly mean anything but that he had done so. He refused, however, to sign any statement. According to his version he said that there had never been any question of misconduct. His account of the interview leaves the impression that he was vainly pressed to make a full admission of adultery, preferably in writing, but that his refusal to do so was accompanied by no firm or explicit denial of the fact. Some time after the interview with the co-respondent had terminated, the inquiry agent brought the respondent to the car and in the presence of the petitioner embarked upon an interrogation or discussion of her relations with other men. This proceeding seems to have evoked no indignant remonstrance from the respondent, who as a preparation obtained her coat and went off with her husband and his inquiry agent to have tea at a restaurant. After the meal they returned to the car. There, according to her evidence, the inquiry agent requested her to sign a statement admitting adultery with the co-respondent. He said that the latter had admitted the adultery. He also said that no one but the judge would see her signature, that she could be identified by means of a photograph which he carried, that there would be no publicity and that her people would know nothing about it. She observed that her people had her full confidence. At the beginning she had said that she would sign nothing and that they could see her solicitor. As she left the car she says that she told them that she was innocent and did not intend to argue about the matter; she would see the co-respondent and find out why he had told lies and she would speak to her employer. The time was then a quarter to nine, and the inquiry agent said that, before leaving for Launceston, they would wait until ten o'clock to see if she changed her mind. She answered that it would make no difference, but, if it pleased them, she would see them again at that hour. This is her version of the interview.

A very different account of her conversations was given by the petitioner and the inquiry agent. The effect of it is that she was told by the latter that the co-respondent had informed them of the occurrences of the night of 19th June and had said that she had

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misconducted herself with him and the inquiry agent asked her to make a similar admission. The petitioner deposed that she replied that, if the co-respondent had admitted it, she would: the inquiry agent, that her reply was that, if the co-respondent had stated it, she would make a statement. Both agreed in attributing to her a request first to see the co-respondent and in saying that the purpose of the appointment at ten o'clock was for her to let them know what she would do. After leaving them she sought out the co-respondent, but they anticipated her and found him first. The inquiry agent told him of the impending visit of the respondent and, according to his own version, said:—"You know what you have stated regarding your conduct with her, and it is for you to judge what you will tell her. You are not compelled to make any explanation to her; but please yourself." According to the co-respondent, the inquiry agent told him that he would be worried by her and he wanted him to say that he had told the truth and nothing more. However, at this point, the respondent herself came up. She drew the co-respondent away, and the inquiry agent says that he overheard her ask what the co-respondent had told them; to which the latter answered that he had told them the truth. She said: "See what a mess you have got us into." He replied: "I did not know that you were married"; to which she said: "Even if you didn't, why should you talk about these things?"

Her version is that she said that she was sorry that she had got the co-respondent into the mess and that they said he had admitted adultery, which he denied. Before she parted with them she renewed her appointment for ten o'clock. At the time and place appointed, she told her husband and his inquiry agent that her employer had advised her to sign nothing. She appears also to have said something about a divorce in two year's time on the ground of desertion, and she said that she had not changed her mind and they could see her solicitor.

Evidence was given by an independent witness of a very direct and explicit admission of adultery made by the co-respondent about three weeks after the filing of the petition; but this was denied both by the co-respondent and another independent witness who had been present when it was said to have been made. Lamprill,

who had been responsible for the original introduction of the co-respondent to the young woman in whom he confided, was also present on the occasion of the last alleged admission. He was not called as a witness. Just before the hearing, the petitioner notified the co-respondent that the petitioner would not call him and the co-respondent said in his cross-examination that, on his side, his advisers did not think his presence was necessary as he was not mentioned in the affidavit in support of the petition.

In the course of reviewing the evidence, which I have summarized above, *Martin* J. said that all the witnesses gave their evidence well and that he could gather nothing adverse to them from their demeanour. He concluded his reasons for judgment thus :—"I do not know what to believe. I have been very much troubled. I think that Lamprill holds the key. It seems he may have held the pistol at both parties' heads. I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The view which his Honour has thus expressed places the appellant in an unusually favourable position in attacking what otherwise might have been regarded as a finding of fact upon which the opinion of the primary judge must prevail. For it not only excludes the demeanour of the witnesses as a source of enlightenment, but it suggests at least an inclination of mind towards the acceptance of the version of the facts supporting the appellant's case. At the same time, the learned judge, in expressing his want of certainty as the ultimate reason for his decision, adverts to a standard of persuasion the application of which to an issue of fact in a matrimonial cause is open to dispute. The case thus comes to depend in a great measure upon a proper understanding of the exact opinion which his Honour formed and of the degree to which his mind was affected by the strength of the petitioner's case. My own interpretation of what he said is that not only had the evidence fallen far short of satisfying his mind beyond reasonable doubt of the adultery alleged, but that he had not formed an actual belief that the adultery took place,

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although he thought that possibly he might consider that the probabilities disclosed by the evidence were greater in favour of that conclusion than against it.

At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded. The distinction obtained long before the publication in 1824 of *Starkie's Law of Evidence*; but the form in which the higher standard of persuasion is described is said to have been influenced by passages in that work. The learned author, who occupied the Downing Chair of Common Law, wrote:—"It is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case. Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable. Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact. The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt" (1st ed. (1824), pp. 450, 451; 4th ed. (1853), pp. 817, 818). When, however, he passes to the standard of proof in other cases, he describes it in less positive and definite terms (1st ed. (1824), p. 451; 4th ed. (1853), p. 818):—"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side

may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or prima-facie right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law." This mode of stating the rule for civil issues appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue. In the course of a discussion of the matter containing no less wisdom than learning, Professor *Wigmore* says:—"In *civil cases* it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a '*preponderance of evidence*' in favour of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases—'satisfied,' 'convinced,' and the like—have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial effort" (*Wigmore* on *Evidence*, 2nd ed. (1923), vol. v., sec. 2498). It is evident that Professor *Wigmore* countenances as much flexibility in the statement and application of the civil requirement as did Mr. *Starkie*. The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. 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

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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 "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus, *Mellish* L.J. says: "No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct" (*Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1)). In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, *Best* J. said: "I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall" (*R.* v. *Burdett* (2)). It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" (Cf. *Mowatt* v. *Blake* (3); *Kisch* v. *Central Railway Co. of Venezuela Ltd.* (4); *Lumley* v. *Desborough* (5)). This does not mean that some standard

(1) (1875) 10 Ch. App. 515, at p. 530.
(2) (1820) 4 B. & Ald. 95, at p. 123; 106 E.R. 873, at p. 884.
(3) (1858) 31 L.T. (O.S.) 387.
(4) (1865) 12 L.T. 295.
(5) (1870) 22 L.T. 597.

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 (*Doe d. Devine* v. *Wilson* (1); *Boyce* v. *Chapman* (2); *Vaughton* v. *London and North Western Railway Co.* (3); *Hurst* v. *Evans* (4); *Brown* v. *McGrath* (5); *Motchall* v. *Massoud* (6); *Nelson* v. *Mutton* (7); *Gerder* v. *Evans* (8); *sed quære* as to the statement of *Swift* J. in *Herbert* v. *Poland* (9); see, further, *Wigmore* on *Evidence*, 2nd ed. (1923), vol. v., p. 472, par. 2498 (2) (1)). But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

These illustrations show the good sense of Professor *Wigmore's* statement that, in civil cases, it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain.

But the development of the two standards of proof or persuasion is the work of the common law. In jurisdictions which do not derive from the common law there has been some uncertainty as to their recognition or adoption. In the ecclesiastical courts before the passing of the *Matrimonial Causes Act* 1857 no attempt had been made to define the degree of certainty which should be felt before finding a spouse guilty of adultery. But, as the issue in most cases depended upon circumstantial evidence and as the testimony was taken out of court, it was natural that the reasons given by the court for its decision in particular cases often should contain general observations as to the nature and amount of evidence required to justify a finding. Many expressions and statements of Lord *Stowell* upon the subject are reported. Thus:—" The court representing the law draws that

(1) (1855) 10 Moo. P.C.C. 502, at pp. 531, 532; 14 E.R. 581, at p. 592.
(2) (1835) 2 Bing. N.C. 222; 132 E.R. 87.
(3) (1874) L.R. 9 Ex. 93.
(4) (1917) 1 K.B. 352.
(5) (1920) S.A.L.R. 97.
(6) (1926) V.L.R. 273.
(7) (1934) 8 A.L.J. 30.
(8) (1933) 45 Ll. L. Rep. 308, at p. 311.
(9) (1932) 44 Ll. L. Rep. 139. at p. 142.

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inference which the proximate acts unavoidably lead to" (*Elwes* v. *Elwes* (1)). "It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed" (*Williams* v. *Williams* (2)). "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging of such things differently from what would strike the careful and cautious consideration of a discreet man" (*Loveden* v. *Loveden* (3)). "To prevent . . . the possibility of being misled by equivocal appearances, the court will always travel to this conclusion with every necessary caution; whilst, on the other hand, it will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof" (*Burgess* v. *Burgess* (4)).

The test formulated twenty years later by Sir *Herbert Jenner Fust* where the evidence was not direct differed only in expression: "It is not necessary to prove an act of adultery at any one particular time or place; but the court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other" (*Grant* v. *Grant* (5)). Up to that time no analogy appears to have been sought in criminal proceedings. But in *Dillon* v. *Dillon* (6) Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence perhaps may preponderate in favour of the

(1) (1796) 1 Hag. Con. 269, at p. 278; 161 E.R. 549, at p. 552.
(2) (1798) 1 Hag. Con. 299, at pp. 299, 300; 161 E.R., at p. 559.
(3) (1810) 2 Hag. Con., at p. 3; 161 E.R., at pp. 648, 649.
(4) (1817) 2 Hag. Con. 223, at p. 227; 161 E.R. 723, at p. 724.
(5) (1839) 2 Curt. 16, at p. 57; 163 E.R. 322, at p. 336.
(6) (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

husband, but I cannot say that it is free from reasonable doubt." Later in the same judgment he described the case as one " of great doubt." In *Davidson* v. *Davidson* (1) he referred to the presumption of adultery arising from proof of what he called a criminal intention and of opportunity, but added that the court required " to be satisfied that actually adultery has been committed." When Sir *Cresswell Cresswell* came in 1858 from the Common Pleas to the new Court of Divorce and Matrimonial Causes he seems to have been content to describe the standard of proof of adultery in the language ordinarily employed at nisi prius. For instance, in *Alexander* v. *Alexander* (2) he says :—" In deciding this question " (of adultery) " we must act upon the same principles as juries are directed to act upon in deciding similar cases. It is a well-known principle of our jurisprudence that the party who alleges misconduct against another is bound to establish such misconduct by affirmative evidence. Unless, therefore, it is proved to the satisfaction of the court, that the respondent has been guilty of the misconduct imputed to her, it is bound to dismiss the petition." In *Miller* v. *Miller* (3), in refusing to disturb a jury's finding against adultery the same learned judge said : " The petitioner was in this case, as in others, bound to prove the affirmative ; and if he failed to do so to the satisfaction of the jury, they were bound to find against him." In another such case—*Gethin* v. *Gethin* (4)—Sir *Cresswell Cresswell* upheld the finding on the view that the jury may have said : " We are not satisfied with the evidence ; we are left in such doubt that we feel we cannot safely draw the inference suggested, and therefore we find that the charge is not proved."

