

Scottish Child Abuse Inquiry

PO Box 24085; Edinburgh EH7 9EA

e-mail: solicitors@childabuseinquiry.scot

SCOTTISH CHILD ABUSE INQUIRY

DECISION

By

THE RT HON LADY SMITH, CHAIR

Re: STANDARD OF PROOF

Introduction

In a note to Core Participants dated 19 December 2017, I advised of my intention to make and publish findings in fact on the evidence presented in relation to the Daughters of Charity case study as soon as is practicable after the case study closes at the end of this month. Since that process will, of necessity, involve the application of a standard of proof, I invited submissions on the approach that I might properly take; ten Core Participants¹ provided helpful written submissions. I have had regard to those submissions in reaching my decision.

Decision

I have decided that, when determining what facts have been established in the course of this Inquiry, it is appropriate that I do so by reference to the civil standard of proof, namely balance of probabilities.

I will not, however, consider myself constrained from making findings about, for example, what may possibly have happened or about the strength of particular evidence, where I consider it would be helpful to do so.

Discussion

This Inquiry is being conducted under and in terms of the *Inquiries Act 2005* and *The Inquiries (Scotland) Rules 2007*. Section 24 of the Act requires me to state what facts I find to have been determined and section 17(3) requires any decision I make about the procedure of the inquiry to be made fairly. Section 2 of the Act provides that I cannot rule on and have no power to determine any person's civil or criminal liability; however, it also expressly anticipates that liability may be inferred from the facts I find to have been established and in directing me not to be inhibited by that, draws attention to the possibility of it happening. But the Act and Rules are silent on the standard of proof I should apply when determining what facts have been established. It is for me to decide what, if any, standard of proof to apply to any or all of the evidence.

¹The Sisters of Nazareth; The Church of Scotland; Quarriers; the Daughters of Charity of St Vincent de Paul; The Care Inspectorate; Scottish Ministers; INCAS; FBGA; The Bishops' Conference of Scotland; The Lord Advocate.

Given the terms of section 2, the high criminal standard of proof seems neither necessary nor appropriate. That standard of proof affords necessary protection to accused persons where conviction and punishment – including the potential loss of liberty – are at stake but notwithstanding the nature of many of the allegations of abuse, the Inquiry context and potential outcomes for the individual are not comparable to a criminal trial. Fairness does not require me to apply this standard.

Although I have no power to determine civil liability, it is useful to have regard to the fact that the only standard of proof recognised by the common law as appropriate in civil litigation is balance of probabilities: *Mullan v Anderson* 1993 SLT 835 at pp. 840, 842, 846-7, and 851, a decision of five judges. That has been confirmed as being the proper approach to determining past facts in litigations concerning the welfare of children by the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, and by the Supreme Court in *S-B (Children)* [2009] EWCA Civ 1048 all of which affirmed that the standard of proof of past facts was “the simple balance of probabilities, no more and no less” (*S- B*, Lady Hale at para 10). Whilst a fact finder will inevitably have regard to any inherent probability or improbability of a particular thing having happened or of it being the current state of affairs, that does not mean that the standard of proof is any higher – or lower - than balance of probabilities. These are, rather, a matter of what weight the evidence carries when it is put in the balance.

Application of the balance of probabilities standard is not, however, appropriate when it comes to assessing future risk. There is no need to be satisfied that a particular harm will probably happen ; it is enough that the established facts provide a sound basis for a conclusion there is a real possibility of it happening.

This thinking can helpfully be applied and developed in the Inquiry context. The purpose, as demonstrated by the Terms of Reference is, put broadly, to investigate, determine what happened in the past, what is the current state of affairs and to make recommendations as to what needs to be done in the future. That is, the task requires me to ascertain past and present facts and to consider what risks need to be protected against now and in the future. Whilst the latter will usually require to have a basis in established fact, it is important to appreciate that it may also be informed by possibilities; if, for instance, there is a real possibility that something occurred in the past, it is likely to be of relevance when formulating recommendations for the future. To put it another way, evidence which was insufficient to allow a finding of fact may nonetheless be very useful. That does not, however, mean that the potential utility of such evidence gives it the status of established fact and I have a concern that descriptions such as “a nuanced approach” or “flexible and varied standard of proof” suggest that it is. They may be taken as indicating that the standard of proof applied to the establishment of facts will be

something of a moveable feast, applied on a sliding scale upon which there is marked no discernible or minimum threshold.

I do not consider that it would be appropriate for me to proceed in that way. The need for fairness points to the desirability of clarity which will, I consider, be aided by the application of a consistent standard for the determination of fact. When it comes to finding what facts have been established, I will apply the standard of balance of probabilities.

I appreciate that some of the discussions about flexible and variable standards of proof may be directed at nothing more than making it clear that the Chair or panel may, at times, usefully and appropriately make observations and/or findings about, for example, the possibility of something spoken to in evidence having occurred or it being only a remote possibility that it occurred. I have no difficulty with that and as I have already alluded to, would confirm that, at times, I may make such observations and findings.

The Rt Hon Lady Smith

25th January 2018