

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: 1.7 National Security and Criminal Justice

Question No. SBE16/038

Senator McKim asked the following question at the hearing on 18 October 2016:

Senator McKIM: Professor Triggs, this will be my last group of questions. It has been a reasonably long day already, and I do not wish to make it unnecessarily longer. The first matter I would seek your advice on is whether the commission or you are aware of the legislation that has been tabled by the government to provide for post-sentence detention of certain categories of people—in broad terms, those who have been convicted of offences against national security. Firstly, are you aware of that? Secondly, was the commission consulted during the drafting of that legislation?

...

Senator McKIM: Clearly they are different circumstances, and, as you have admitted, there is a different and lower standard of proof in your legislation compared to the standard of proof which would need to be cleared for a criminal conviction. You have said it is lower than a criminal standard but higher than a criminal standard. There is a standard in between those, which is 'comfortable satisfaction', which is something that I am familiar with. I am not a lawyer, as you know.

Senator Brandis: I thought you were.

Senator McKIM: No. I am doing a reasonable impression!

Senator Brandis: You have, if I must say so, a much better familiarity with legal concepts than some senators I know who have LLBs.

Senator McKIM: Thank you, I appreciate that. Where does 'high degree of probability' sit vis-a-vis comfortable satisfaction?

Senator Brandis: I would want to consider that. It is a very, very good question. I would have thought probably higher, but I want to reserve my answer to that and reflect upon it.

Traditionally, there have only been two standards for ultimate proceedings—there is also the prima facie standard for committal proceedings—the civil standard, 'balance of probabilities', and the criminal standard, 'beyond reasonable doubt'. In the last several decades, other intermediate standards of satisfaction have crept into the law. I make no comment on the desirability of that. The standard we have adopted, which we took from the Queensland legislation—which was upheld by the High Court in Fardon's case about 10 years or so ago—uses the expression 'a high degree of probability', which is now a reasonably familiar standard on which the courts have interpreted several times.

Senator McKIM: In Australia?

Senator Brandis: In Australia—whether overseas, I would need to check. But it is a very good question, and thank you for putting me on notice so that we can have this debate in the committee stage of the bill.

Senator McKIM: I am very much looking forward to it.

The answer to the honourable senator's question is as follows:

The standard of proof required in civil cases is generally referred to as being 'on the balance of probabilities'. In criminal cases, the standard of proof is 'beyond reasonable doubt'.

The terms 'comfortable satisfaction', and 'reasonable satisfaction' featured in the High Court's discussion of the civil standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336. In general, they reflect the principle that a court or tribunal determining whether a fact has been established to the civil standard does not undertake a mere mechanical comparison of probabilities, and that the strength of the evidence necessary to establish a fact in issue in a civil case may vary according to the nature and circumstances of what is sought to be proved. For example, if a finding of fact by a court would have serious consequences for an individual, a court should only be satisfied of that fact on the basis of firm and cogent evidence. This principle is reflected in Australian uniform evidence law (see s 140 *Evidence Act 1995* (Cth)) which provides for the standard of proof in civil proceedings. Under this legislation, the court must take into account, among other things, 'the gravity of matters alleged' when deciding whether it is satisfied that the case has been proved 'on the balance of probabilities'.

The 'high degree of probability' standard is a statutory standard which has been used in most Australian jurisdictions' laws that have post sentence preventative detention regimes. Decisions applying those laws have held that the phrase requires something beyond the traditional civil standard of proof, but does not require that a matter be proved to the criminal standard. Further, given the serious consequences for the individual involved under the proposed laws in this case, a finding that a person posed an unacceptable risk could only be made on the basis of firm and cogent evidence.