Putting aside the line of authorities which deal with the special question of confessional evidence, no further attempt to formulate or define the measure of proof of adultery appears to be reported until *Allen* v. *Allen* (5), when *Lopes* L.J., after setting out the statement of Lord *Stowell* in *Loveden* v. *Loveden* (6), dealt with proof by circumstantial evidence as follows :—" To lay down any general

(1) (1856) Dea. & Sw. 132, at p. 135 ; 164 E.R. 526, at p. 527.
(2) (1860) 2 Sw. & Tr. 95, at p. 101 ; 164 E.R. 928, at p. 931.
(3) (1862) 2 Sw. & Tr. 427, at p. 433 ; 164 E.R. 1062, at p. 1064.
(4) (1862) 2 Sw. & Tr. 560, at p. 563 ; 164 E.R. 1114, at p. 1116.
(5) (1894) P., at p. 252.
(6) (1810) 2 Hag. Con. 1 ; 161 E.R. 648.

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rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated." Lord *Stowell's* statement in *Loveden* v. *Loveden* (1) and the comments of *Lopes* L.J. were applied in *Woolf* v. *Woolf* (2). Apparently these passages adequately describe the nature and amount of proof of adultery required in England in ordinary daily practice. The language used by more than one of their Lordships in *Ross* v. *Ross* (3) shows, I think, that satisfaction beyond all reasonable doubt is not the criterion applied where proof of adultery depends on circumstances. For, if that had been the accepted test, it would indeed be strange if it were not applied or relied upon as part of the reasons for holding, as a majority of the House of Lords did, that the circumstances failed to establish guilt. So far from applying this standard, Lord *Buckmaster* first speaks of proof of adultery "as a matter of inference and circumstance" and then, in denying the sufficiency of the fact that the parties are thrown together in an environment which lends itself to the commission of the offence, states the necessary qualification thus: "Unless it can be shown . . . that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence" (4). Lord *Atkin*, alluding to the circumstances telling in favour of innocence, says simply: "Such a charge in such circumstances ought to be fully proved" (5). Lord *Thankerton* said: "Admittedly the respondent must prove facts which are not reasonably capable of an innocent construction" (6).

(1) (1810) 2 Hag. Con. 1; 161 E.R. 648.
(2) (1931) P. 134.
(3) (1930) A.C. 1.
(4) (1930) A.C., at p. 7.
(5) (1930) A.C., at p. 23.
(6) (1930) A.C., at p. 25.

Although confessional evidence has been the subject of special or independent treatment in the authorities, the result has been to establish no different measure of persuasion. Corroboration should be looked for, but "the true test seems to be whether the court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true" (per Sir *Samuel Evans* P., *Weinberg* v. *Weinberg* (1); cf. *Getty* v. *Getty* (2)).

There are, however, two English cases containing statements that particular issues should be proved in the matrimonial-causes jurisdiction beyond reasonable doubt. In *Statham* v. *Statham* (3) Lord *Hanworth* M.R. says that an allegation of sodomy should be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence. No such expression is used by the two Lords Justices. In *Gaskill* v. *Gaskill* (4) Lord *Birkenhead* applied to matrimonial causes the rule relating to legitimacy, namely, that to bastardize a child conceived and born during wedlock it is not enough to establish a mere preponderance of probability in favour of the inference that the husband did not beget the child; the presumption of legitimacy is not rebutted unless the proof excludes all reasonable doubt. The use of the phraseology of the criminal jurisdiction is due to Lord *Lyndhurst* in *Morris* v. *Davies* (5), a case the course of which is fully examined by *Cussen* J. in *In the Estate of L.* (6). *Cussen* J. concludes his consideration of the legitimacy rule by saying:—"The expression 'beyond reasonable doubt' recalls the ordinary direction in criminal cases that it is necessary that the jury should be satisfied of guilt beyond reasonable doubt before they disregard the primary presumption of innocence. It may be that the origin of the rules in cases like the present is that adultery was, and to a certain extent still is, regarded as an offence, and is not to be imputed on a mere balance of probabilities as in an ordinary civil case" (7). This does not appear to me necessarily to imply that his Honour considered that always and for all purposes adultery must be established beyond reasonable doubt. In New South

(1) (1910) 27 T.L.R. 9.
(2) (1907) P. 334.
(3) (1929) P., at p. 139.
(4) (1921) P., at pp. 432-434.
(5) (1837) 5 Cl. & Fin. 163, at p. 215; 7 E.R. 365, at p. 385.
(6) (1919) V.L.R., at p. 30; 40 A.L.T., at p. 159.
(7) (1919) V.L.R., at p. 36; 40 A.L.T., at p. 161.

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Wales, however, it has come to be the accepted rule that on a trial with a jury of a petition for dissolution on the ground of adultery the direction should be that the jury must be satisfied of adultery beyond reasonable doubt (See *Godfrey* v. *Godfrey* (1); *Tuckerman* v. *Tuckerman and Hogg* (2); *Doherty* v. *Doherty* (3)).

In *Edmunds* v. *Edmunds and Ayscough* (4) *Lowe* J., after referring to the rule adopted in New South Wales and comparing it with that expressed in *Allen* v. *Allen* (5), said, in effect, that the difference was only a matter of expression. No doubt in most cases the difference is of no importance whatever. For it must very rarely happen that a tribunal of fact, upon a careful scrutiny and critical examination of the circumstances proved in evidence or of the testimony adduced, forms a definite opinion that adultery has been committed and yet retains a doubt, based upon reasonable grounds, of the correctness of the opinion. For the very practical reason that the decision of cases has not been found to depend upon the distinction the necessity has not arisen in England of attempting to define with precision the measure or standard of persuasion required before adultery is found in a matrimonial cause. At the same time, I think that the foregoing discussion of the authorities makes it clear that in England the high degree of persuasion exacted in the criminal jurisdiction has not been adopted as the standard where adultery is in issue in the matrimonial jurisdiction. It is a common experience that in criminal matters the great certainty demanded has a most important influence upon the result. The distinction between that and a lower standard of persuasion cannot be considered unreal.

Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced,

(1) (1907) 24 W.N. (N.S.W.) 57.
(2) (1932) 32 S.R. (N.S.W.) 220; 49 W.N. (N.S.W.) 59.
(3) (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.
(4) (1935) V.L.R. 177.
(5) (1894) P. 248.

when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

This view of the law makes it necessary to return to the conclusion expressed by *Martin* J. If I thought that his Honour had formed a definite opinion that the respondent had committed adultery with the co-respondent, and had abstained from giving effect to his opinion because he applied the standard of persuasion appropriate to criminal cases, I should regard a rehearing as necessary. But, as in effect I have already said, I do not so interpret his reasons. Nor do I think that his Honour means to convey that he has not directed his mind to any other question than whether adultery was established beyond reasonable doubt. From the whole tenor of his reasons, I think that it clearly appears that his Honour found himself unable to arrive at any satisfactory or firm and definite conclusion that adultery had been committed although conceding that perhaps in the probabilities arising upon the evidence there was some preponderance of those for, over those against, such a conclusion. It follows that, in order to succeed upon this appeal, the petitioner must satisfy this court, either that the learned judge ought to have been satisfied of the adultery alleged or that his conclusion was determined by some mistake or error in his reasoning upon the facts. As for the first alternative, I must acknowledge that the respondent's and co-respondent's account of the matter, as recorded, has filled me with much misgiving, but I do not think that the materials warrant a court of appeal in finding affirmatively the adultery of which the trial judge was not satisfied.

As for the second alternative, his Honour's reasons were made the subject of criticisms of which two deserve express reference. It was said that one of the hypotheses mentioned by the learned judge as perhaps explaining the failure of the respondent to make an indignant denial of adultery was opposed to the evidence. He said that perhaps she was too thunderstruck to reply. This observation was nothing more than one of two suggestions as to why she did not behave as might have been expected *a priori*. It is not, I think, an essential step in the reasoning determining the conclusion.

The second of the two criticisms related to the failure of either party to call Lamprill. His Honour evidently desired to hear his

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evidence, which he felt might remove some of the difficulties presented by the case. It is said that the learned judge ought to have inferred that Lamprill would not support the co-respondent's case. Lamprill's evidence could not affect the respondent. But, in any case, I regard his Honour, not as drawing any inference adverse to the petitioner from his failure to call Lamprill, but simply as explaining that he felt that Lamprill was in a position to solve certain of the difficulties he felt. As they remained unsolved, he was unable to arrive at any affirmative conclusion.

In my opinion the appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

Martin J., in dismissing the petition, said: "I have done my best to decide, but the petitioner must satisfy me that his story is true." There his Honour professed to fulfil the duty, which is imposed on the court by secs. 80 and 86 of the Victorian *Marriage Act* 1928, to consider whether it was proved to his reasonable satisfaction that the petitioner's allegation of adultery was true. If his Honour had limited his observations to that statement, the contention would hardly have arisen that he misdirected himself as to the minimum of proof required to establish an allegation of adultery. That contention is based on the observations which follow. They were in these terms: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

It is contended, firstly, that it is apparent from these observations that the evidence did produce in the mind of the court such a degree of persuasion of the truth of the petitioner's allegations of adultery as to entitle him to a divorce; and, secondly, that the court did not find in his favour because it treated the allegations as allegations of a crime which the law required to be proved beyond a reasonable doubt. It would be quite contrary to settled principle to accede to the contention that the court ought to find that an allegation of adultery is established when the court thinks that it is more probable that adultery was committed than that it was not, and the court's state of persuasion rises no higher than that; and, regarding the second

contention, it is, I think, based on a misunderstanding of the learned judge's observations. It assumes that he treated the case as a criminal trial in which he was bound to apply the criminal standard of proof. But it is apprehended that the purpose of this observation was not to indicate that the trial was criminal as distinguished from civil but to indicate that it was not a case in which the mere preponderance of evidence would suffice to establish the petitioner's allegations of adultery. Indeed, it is well established that the procedure in divorce is not a criminal procedure (*Mordaunt* v. *Moncreiffe* (1); *Redfern* v. *Redfern* (2); *Branford* v. *Branford* (3)). It is not conceivable that his Honour laboured under the misconception which the leading case of *Mordaunt* v. *Moncreiffe* (1) long ago removed. But in referring to the case as one to be distinguished from a purely civil case, his Honour has the support of high authority. In *Mordaunt* v. *Moncreiffe* (4) Lord *Hatherley*, after saying that the procedure in divorce was not criminal procedure, added: "It is true that the consequences of a divorce may be far more severe than those in any *merely* civil suit, but it is consequentially only that this result takes place" (italics mine) (Cf. *In the Estate of L.* (5), per *Cussen* J.). Moreover, the *Rules of the Supreme Court* of Victoria do not include divorce and matrimonial causes within the classification of civil proceedings (*Rules of the Supreme Court* of Victoria, 1916, chapters I. and II.; see also Victorian *Supreme Court Act* 1928, secs. 15 and 19).

The contention that *Martin* J. ascribed the character of a criminal proceeding to the trial must fail. But do his observations show that he required an unduly strict standard of proof of the allegations? He declared that he was not satisfied beyond reasonable doubt. I agree with my brother *Rich* J. in the view that the validity of this direction depends on whether it departs from the standard of proof required by the Act. The Act does not expressly import the standard of proof applicable to a merely civil suit, that is, a preponderance of evidence. Nor does it import the criminal standard as such, that is, proof beyond reasonable doubt. The duty of the court in trying an issue of adultery is to consider whether it is satisfied that

(1) (1874) L.R. 2 Sc. & Div. 374.
(2) (1891) P. 139.
(3) (1879) 4 P.D. 72.
(4) (1874) L.R. 2 Sc. & Div., at p. 393.
(5) (1919) V.L.R., at p. 36; 40 A.L.T., at p. 161.

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the allegation is true. Strictness of proof is required generally in the matrimonial jurisdiction of the court. "Decrees of dissolution of marriage are to be made only upon strict proof" (*Russell* v. *Russell* (1), per Lord *Sumner*). English law adopts the reasonable rule that the strictness of the proof of an issue should be governed by the nature of the issue and its consequences. Lord *Brougham's* speech in defence of Queen Caroline describes an ascending scale of issues which illustrates this principle: "The evidence before us," he said, "is inadequate even to prove a debt, impotent to deprive of a civil right, ridiculous for convicting of the pettiest offence, scandalous if brought forward to support a charge of any grave character, monstrous if to ruin the honour of an English Queen." The law presumes against guilt of vice and immorality (*Best* on *Evidence* 2nd ed. (1855), pp. 309, 349). A learned authority says, however, that the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing (*Kenny, Outlines of Criminal Law*, 14th ed. (1933), p. 343). The proof of the issue of adultery involves the displacement of this presumption of innocence in favour of the person charged with serious misconduct. The presumption is not to be regarded as a weak one. The consequences of the proof of the charge include the dissolution of the marriage bond and the loss of status. The courts, therefore, in the exercise of their jurisdiction to grant a dissolution of marriage on the ground of adultery have adopted a standard proportionate to the gravity of the issue. The measure of proof necessary to satisfy the court has been described in this court in these terms:—"Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery. Mere suspicion is not enough. The view taken by his Honour that the case contained nothing stronger than suspicion was one that it was perfectly open to him to take on the evidence" (*Dearman* v. *Dearman* (2), per *Barton* J.). The strictness of proof required is illustrated by the attitude taken by the courts to admissions of adultery made by the accused spouse. In *Robinson* v. *Robinson and Lane* (3), which was decided in the first year of the operation

(1) (1924) A.C. 687, at p. 736.
(2) (1908) 7 C.L.R., at p. 557.
(3) (1858) 1 Sw. & Tr. 362; 164 E.R. 767.

of the English *Matrimonial Causes Act* 1857, it was decided that the admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided that the court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct and unequivocal admission of adultery (See also *Williams* v. *Williams and Padfield* (1) and *Read* v. *Read* (2)). The standard of proof which the courts require has been frequently explained. The following instance may be given. In *Allen* v. *Allen* (3) *Lopes* L.J., adopting the words of Sir *William Scott* in *Loveden* v. *Loveden* (4) said :—" It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time or place, because, to use the words of Sir *William Scott* in *Loveden* v. *Loveden* (5), ' if it were otherwise, there is not one case in a hundred in which that proof would be attainable : it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion ; and unless this were the case and unless this were so held, no protection whatever could be given to marital rights.' To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated."

It is not correct to say that the Act requires a charge of adultery to be proved with the same strictness as a grave charge of crime. But *Martin* J. did not adopt an erroneous standard. He declined to

(1) (1865) L.R. 1 P. & D. 29.
(2) (1905) V.L.R. 424 ; 27 A.L.T. 8.
(3) (1894) P., at pp. 251, 252.
(4) (1810) 2 Hag. Con., 1 ; 161 E.R. 648.
(5) (1810) 2 Hag. Con., at p. 2 ; 161 E.R., at p. 648.

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be satisfied that the allegation of adultery was established because he had a reasonable doubt. It is impossible to say that he ought to have felt that degree of satisfaction which the law requires the tribunal to have before finding a spouse guilty of adultery, while he was oppressed with a reasonable doubt.

We are asked to say that the learned judge was wrong in not finding the issue of adultery proved. The evidence has already been discussed in detail. The learned judge said that he could gather nothing adverse to any of the witnesses from their demeanour. The evidence affords ground for suspicion, but, in my opinion, the evidence is not such as should satisfy a reasonable mind that the petitioner's allegations of adultery are true.

Appeal dismissed with costs.

Solicitor for the appellant, *Dudley A. Tregent.*

Solicitor for the respondent, *Joan Rosanove.*

Solicitors for the co-respondent, *Rodda, Ballard & Vroland.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

HALL . . . . . APPELLANT;
PETITIONER,

AND

HALL . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *Aug.* 9, 31.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Divorce—Desertion—Continuance for statutory period—Intervening suit—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 13 (*a*).

A married person cannot by filing a petition for divorce terminate or suspend a period of desertion already commenced by that person, and the mere pendency of such a petition does not preclude the innocent spouse from presenting and maintaining a petition for divorce based on that desertion.

Gidley v. *Gidley*, (1926) 43 W.N. (N.S.W.) 191, and *Oxenham* v. *Oxenham*, (1931) 48 W.N. (N.S.W.) 168, overruled.

Fremlin v. *Fremlin*, (1913) 16 C.L.R. 212, at pp. 238, 239, discussed and explained.

Decision of the Supreme Court of New South Wales (*Edwards* A.J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A petition was filed on 1st December 1937, in the Supreme Court of New South Wales, by Weaver George Blythe Hall for the dissolution of his marriage with Muriel Joyce Hall on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted during three years and upwards. The wife did not defend the suit.

High Court of Australia

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Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)

HIGH COURT OF AUSTRALIA

Briginshaw Petitioner, Appellant; and Briginshaw and Another Respondent and Co-respondent, Respondents.

H C of A

On appeal from the Supreme Court of Victoria.

30 June 1938

Latham C.J., Rich, Starke, Dixon and McTiernan JJ

Ashkanasy and Smithers, for the appellant.

Mark Lazarus and Joan Rosanove, for the respondent.

H. Woolf (with him Adam), for the co-respondent.

Smithers, in reply.

The following written judgments were delivered:—

June 30

Latham C.J.

This is an appeal from a judgment of *Martin* J. whereby the appellant husband's petition for divorce on the ground of adultery was dismissed. The appeal is based upon the following grounds: (1) That the learned judge wrongly decided that he could not hold that adultery was proved unless he was satisfied of the fact of adultery beyond reasonable doubt; that is, that it was wrongly held that the criminal standard of proof should be applied in divorce proceedings, at least in relation to a charge of adultery; (2) that the reasons for judgment given by the learned judge showed that he was satisfied of the fact of adultery according to civil standards of proof, that is, upon a preponderance of probabilities, and that therefore the petition should have been granted; (3) alternatively, that upon the evidence the learned judge should have been so satisfied; (4) alternatively, a new trial is sought.

The question of the standard of proof required in order to establish adultery in divorce proceedings has been expressly considered in three cases in the Supreme Court of New South Wales. The cases are *Godfrey v. Godfrey*[1], *Tuckerman v. Tuckerman and Hogg*[2] and *Doherty v. Doherty*[3].

In the former two cases it was held that, in a suit for dissolution of marriage, a charge of adultery must be proved to the satisfaction of the judge or jury beyond reasonable doubt, and this principle was applied in the third case in relation to proceedings for variation of a maintenance order under the *Deserted Wives' and Children's Act 1901*. It is argued for the respondent that a charge of adultery should be treated in the same way as a criminal charge, and that this proposition is established by the principles applied in the ecclesiastical courts in relation to such charges.

The ecclesiastical courts had no jurisdiction to pronounce a decree of divorce *a vinculo*, but questions of adultery arose in suits for divorce *a mensa et thoro*, and in other courts in proceedings involving legitimacy of issue. In *Dillon v. Dillon*[4], which was a suit for divorce *a mensa et thoro*, Dr. *Lushington* said that where a charge of adultery was made against a wife the proceeding was in effect a criminal proceeding, and that, if there were any reasonable doubt, she was entitled to the benefit of it. He dismissed the suit because he was unable to say that the evidence was free from reasonable doubt. Dr. *Lushington*, however, described the case as "a case of grave doubt"[5]. Therefore, in this case, the question did not really arise as to any difference between civil and criminal standards of proof, although the language used tends rather towards the adoption of the criminal standard. In more recent times, after the *Matrimonial Causes Act 1857*, there is but little authority on the subject, and what there is is not very satisfactory in character. In *Allen v. Allen*[6] the Court of Appeal approved the words of Sir *William Scott* in *Loveden v. Loveden*[7]: "In every case almost the fact" (of adultery) "is inferred from circumstances that lead to it by fair inference as a necessary conclusion." The judgment of the Court of Appeal proceeds: —"To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated"[8].

I am unable to regard either *Loveden v. Loveden*[9] or *Allen v. Allen*[10] as conclusive of the question which arises. In the first place, the phrase "circumstances which lead to it by fair inference as a necessary conclusion" is not very informative. The phrase combines in one sentence two quite different ideas. A "necessary conclusion" is one thing—a conclusion reached by what is generally described as "fair inference" is another thing. A "necessary conclusion" partakes of the character of a conclusion reached by mathematical demonstration. "Fair inference" is a phrase which is more properly descriptive of a process of thought leading to a conclusion which, on the whole, is regarded as justifiable as a proper conclusion, but which cannot be said to be absolutely demonstrated. Further, the subsequent reference in *Allen v. Allen*[11] to "the infinite variety of circumstantial evidentiary facts" suggests reasonable inferences rather than "necessary conclusions" in such infinitely varying cases. The final advice that a jury should exercise its judgment "with caution, applying their knowledge of the world and of human nature to all the circumstances" is a statement which tends against the requirement that any conclusion should be a necessary conclusion in the ordinary logical sense. On the other hand, the question with which the quotation which I have made concludes, namely, whether the circumstances are capable of any other reasonable solution than that of guilt, is a statement which rather supports the applicability of the criminal standard of proof, which involves the exclusion of any other reasonable hypothesis than that of guilt (*Wills' Circumstantial Evidence*, 5th ed. (1902), p. 262). Thus, I am unable to regard *Allen v. Allen*[12] as decisive of the questions raised.

In the case of *Ross v. Ross*[13] there was a difference of opinion in the House of Lords upon an appeal on facts on the subject of adultery. None of the learned Lords, however, suggested that the rule of proof beyond reasonable doubt was applicable in such a case. The matter was determined in exactly the same way as any appeal in a civil case upon a question of fact would have been determined. But the question of the proper standard of proof was not raised, and the case can hardly be regarded as a decision upon that point.

There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue —See *Wills' Circumstantial Evidence* (1902), 5th ed., p. 267, note *n*: "Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same."

In criminal cases it has long been established that there must be a moral certainty of the guilt of the accused; the presumption of innocence must be definitely displaced either by direct evidence of facts which constitute the offence charged or by evidence from which the jury can draw an inference which satisfies the mind beyond reasonable doubt. The difference between the civil standard of proof and the criminal standard of proof has been examined and explained in this court in the case of *Brown v. The King*[14]. Accordingly I am not prepared to adopt the view, which was suggested in argument, that the difference between the criminal and civil standards of proof is really only a matter of words.

What, then, is the rule to be applied to proof of adultery in proceedings for divorce? In the first place, I am of opinion that little attention should be paid to any decisions of the ecclesiastical courts upon such a matter and that they should not be accepted as binding. The jurisdiction in divorce, conferred in England by the *Matrimonial Causes Act 1857*, and in the various States of Australia by similar legislation, was a new jurisdiction. The ecclesiastical courts had never had power to pronounce a divorce *a vinculo*. Such a divorce could only be obtained by legislative procedure. The new legislation not only permitted divorce to be obtained by legal proceedings, but also gave persons a right to obtain a divorce if the conditions of the statute were satisfied. The legislation was strongly resented in many quarters. It was evidently feared by Parliament that the old rules of the ecclesiastical courts, belonging to an entirely different order of ideas, might be used so as to impede the exercise of the new jurisdiction and to deprive the public of its benefits. Accordingly, sec. 22 of the Act of 1857, while providing that in other matters the new court established by sec. 6 should proceed and act and give relief on principles and rules as nearly as might be conformable to those on which the ecclesiastical courts had theretofore acted and given relief, expressly excepted from this provision "proceedings to dissolve any marriage." The section corresponding to sec. 22 of the English Act is to be found in the *Victorian* *Marriage Act 1928*, sec. 109, and also in the *New South Wales* *Matrimonial Causes Act 1899*, sec. 5. Therefore, prima facie, any special principle according to which the ecclesiastical courts acted in relation to proof of adultery in proceedings for divorce *a mensa et thoro* or other proceedings is irrelevant and not applicable in proceedings for divorce *a vinculo* in the new jurisdiction.

Next, the House of Lords has stated in most explicit terms that the new jurisdiction is not a criminal jurisdiction and that it is to be exercised according to the provisions of the applicable statute and not in accordance with any analogy derived from the administration of the criminal law. In *Mordaunt v. Moncreiffe*[15] the House of Lords took the opinion of the judges with respect to the question of the power of the court to grant a decree of divorce where the respondent was insane. It was held that, by the law of England, "adultery, though a grievous sin, is not a crime; and the analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal" (Headnote). *Brett* J. regarded divorce proceedings as criminal in character, but Lord Chief Baron *Kelly, Denman* and *Pollock* BB. and *Keating* J. took the opposite view, being of opinion that divorce proceedings were civil in character. Lord *Chelmsford* said that it was unnecessary to consider whether proceedings for a divorce were of civil or quasi-criminal nature and that no aid to the consideration of the Act could be obtained from analogies applicable to cases of those different descriptions respectively. He said: "It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of a marriage for adultery, by the decree of a newly-created court of law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised" [16]. Lord *Hatherley* said: "The procedure in divorce is not a criminal procedure"[17], and, referring to the *Divorce Acts*, said: "Every enactment indicates an analogy to civil and not criminal process"[18].

Accordingly, in order to determine the principles regulating the standard of proof in the divorce court, it is necessary to go to the provisions of the statute, which in this case is the *Marriage Act 1928*. Sec. 80 of that Act is as follows: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged and also to inquire into any countercharge which may be made against the petitioner."

Sec. 86 is in the following terms: "Subject to the provisions of this Act the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage."

The phrase "it shall be the duty of the court to satisfy itself, so far as it reasonably can" is also used in sec. 81 with reference to a petitioner being accessory to or conniving at or condoning adultery. In secs. 82 and 83 the word "find" is used in relation to collusion and the other matters mentioned. In sec. 84 (1) it is provided that the court shall not be bound to pronounce a decree of dissolution of marriage if it "finds" that the petitioner has during the marriage been guilty of adultery. The same word is used in sec. 84 (2), but with reference to desertion.

The sections which are directly relevant to the present case are secs. 80 and 86. Sec. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce—adultery, desertion, &c. So far from the legislature having used the phrase "satisfy itself beyond reasonable doubt" or any similar phrase, the legislature has simply used the word "satisfy." It can be assumed that the legislature was aware of the difference between the civil standard of proof and the criminal standard of proof. It would not be a reasonable interpretation of sec. 80 to hold that the words "satisfy itself" meant "satisfy itself beyond reasonable doubt." But the actual phrase is not merely "satisfy itself" but "satisfy itself, so far as it reasonably can." The addition of the words "so far as it reasonably can" strongly supports the view that the legislature did not intend the court to reach that degree of moral certainty which is required in the proof of a criminal charge. The words are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words

of description for the criminal standard of proof. In sec. 86 the words are simply: "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi." These words, like those in sec. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in the case of adultery, they also require that standard of proof in the case of desertion—a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings, subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established. This view is supported by the decision of this court in *Dearman v. Dearman*[19]—an appeal on facts in a divorce suit where adultery was the ground of the petition. *Barton* J. stated the rule which he applied in the following words: "Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery"[20]. *Isaacs* J. adopted language from *Grant v. Grant*[21] as "an authoritative statement as to what is sufficient to establish the charge of adultery"[22]: "The court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other"[23]. Accordingly, I agree with the contention of the appellant that it is not the law that adultery in a divorce proceeding must be proved beyond reasonable doubt; that is, in my opinion, the criminal standard is not applicable in such a case.

It is next argued for the appellant that the learned judge stated in his reasons for judgment that, according to the civil standard of proof, he was satisfied that adultery had been committed. In my opinion the words of the learned judge will not bear this construction. The reasons for judgment show, in my opinion, that the learned judge was left in a state of complete uncertainty on the issue of adultery. He was not prepared to accept or to act upon the evidence of any witness in the case. His Honour said: "I have read the evidence several times, and the more I read it the more difficult the case seems." He then recited the evidence against the co-respondent. He said: "In fact all the witnesses gave their evidence well, and I could gather nothing adverse to them from their demeanour." Coming to the case against the respondent he recited the relevant evidence, referred to discrepancies, and said: "I am unable to draw any certain conclusions from the discrepancies." He added: "Then there is a total denial by the" wife "on oath, and there was nothing in her demeanour in the box to suggest that she was lying." The nearest approach to a definite finding of fact is the statement of his Honour that the account of a particular conversation given by the co-respondent was "the more feasible."

His Honour concluded his judgment by saying:—"I do not know what to believe. I have been very troubled." After a reference to a witness who was not called, the learned judge said:—"I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The appellant relied upon the statement, "If this were a civil case I might well consider that the probabilities were in favour of the petitioner." But this statement, in the whole of the context to which I have referred, cannot be regarded as a finding that the witnesses for the petitioner or any of them were to be accepted as having spoken the truth. I am unable to discover in the reasons for judgment any finding of any fact. It therefore cannot, in my opinion, be said that the learned judge has made findings upon which the petitioner is entitled to a decree.

It is then argued for the petitioner that, even if this be so, the learned judge should have been satisfied by the evidence for the petitioner that adultery had been committed, and emphasis is placed upon his Honour's statement that he could gather nothing adverse to the witnesses from their demeanour. It is, therefore, urged that this court is in as good a position as the learned judge to determine all questions of fact and that it should accordingly do so. For myself, in the absence of any findings of fact by any tribunal I should be most reluctant, save in a quite exceptional case, to find any person guilty of adultery upon conflicting evidence of conversations (as in this case) when I could not see the parties and other witnesses who gave evidence. If one regards only the evidence given (there being no findings of fact based on that evidence), this is an ordinary case of a conflict of evidence, with probabilities and improbabilities on both sides. The learned judge has been unable to make up his mind on the issue of adultery. The petitioner carries the onus of persuading a judge to make up his mind in his favour. If he does not succeed in so persuading a judge, he fails in his petition and the matter is at an end.

There is, however, in my opinion, a special circumstance in this case which makes it proper that a new trial should be ordered. That special circumstance is to be found in the fact that the learned judge (in my opinion, wrongly) considered that he was bound to be satisfied of the fact of adultery beyond reasonable doubt, that is, according to the criminal standard of proof. He regarded the following statement at the end of his judgment as decisive of the case: "I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." Accordingly the learned judge did not actually consider the evidence according to the relevant and proper standard of proof. It is true that he says: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner." This statement is, however, discarded by the learned judge as irrelevant, and there is no actual decision according to the probabilities of the case. There ought to have been such a decision, with, as I have already stated, a realization of the serious nature of the charge made against the wife. His Honour limits himself to saying: "I might well consider." He did not actually direct his mind to a consideration of the evidence upon a proper basis. The petitioner is entitled to have his case considered and decided upon such a basis.

I am, therefore, of opinion that there should be an order for a new trial.

Rich J.

The divorce and matrimonial jurisdiction of the Supreme Court of Victoria depends upon legislation which substantially reproduces the English legislation of 1857-1858 (20 & 21 Vict. c. 85 and 21 & 22 Vict. c. 108). By sec. 80 of the *Marriage Act 1928*, which is taken from sec. 29 of the English Act it is provided that "upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged." 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 (*Mordaunt v. Moncreiffe*[24]; *Branford v. Branford*[25]; *Sims v. Sims*[26]; *Tickner v. Tickner [No. 2]*[27]).

The appeal in the present case raises what is purely a question of fact. In deciding it *Martin* J. gave effect to the burden of proof and used expressions which are said to show that if he had not applied the criminal standard of proof he might or would have found that adultery had been proved. I do not think that this is a correct interpretation of his judgment. No doubt he demanded a high degree of certainty, and it is not surprising that the inclination of his mind was towards the view that the balance of probabilities made it more likely than not that adultery had been committed. But I gather from his judgment that he did not feel reasonably satisfied that adultery had been committed, that he had no definite and clear opinion of the truth of the charge. We had the benefit of a full discussion of the evidence in the case, and I must acknowledge that my mind felt the full force of the considerations advanced by counsel for the appellant that as a court of appeal we should reverse the finding of fact. But, in spite of what *Martin* J. says about the demeanour of the witnesses, the personality and the characteristics of the parties and of the witnesses remain a very important factor in considering such a case as the present, depending, as it largely does, upon admissions alleged to have been made out of court and on admissions made in the witness-box. I have not been able on the mere printed record to satisfy myself that adultery was in fact committed.

Starke J.

This is an appeal on the part of a husband from a decision of the Supreme Court of Victoria dismissing his petition praying the dissolution of his marriage on the ground of the adultery of his wife.

The *Marriage Act 1928* Vict. provides, in sec. 80, that upon any petition for the dissolution of marriage it shall be the duty of the court to satisfy itself so far as it reasonably can as to the facts alleged and, in sec. 86, that, subject to the provisions of the Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for the dissolution of marriage.

The trial judge examined the evidence given in the cause with some care and finally concluded:—"I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." One might think, on such a grave charge as adultery, that "no reasonable or just man" ought to infer guilt unless the evidence satisfied him beyond reasonable doubt of the truth of the charge. We, however, listened over two days to arguments directed to the point that the measure of proof required by the judge was too high and that he ought to have been satisfied on a balance or preponderance of probabilities. Even on the argument addressed to us the matter is one of degree: it depends upon "the strength of conviction that must be produced in the mind of the tribunal." Sir *James FitzJames Stephen*, referring to the rule that a criminal offence must be proved beyond all reasonable doubt, observes:—"The word reasonable is indefinite, but a rule is not worthless because it is vague. Its real meaning, and I think its practical operation, is that it is an emphatic caution against haste in coming to a conclusion adverse to the prisoner" (*A General View of the Criminal Law of England*, 2nd ed. (1890), p. 183). Professor *Thayer* in his *Preliminary Treatise on Evidence* (1898), pp. 552 and 337, says: "In civil cases it is enough if the mere balance of probabilities is with the plaintiff but in criminal cases there must be a clear, heavy, emphatic preponderance." *Phipson* (*Evidence*, 7th ed. (1930), p. 11) states the proposition in a few words: "Civil cases may be proved by a preponderance of evidence; criminal charges must be proved beyond reasonable doubt." (See also *Motchall v. Massoud*[28].) The difference in measure has never been defined (*Sodeman v. The King*[29]).

Matrimonial causes are in their nature civil proceedings, but the method in which judges have from time to time dealt practically with the proof of adultery and other charges in matrimonial cases is instructive. In *Loveden v. Loveden*[30] Sir *William Scott* said:—"In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion." "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." In 1894 the Court of Appeal cites the case with approval (*Allen v. Allen*[31]). In 1842, in *Dillon v. Dillon*[32], Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence, perhaps, may preponderate in favour of the husband, but I cannot say that it is free from reasonable doubt." It is strange to find so near a parallel in Dr. *Lushington's* language to that used by the judge in the present case.

Adultery was not indictable at common law, though it exposed the guilty party in other days to ecclesiastical censure and to penance. But Dr. *Lushington* regards the effect and not the actual character of the proceeding. In modern times we find the Lord Chancellor *Birkenhead* saying that an allegation of adultery is a serious allegation which must be strictly proved (*Gaskill v. Gaskill*[33]); and in a case praying a decree of nullity on the ground of impotency the Lord Chancellor stated that the petitioner must remove all reasonable doubt, "for the charge ... is ... a grave and wounding imputation" (*C. v. C.*[34]). Again, the Supreme Court of New South Wales invariably requires that a matrimonial offence be established beyond reasonable doubt (*Doherty v. Doherty*[35]). And in *Edmunds v. Edmunds and Ayscough*[36] *Lowe* J. made the common-sense observation that the distinction was "more a matter of words than of substance." (See also *Ross v. Ross*[37]; *Statham v. Statham*[38].) The truth is that civil causes may, not must, be decided on a balance of probabilities. If the proof brings no strength of conviction to the mind of the tribunal or, what is much the same thing, does not satisfy the tribunal beyond reasonable doubt of the truth of the fact alleged, especially in the case of serious allegations such as adultery or fraud or crime, then the allegation remains unproved, or, to use the language of the *Marriage Act*, which is the test in this case, the court is not satisfied as to the facts alleged and the case for the petitioner is not established. But this was the position of the judge in the present case, though I do not understand why he did not keep to the words of the *Marriage Act*, especially as this court is so meticulous in its scrutiny of the language used in judgments and in charges to juries. Even if the probabilities of the case preponderated in favour of the petitioner's allegations, they brought no strength of conviction to the judge's mind and did not satisfy him beyond reasonable doubt of the truth of the allegation of adultery. Consequently the court was not satisfied of the fact alleged or that the petitioner had established his case. Looking at the evidence printed in the transcript I am not surprised. Both the respondent and the co-respondent denied adultery on oath, and all that the petitioner relied upon was the evidence of paid agents of statements made by the respondents which were wholly denied by them in all essential matters. Such evidence does not necessarily lead the "guarded discretion of a reasonable and just man to the conclusion" that the adultery charged in this case is proved. And the appeal should be dismissed.

Dixon J.

The decree from which this appeal is brought dismissed a husband's petition for dissolution of marriage on the ground of adultery.

At the time of the marriage, which took place in 1932, the husband was twenty-three years of age and the wife twenty-one. There are no children of the marriage. For three years husband and wife lived together in a flat. Then, in July 1935, the wife took up her residence in a boarding-house and the husband went to live with a relative. But the termination of their domestic relations seems to have been considered an appropriate occasion for establishing an association of a business nature. The husband and his father carried on a manufacturing business together, and the wife forthwith entered into their employment as a female clerk. She was paid an ordinary wage, but she also received a weekly allowance from her husband. After about six months the relation of employer and employee was found no more satisfactory than that of husband and wife and she left the service of the firm. Her allowance was increased somewhat, but in course of time her husband's payments became irregular. During the period from the end of January 1936, when the wife's employment in her husband's business ended, until April 1937, when she took up work at Devonport, Tasmania, their estrangement steadily increased. He made some complaint about the freedom of her conduct at the boarding-house; she resorted to the law to secure her maintenance. About the time of her departure for Tasmania, of which she did not inform her husband, she obtained an order requiring him to pay a weekly sum of thirty-five shillings for her upkeep.

At Devonport she was employed as a hairdresser at a store. She lived at an hotel, under her maiden name, as an unmarried woman. Soon after her arrival she went out to some dances with other people staying at the hotel. At one of these, held on 19th June 1937, she met the co-respondent, and it is alleged that after the dance they committed adultery. The evidence relied upon to prove the fact consists of admissions said to have been made by the respondent and by the co-respondent, a bank clerk twenty-one years of age. *Martin* J., who heard the suit, decided the case entirely on the burden of proof, and dismissed the petition because he was not sufficiently satisfied of the adultery. The husband's appeal is based upon the contentions that the learned judge set too high a standard of proof or persuasion and that, in any case, the inference of adultery ought to be drawn from the evidence.

The version given by the respondent and co-respondent of the nature and extent of their relations makes a convenient starting point in the discussion of the evidence on which these contentions arise. According to their version, the respondent and co-respondent first met at a dance. They were introduced by a man living at the hotel in whose company she had come. During the evening this man got drunk. The co-respondent and a friend gave him some attention and resolved to take him home to his hotel. He had come in his car, and to take him home meant that the co-respondent should drive the car and its drunken owner to the hotel while the friend followed in his own car to bring the co-respondent back to the dance. The respondent appeared while they were still doctoring up the drunken man, and she offered to accompany them. When they got to the hotel their charge revived sufficiently to say that he would not spoil the night and to give the co-respondent the keys of his car. The respondent sat in the car while the two men put its owner to bed. Then she drove back with the co-respondent to the dance. It finished about midnight, and the co-respondent drove her home to the hotel, in front of which they sat in the car for about twenty minutes talking. He kissed her twice, but in his own phrase, "she did not appear very interested. She did not wait for more but got out and walked into her hotel." Except for passing one another in the street, they did not meet for about a month afterwards. Then, on 17th July, he took her in a car to another dance, from which he drove her home. On this occasion, before reaching the hotel, he stopped the car and put his arm around her and tried to kiss her. She objected. According to the co-respondent, she said: "I don't want you to kiss me, I have turned over a new leaf and I am going to live very quietly." So he drove her home and she went into her hotel.

Four days earlier two persons had come to Devonport for the purpose of obtaining evidence on behalf of her husband against the respondent. One of these, an inquiry agent, put up at the same hotel. Another, a young woman, said to be a friend of the petitioner's sister, had volunteered for the work. The respondent learned of their visit and its purpose, and it may have been for that reason that she said that she had turned over a new leaf. The professional inquiry agent apparently met with no success. But the amateur says she secured an admission or confession from the co-respondent. The petitioner obtained for her a letter of introduction to a resident of Launceston named Lamprill, who, in turn, introduced her to the co-respondent. The introduction took place on 22nd July 1937. Her mission was candidly stated to the latter at the outset. According to him, he lent his assistance by mentioning the names of three young men as having taken the respondent out and admittedly he gave an account of what took place between himself and the respondent on the nights of 19th June and 17th July 1937. He says that he gave the same version of what occurred as that already stated. But the young woman who received his confidence swore that his story went much further and included an unmistakable admission that, on the night of 19th June 1937, he had sexual intercourse with the respondent. On the following day, the young woman returned to Melbourne and reported the result of her inquiries. On 9th August 1937 she arrived back at Devonport accompanied by the petitioner and by another inquiry agent. Next day, she began work by inducing the co-respondent to meet the inquiry agent. The interview took place in a car standing in the street at about half-past four in the afternoon. If the evidence of the inquiry agent and his ally is to be believed, upon the former's stating that he understood that the co-respondent had admitted to the latter his misconduct with the respondent, the co-respondent returned an answer which could hardly mean anything but that he had done so. He refused, however, to sign any statement. According to his version he said that there had never been any question of misconduct. His account of the interview leaves the impression that he was vainly pressed to make a full admission of adultery, preferably in writing, but that his refusal to do so was accompanied by no firm or explicit denial of the fact. Some time after the interview with the co-respondent had terminated, the inquiry agent brought the respondent to the car and in the presence of the petitioner embarked upon an interrogation or discussion of her relations with other men. This proceeding seems to have evoked no indignant remonstrance from the respondent, who as a preparation obtained her coat and went off with her husband and his inquiry agent to have tea at a restaurant. After the meal they returned to the car. There, according to her evidence, the inquiry agent requested her to sign a statement admitting adultery with the co-respondent. He said that the latter had admitted the adultery. He also said that no one but the judge would see her signature, that she could be identified by means of a photograph which he carried, that there would be no publicity and that her people would know nothing about it. She observed that her people had her full confidence. At the beginning she had said that she would sign nothing and that they could see her solicitor. As she left the car she says that she told them that she was innocent and did not intend to argue about the matter; she would see the co-respondent and find out why he had told lies and she would speak to her employer. The time was then a quarter to nine, and the inquiry agent said that, before leaving for Launceston, they would wait until ten o'clock to see if she changed her mind. She answered that it would make no difference, but, if it pleased them, she would see them again at that hour. This is her version of the interview.

A very different account of her conversations was given by the petitioner and the inquiry agent. The effect of it is that she was told by the latter that the co-respondent had informed them of the occurrences of the night of 19th June and had said that she had misconducted herself with him and the inquiry agent asked her to make a similar admission. The petitioner deposed that she replied that, if the co-respondent had admitted it, she would: the inquiry agent, that her reply was that, if the co-respondent had stated it, she would make a statement. Both agreed in attributing to her a request first to see the co-respondent and in saying that the purpose of the appointment at ten o'clock was for her to let them know what she would do. After leaving them she sought out the co-respondent, but they anticipated

her and found him first. The inquiry agent told him of the impending visit of the respondent and, according to his own version, said:—"You know what you have stated regarding your conduct with her, and it is for you to judge what you will tell her. You are not compelled to make any explanation to her; but please yourself." According to the co-respondent, the inquiry agent told him that he would be worried by her and he wanted him to say that he had told the truth and nothing more. However, at this point, the respondent herself came up. She drew the co-respondent away, and the inquiry agent says that he overheard her ask what the co-respondent had told them; to which the latter answered that he had told them the truth. She said: "See what a mess you have got us into." He replied: "I did not know that you were married"; to which she said: "Even if you didn't, why should you talk about these things?"

Her version is that she said that she was sorry that she had got the co-respondent into the mess and that they said he had admitted adultery, which he denied. Before she parted with them she renewed her appointment for ten o'clock. At the time and place appointed, she told her husband and his inquiry agent that her employer had advised her to sign nothing. She appears also to have said something about a divorce in two year's time on the ground of desertion, and she said that she had not changed her mind and they could see her solicitor.

Evidence was given by an independent witness of a very direct and explicit admission of adultery made by the co-respondent about three weeks after the filing of the petition; but this was denied both by the co-respondent and another independent witness who had been present when it was said to have been made. Lamprill, who had been responsible for the original introduction of the co-respondent to the young woman in whom he confided, was also present on the occasion of the last alleged admission. He was not called as a witness. Just before the hearing, the petitioner notified the co-respondent that the petitioner would not call him and the co-respondent said in his cross-examination that, on his side, his advisers did not think his presence was necessary as he was not mentioned in the affidavit in support of the petition.

In the course of reviewing the evidence, which I have summarized above, *Martin* J. said that all the witnesses gave their evidence well and that he could gather nothing adverse to them from their demeanour. He concluded his reasons for judgment thus:—"I do not know what to believe. I have been very much troubled. I think that Lamprill holds the key. It seems he may have held the pistol at both parties' heads. I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The view which his Honour has thus expressed places the appellant in an unusually favourable position in attacking what otherwise might have been regarded as a finding of fact upon which the opinion of the primary judge must prevail. For it not only excludes the demeanour of the witnesses as a source of enlightenment, but it suggests at least an inclination of mind towards the acceptance of the version of the facts supporting the appellant's case. At the same time, the learned judge, in expressing his want of certainty as the ultimate reason for his decision, adverts to a standard of persuasion the application of which to an issue of fact in a matrimonial cause is open to dispute. The case thus comes to depend in a great measure upon a proper understanding of the exact opinion which his Honour formed and of the degree to which his mind was affected by the strength of the petitioner's case. My own interpretation of what he said is that not only had the evidence fallen far short of satisfying his mind beyond reasonable doubt of the adultery alleged, but that he had not formed an actual belief that the adultery took place, although he thought that possibly he might consider that the probabilities disclosed by the evidence were greater in favour of that conclusion than against it.

At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded. The distinction obtained long before the publication in 1824 of *Starkie's Law of Evidence*; but the form in which the higher standard of persuasion is described is said to have been influenced by passages in that work. The learned author, who occupied the Downing Chair of Common Law, wrote:—"It is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case. Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable. Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact. The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt" (1st ed. (1824), pp. 450, 451; 4th ed. (1853), pp. 817, 818). When, however, he passes to the standard of proof in other cases, he describes it in less positive and definite terms (1st ed. (1824), p. 451; 4th ed. (1853), p. 818):—"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or prima-facie right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law." This mode of stating the rule for civil issues appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue. In the course of a discussion of the matter containing no less wisdom than learning, Professor *Wigmore* says:—"In civil cases it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a preponderance of evidence in favour of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases—satisfied, convinced, and the like—have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial effort" (*Wigmore* on *Evidence*, 2nd ed. (1923), vol. *v.*, sec. 2498). It is evident that Professor *Wigmore* countenances as much flexibility in the statement and application of the civil requirement as did Mr. *Starkie.* The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. 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 "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus, *Mellish* L.J. says: "No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct" (*Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha, and Telegraph Works Co.*[39]). In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, *Best* J. said: "I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall" (*R. v. Burdett*[40]). It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" (Cf. *Mowatt v. Blake*[41]; *Kisch v. Central Railway Co. of Venezuela Ltd.*[42]; *Lumley v. Desborough*[43]). 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 (*Doe d. Devine v. Wilson*[44]; *Boyce v. Chapman*[45]; *Vaughton v. London and North Western Railway Co.*[46]; *Hurst v. Evans*[47]; *Brown v. McGrath*[48]; *Motchall v. Massoud*[49]; *Nelson v. Mutton*[50]; *Gerder v. Evans*[51]; *sed quœre* as to the statement of *Swift* J. in *Herbert v. Poland*[52]; see, further, *Wigmore* on *Evidence*, 2nd ed. (1923), vol. *v.*, p. 472, par. 2498 (2) (1)). But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

These illustrations show the good sense of Professor *Wigmore's* statement that, in civil cases, it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain.

But the development of the two standards of proof or persuasion is the work of the common law. In jurisdictions which do not derive from the common law there has been some uncertainty as to their recognition or adoption. In the ecclesiastical courts before the passing of the *Matrimonial Causes Act 1857* no attempt had been made to define the degree of certainty which should be felt before finding a spouse guilty of adultery. But, as the issue in most cases depended upon circumstantial evidence and as the testimony was taken out of court, it was natural that the reasons given by the court for its decision in particular cases often should contain general observations as to the nature and amount of evidence required to justify a finding. Many expressions and statements of Lord *Stowell* upon the subject are reported. Thus:—"The court representing the law draws that inference which the proximate acts unavoidably lead to" (*Elwes v. Elwes*[53]). "It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed" (*Williams v. Williams*[54]). "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging of such things differently from what would strike the careful and cautious consideration of a discreet man" (*Loveden v. Loveden*[55]). "To prevent ... the possibility of being misled by equivocal appearances, the court will always travel to this conclusion with every necessary caution; whilst, on the other hand, it will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof" (*Burgess v. Burgess*[56]).

The test formulated twenty years later by Sir *Herbert Jenner Fust* where the evidence was not direct differed only in expression: "It is not necessary to prove an act of adultery at any one particular time or place; but the court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other" (*Grant v. Grant*[57]). Up to that time no analogy appears to have been sought in criminal proceedings. But in *Dillon v. Dillon*[58] Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence perhaps may preponderate in favour of the husband, but I cannot say that it is free from reasonable doubt." Later in the same judgment he described the case as one "of great doubt." In *Davidson v. Davidson*[59] he referred to the presumption of adultery arising from proof of what he called a criminal intention and of opportunity, but added that the court required "to be satisfied that actually adultery has been committed." When Sir *Cresswell Cresswell* came in 1858 from the Common Pleas to the new Court of Divorce and Matrimonial Causes he seems to have been content to describe the standard of proof of adultery in the language ordinarily employed at nisi prius. For instance, in *Alexander v. Alexander*[60] he says:—"In deciding this question" (of adultery) "we must act upon the same principles as juries are directed to act upon in deciding similar cases. It is a well-known principle of our jurisprudence that the party who alleges misconduct against another is bound to establish such misconduct by affirmative evidence. Unless, therefore, it is proved to the satisfaction of the court, that the respondent has been guilty of the misconduct imputed to her, it is bound to dismiss the petition." In *Miller v. Miller*[61], in refusing to disturb a jury's finding against adultery the same learned judge said: "The petitioner was in this case, as in others, bound to prove the affirmative; and if he failed to do so to the satisfaction of the jury, they were bound to find against him." In another such case—*Gethin v. Gethin*[62]—Sir *Cresswell Cresswell* upheld the finding on the view that the jury may have said: "We are not satisfied with the evidence; we are left in such doubt that we feel we cannot safely draw the inference suggested, and therefore we find that the charge is not proved."

Putting aside the line of authorities which deal with the special question of confessional evidence, no further attempt to formulate or define the measure of proof of adultery appears to be reported until *Allen v. Allen*[63], when *Lopes* L.J., after setting out the statement of Lord *Stowell* in *Loveden v. Loveden*[64], dealt with proof by circumstantial evidence as follows:—"To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial

evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated." Lord *Stowell's* statement in *Loveden v. Loveden*[65] and the comments of *Lopes* L.J. were applied in *Woolf v. Woolf*[66]. Apparently these passages adequately describe the nature and amount of proof of adultery required in England in ordinary daily practice. The language used by more than one of their Lordships in *Ross v. Ross*[67] shows, I think, that satisfaction beyond all reasonable doubt is not the criterion applied where proof of adultery depends on circumstances. For, if that had been the accepted test, it would indeed be strange if it were not applied or relied upon as part of the reasons for holding, as a majority of the House of Lords did, that the circumstances failed to establish guilt. So far from applying this standard, Lord *Buckmaster* first speaks of proof of adultery "as a matter of inference and circumstance" and then, in denying the sufficiency of the fact that the parties are thrown together in an environment which lends itself to the commission of the offence, states the necessary qualification thus: "Unless it can be shown ... that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence"[68]. Lord *Atkin*, alluding to the circumstances telling in favour of innocence, says simply: "Such a charge in such circumstances ought to be fully proved"[69]. Lord *Thankerton* said: "Admittedly the respondent must prove facts which are not reasonably capable of an innocent construction"[70].

Although confessional evidence has been the subject of special or independent treatment in the authorities, the result has been to establish no different measure of persuasion. Corroboration should be looked for, but "the true test seems to be whether the court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true" (per Sir *Samuel Evans* P., *Weinberg v. Weinberg*[71]; cf. *Getty v. Getty*[72]).

There are, however, two English cases containing statements that particular issues should be proved in the matrimonial-causes jurisdiction beyond reasonable doubt. In *Statham v. Statham*[73] Lord *Hanworth* M.R. says that an allegation of sodomy should be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence. No such expression is used by the two Lords Justices. In *Gaskill v. Gaskill*[74] Lord *Birkenhead* applied to matrimonial causes the rule relating to legitimacy, namely, that to bastardize a child conceived and born during wedlock it is not enough to establish a mere preponderance of probability in favour of the inference that the husband did not beget the child; the presumption of legitimacy is not rebutted unless the proof excludes all reasonable doubt. The use of the phraseology of the criminal jurisdiction is due to Lord *Lyndhurst* in *Morris v. Davies*[75], a case the course of which is fully examined by *Cussen* J. in *In the Estate of L.*[76]. *Cussen* J. concludes his consideration of the legitimacy rule by saying:—"The expression beyond reasonable doubt recalls the ordinary direction in criminal cases that it is necessary that the jury should be satisfied of guilt beyond reasonable doubt before they disregard the primary presumption of innocence. It may be that the origin of the rules in cases like the present is that adultery was, and to a certain extent still is, regarded as an offence, and is not to be imputed on a mere balance of probabilities as in an ordinary civil case"[77]. This does not appear to me necessarily to imply that his Honour considered that always and for all purposes adultery must be established beyond reasonable doubt. In New South Wales, however, it has come to be the accepted rule that on a trial with a jury of a petition for dissolution on the ground of adultery the direction should be that the jury must be satisfied of adultery beyond reasonable doubt (See *Godfrey v. Godfrey*[78]; *Tuckerman v. Tuckerman and Hogg*[79]; *Doherty v. Doherty*[80]).

In *Edmunds v. Edmunds and Ayscough*[81] *Lowe* J., after referring to the rule adopted in New South Wales and comparing it with that expressed in *Allen v. Allen*[82], said, in effect, that the difference was only a matter of expression. No doubt in most cases the difference is of no importance whatever. For it must very rarely happen that a tribunal of fact, upon a careful scrutiny and critical examination of the circumstances proved in evidence or of the testimony adduced, forms a definite opinion that adultery has been committed and yet retains a doubt, based upon reasonable grounds, of the correctness of the opinion. For the very practical reason that the decision of cases has not been found to depend upon the distinction the necessity has not arisen in England of attempting to define with precision the measure or standard of persuasion required before adultery is found in a matrimonial cause. At the same time, I think that the foregoing discussion of the authorities makes it clear that in England the high degree of persuasion exacted in the criminal jurisdiction has not been adopted as the standard where adultery is in issue in the matrimonial jurisdiction. It is a common experience that in criminal matters the great certainty demanded has a most important influence upon the result. The distinction between that and a lower standard of persuasion cannot be considered unreal.

Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

This view of the law makes it necessary to return to the conclusion expressed by *Martin* J. If I thought that his Honour had formed a definite opinion that the respondent had committed adultery with the co-respondent, and had abstained from giving effect to his opinion because he applied the standard of persuasion appropriate to criminal cases, I should regard a rehearing as necessary. But, as in effect I have already said, I do not so interpret his reasons. Nor do I think that his Honour means to convey that he has not directed his mind to any other question than whether adultery was established beyond reasonable doubt. From the whole tenor of his reasons, I think that it clearly appears that his Honour found himself unable to arrive at any satisfactory or firm and definite conclusion that adultery had been committed although conceding that perhaps in the probabilities arising upon the evidence there was some preponderance of those for, over those against, such a conclusion. It follows that, in order to succeed upon this appeal, the petitioner must satisfy this court, either that the learned judge ought to have been satisfied of the adultery alleged or that his conclusion was determined by some mistake or error in his reasoning upon the facts. As for the first alternative, I must acknowledge that the respondent's and co-respondent's account of the matter, as recorded, has filled me with much misgiving, but I do not think that the materials warrant a court of appeal in finding affirmatively the adultery of which the trial judge was not satisfied.

As for the second alternative, his Honour's reasons were made the subject of criticisms of which two deserve express reference. It was said that one of the hypotheses mentioned by the learned judge as perhaps explaining the failure of the respondent to make an indignant denial of adultery was opposed to the evidence. He said that perhaps she was too thunderstruck to reply. This observation was nothing

more than one of two suggestions as to why she did not behave as might have been expected *a priori*. It is not, I think, an essential step in the reasoning determining the conclusion.

The second of the two criticisms related to the failure of either party to call Lamprill. His Honour evidently desired to hear his evidence, which he felt might remove some of the difficulties presented by the case. It is said that the learned judge ought to have inferred that Lamprill would not support the co-respondent's case. Lamprill's evidence could not affect the respondent. But, in any case, I regard his Honour, not as drawing any inference adverse to the petitioner from his failure to call Lamprill, but simply as explaining that he felt that Lamprill was in a position to solve certain of the difficulties he felt. As they remained unsolved, he was unable to arrive at any affirmative conclusion.

In my opinion the appeal should be dismissed.

McTiernan J.

In my opinion the appeal should be dismissed.

Martin J., in dismissing the petition, said: "I have done my best to decide, but the petitioner must satisfy me that his story is true." There his Honour professed to fulfil the duty, which is imposed on the court by secs. 80 and 86 of the *Victorian Marriage Act 1928*, to consider whether it was proved to his reasonable satisfaction that the petitioner's allegation of adultery was true. If his Honour had limited his observations to that statement, the contention would hardly have arisen that he misdirected himself as to the minimum of proof required to establish an allegation of adultery. That contention is based on the observations which follow. They were in these terms: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

It is contended, firstly, that it is apparent from these observations that the evidence did produce in the mind of the court such a degree of persuasion of the truth of the petitioner's allegations of adultery as to entitle him to a divorce; and, secondly, that the court did not find in his favour because it treated the allegations as allegations of a crime which the law required to be proved beyond a reasonable doubt. It would be quite contrary to settled principle to accede to the contention that the court ought to find that an allegation of adultery is established when the court thinks that it is more probable that adultery was committed than that it was not, and the court's state of persuasion rises no higher than that; and, regarding the second contention, it is, I think, based on a misunderstanding of the learned judge's observations. It assumes that he treated the case as a criminal trial in which he was bound to apply the criminal standard of proof. But it is apprehended that the purpose of this observation was not to indicate that the trial was criminal as distinguished from civil but to indicate that it was not a case in which the mere preponderance of evidence would suffice to establish the petitioner's allegations of adultery. Indeed, it is well established that the procedure in divorce is not a criminal procedure (*Mordaunt v. Moncreiffe*[83]; *Redfern v. Redfern*[84]; *Branford v. Branford*[85]). It is not conceivable that his Honour laboured under the misconception which the leading case of *Mordaunt v. Moncreiffe*[86] long ago removed. But in referring to the case as one to be distinguished from a purely civil case, his Honour has the support of high authority. In *Mordaunt v. Moncreiffe*[87] Lord *Hatherley*, after saying that the procedure in divorce was not criminal procedure, added: "It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place" (italics mine) (Cf. *In the Estate of L.*[88], per *Cussen* J.). Moreover, the *Rules of the Supreme Court* of Victoria do not include divorce and matrimonial causes within the classification of civil proceedings (*Rules of the Supreme Court* of Victoria, 1916, chapters I. and II.; see also *Victorian Supreme Court Act 1928*, secs. 15 and 19).

The contention that *Martin* J. ascribed the character of a criminal proceeding to the trial must fail. But do his observations show that he required an unduly strict standard of proof of the allegations? He declared that he was not satisfied beyond reasonable doubt. I agree with my brother *Rich* J. in the view that the validity of this direction depends on whether it departs from the standard of proof required by the Act. The Act does not expressly import the standard of proof applicable to a merely civil suit, that is, a preponderance of evidence. Nor does it import the criminal standard as such, that is, proof beyond reasonable doubt. The duty of the court in trying an issue of adultery is to consider whether it is satisfied that the allegation is true. Strictness of proof is required generally in the matrimonial jurisdiction of the court. "Decrees of dissolution of marriage are to be made only upon strict proof" (*Russell v. Russell*[89], per Lord *Sumner*). English law adopts the reasonable rule that the strictness of the proof of an issue should be governed by the nature of the issue and its consequences. Lord *Brougham's* speech in defence of Queen Caroline describes an ascending scale of issues which illustrates this principle: "The evidence before us," he said, "is inadequate even to prove a debt, impotent to deprive of a civil right, ridiculous for convicting of the pettiest offence, scandalous if brought forward to support a charge of any grave character, monstrous if to ruin the honour of an English Queen." The law presumes against guilt of vice and immorality (*Best* on *Evidence* 2nd ed. (1855), pp. 309, 349). A learned authority says, however, that the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing (*Kenny*, *Outlines of Criminal Law*, 14th ed. (1933), p. 343). The proof of the issue of adultery involves the displacement of this presumption of innocence in favour of the person charged with serious misconduct. The presumption is not to be regarded as a weak one. The consequences of the proof of the charge include the dissolution of the marriage bond and the loss of status. The courts, therefore, in the exercise of their jurisdiction to grant a dissolution of marriage on the ground of adultery have adopted a standard proportionate to the gravity of the issue. The measure of proof necessary to satisfy the court has been described in this court in these terms:—"Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery. Mere suspicion is not enough. The view taken by his Honour that the case contained nothing stronger than suspicion was one that it was perfectly open to him to take on the evidence" (*Dearman v. Dearman*[90], per *Barton* J.). The strictness of proof required is illustrated by the attitude taken by the courts to admissions of adultery made by the accused spouse. In *Robinson v. Robinson and Lane*[91], which was decided in the first year of the operation of the English *Matrimonial Causes Act 1857*, it was decided that the admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided that the court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct and unequivocal admission of adultery (See also *Williams v. Williams and Padfield*[92] and *Read v. Read*[93]). The standard of proof which the courts require has been frequently explained. The following instance may be given. In *Allen v. Allen*[94] *Lopes* L.J., adopting the words of Sir *William Scott* in *Loveden v. Loveden*[95] said:—"It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time or place, because, to use the words of Sir William Scott in Loveden v. Loveden5(1810) 2 Hag. Con., at p. 2; 161 E.R., at p. 648., if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from

circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case and unless this were so held, no protection whatever could be given to marital rights. To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated."

It is not correct to say that the Act requires a charge of adultery to be proved with the same strictness as a grave charge of crime. But *Martin* J. did not adopt an erroneous standard. He declined to be satisfied that the allegation of adultery was established because he had a reasonable doubt. It is impossible to say that he ought to have felt that degree of satisfaction which the law requires the tribunal to have before finding a spouse guilty of adultery, while he was oppressed with a reasonable doubt.

We are asked to say that the learned judge was wrong in not finding the issue of adultery proved. The evidence has already been discussed in detail. The learned judge said that he could gather nothing adverse to any of the witnesses from their demeanour. The evidence affords ground for suspicion, but, in my opinion, the evidence is not such as should satisfy a reasonable mind that the petitioner's allegations of adultery are true.

Appeal dismissed with costs.

Solicitor for the appellant, Dudley A. Tregent.

Solicitor for the respondent, Joan Rosanove.

Solicitors for the co-respondent, Rodda, Ballard & Vroland.

[1] (1907) 24 W.N. (N.S.W.) 57.

[2] (1932) 32 S.R. (N.S.W.) 220; 49 W.N. (N.S.W.) 59.

[3] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[4] (1842) 3 Curt. 86; 163 E.R. 663.

[5] (1842) 3 Curt., at p. 117; 163 E.R., at p. 674.

[6] (1894) P. 248.

[7] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[8] (1894) P., at p. 252.

[9] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[10] (1894) P. 248.

[11] (1894) P. 248.

[12] (1894) P. 248.

[13] (1930) A.C. 1.

[14] [1913] HCA 70; (1913) 17 C.L.R. 570. See particularly at pp. 584 et seq. and pp. 595, 596.

[15] (1874) L.R. 2 Sc. & Div. 374.

[16] (1874) L.R. 2 Sc. & Div., at p. 384.

[17] (1874) L.R. 2 Sc. & Div., at p. 393.

[18] (1874) L.R. 2 Sc. & Div., at pp. 394, 395.

[19] [1908] HCA 84; (1908) 7 C.L.R. 549.

[20] (1908) 7 C.L.R., at p. 557.

[21] (1839) 2 Curt. 16; 163 E.R. 322.

[22] (1908) 7 C.L.R., at pp. 562, 563.

[23] (1839) 2 Curt., at p. 57; 163 E.R., at p. 336.

[24] (1874) L.R. 2 Sc. & Div. 374.

[25] (1879) 4 P.D. 72, at p. 73.

[26] (1878) 1 S.C.R. (N.S.) (N.S.W.) (D.) 1.

[27] (1937) N.Z.L.R. 802, at p. 805.

[28] [1926] VicLawRp 43; (1926) V.L.R. 273.

[29] (1936) 55 C.L.R., at p. 233.

[30] (1810) 2 Hag. Con., at pp. 2, 3; 161 E.R., at pp. 648, 649.

[31] (1894) P., at p. 252.

[32] (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

[33] (1921) P. 425, at p. 431.

[34] (1921) P. 399, at p. 400.

[35] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[36] (1935) V.L.R., at p. 183.

[37] (1930) A.C., at pp. 17, 23, 25.

[38] (1929) P. 131.

[39] (1875) 10 Ch. App. 515, at p. 530.

[40] (1820) 4 B. & Ald. 95, at p. 123; 106 E.R. 873, at p. 884.

[41] (1858) 31 L.T. (O.S.) 387.

[42] (1865) 12 L.T. 295.

[43] (1870) 22 L.T. 597.

[44] [1855] EngR 708; (1855) 10 Moo. P.C.C. 502, at pp. 531, 532; [1855] EngR 708; 14 E.R. 581, at p. 592.

[45] [1835] EngR 942; (1835) 2 Bing. N.C. 222; 132 E.R. 87.

[46] (1874) L.R. 9 Ex. 93.

[47] (1917) 1 K.B. 352.

[48] (1920) S.A.L.R. 97.

[49] [1926] VicLawRp 43; (1926) V.L.R. 273.

[50] (1934) 8 A.L.J. 30.

[51] (1933) 45 Ll. L. Rep. 308, at p. 311.

[52] (1932) 44 Ll. L. Rep. 139, at p. 142.

[53] [1796] EngR 2463; (1796) 1 Hag. Con. 269, at p. 278; [1796] EngR 2463; 161 E.R. 549, at p. 552.

[54] [1798] EngR 130; (1798) 1 Hag. Con. 299, at pp. 299, 300; 161 E.R., at p. 559.

[55] (1810) 2 Hag. Con., at p. 3; 161 E.R., at pp. 648, 649.

[56] [1817] EngR 626; (1817) 2 Hag. Con. 223, at p. 227; [1817] EngR 626; 161 E.R. 723, at p. 724.

[57] (1839) 2 Curt. 16, at p. 57; 163 E.R. 322, at p. 336.

[58] (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

[59] (1856) Dea. & Sw. 132, at p. 135; [1856] EngR 533; 164 E.R. 526, at p. 527.

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[61] (1862) 2 Sw. & Tr. 427, at p. 433; 164 E.R. 1062, at p. 1064.

[62] (1862) 2 Sw. & Tr. 560, at p. 563; 164 E.R. 1114, at p. 1116.

[63] (1894) P., at p. 252.

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[65] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[66] (1931) P. 134.

[67] (1930) A.C. 1.

[68] (1930) A.C., at p. 7.

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[71] (1910) 27 T.L.R. 9.

[72] (1907) P. 334.

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[75] (1837) 5 Cl. & Fin. 163, at p. 215; [1837] EngR 1126; 7 E.R. 365, at p. 385.

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[78] (1907) 24 W.N. (N.S.W.) 57.

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[80] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[81] [1935] VicLawRp 35; (1935) V.L.R. 177.

[82] (1894) P. 248.

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[87] (1874) L.R. 2 Sc. & Div., at p. 393.

[88] (1919) V.L.R., at p. 36; 40 A.L.T., at p. 161.

[89] [1924] UKHL 1; (1924) A.C. 687, at p. 736.

[90] (1908) 7 C.L.R., at p. 557.

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[92] (1865) L.R. 1 P. & D. 29.

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[94] (1894) P., at pp. 251, 252.

[95] (1810) 2 Hag. Con., 1; 161 E.R. 648.

[96] (1810) 2 Hag. Con., at p. 2; 161 E.R., at p. 648.

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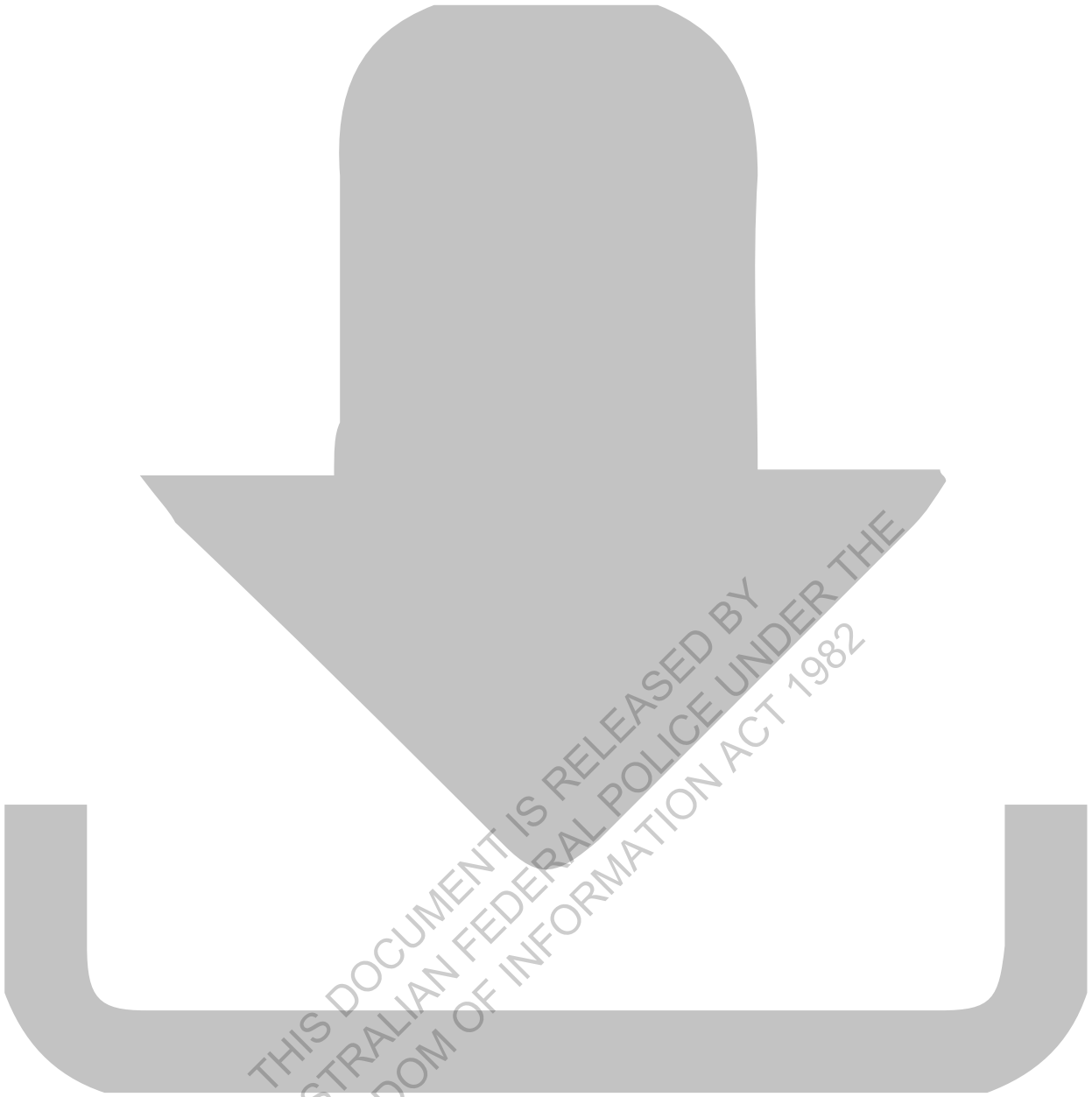

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