

Submission for the Scottish Human Rights Commission 22nd June 2009

What do we mean by Human Rights?

There were Children's Acts and legislation, enshrined in Law, The Poor Law Amendment Act 1845 followed by other Children's Acts and Legislation such as the 1908, 1937, 1948 Acts which were amended and updated throughout until the present day. Acts and Legislation were enacted to protect children in-care in the UK.

Extracts, Tom Shaw report, chapter 2, The Regulatory Framework.

As a result, early recognition³ that the law should prevent cruelty to children (for example, in laws such as the Children Act 1908⁴) was continued and extended under The Children and Young Persons (Scotland) Act 1937⁵. This Act laid the foundations for the modern law on child protection, and substantially increased the legal responsibilities of public authorities⁶, such as local councils. From here on, we refer to it as "the 1937 Act". The 1937 Act – and the amendments to it since 1937 – provided most of the fundamental rules for the protection and welfare of children and young people⁷ during the 1950s and 1960s. Section 12⁸ recognised the need to make more detailed provision on child cruelty: "**Section 12** Cruelty to persons under 16 - (1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age⁹, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence..."(2) For the purposes of this section - (a) a parent or other person legally liable to maintain a child or young person¹⁰ shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging he has failed to take steps to procure it to be provided under the Acts relating to the relief of the poor...

- Many former children in-care were denied their Constitutional Rights as children in Scotland's past care system.
- Many individuals, organisations and the State are being accused of failing in their collective and individual duty of care to children in Scotland's past care system.
- The State and other regulatory bodies had a duty to regulate properly such institutions and care establishments.
- Former children in-care are accusing former carers and others of physical, emotional and sexual abuse while in the care of institutions and in some cases placed by the State. These are very serious allegations and crimes being alleged against individuals, organisations and the State.
- The process can only be deemed credible and fair if the accuracy, scrutiny and validation of all individual abuse claims is itself credible.
- As such it is imperative that all abuse claims regardless are properly investigated in any due process to establish the veracity, accuracy and truthfulness of all claims being made. While at the same time validate and scrutinise all such claims being made to ensure that they are credible and can withstand public scrutiny.
- To-date 8 ex-employees of Quarriers Homes were convicted in the Courts of abusing children in-care. Establishing that there was systemic abuse in the care home.

Human Rights

The Scottish Government to guarantee that, in any process setup with regards "Acknowledgement and Accountability" or any other such process in the future, it will not "seek, offer or impose" any confidentiality clauses on victims in any process now or in the future.

FBGA wish to ensure that all child abuse victims including historical abuse victims are free to speak out, regardless of any agreements or otherwise, legal or compensation agreements which may be reached in future.

FBGA would wish any process set-up and the Scottish Government to abide by Article 10 of the Human Rights Act which states that "everyone has the right to freedom of expression".

Human Rights are currently enshrined within the United Nations and the European Human Rights Act and we enclose a selection which we believe are relevant to these issues and this "Acknowledgement and Accountability" consultation process.

The Human Rights Act incorporated fundamental rights enshrined in the European Convention of Human Rights into UK law.

These included the right to life, the right to family, freedom from torture and the right to a fair trial.

Scottish Law and the The presumption of innocence

- The presumption of innocence is an ancient principle common to the legal systems of civilised states. It is reflected in Article 6(2) of the European Convention on Human Rights, **which provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"**. In its essence, the presumption of innocence means that an accused person must be treated as not having committed any offence unless and until sufficient evidence has been adduced to satisfy an independent and impartial tribunal of that person's guilt. These principles have been developed in extensive case law of the European Court of Human Rights in relation to such questions as conditions for detention prior to trial, the privilege against self-incrimination, trials *in absentia*, the burden of proof and the right of silence.
- **Under a legal precedent called the Moorov doctrine, at least two separate but similar crimes must be proved in Scotland, if the only witness is the accuser.**
- As a measure to protect the fairness of trials, and notes the further safeguard, **in Scotland, provided by the need to show corroboration i.e. evidence from at least two sources that the alleged offence has been committed, and that it was the accused who committed the said offence.**

European Human Rights

Article 3: Inhuman treatment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6: Right to a fair trial or hearing

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8: Right to privacy

(1) Everyone has the right for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of Expression

(1) Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

United Nations Human Rights.

Article 1,

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 5,

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7,

All are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 10,

Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11,

Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 19,

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

Public interest matters

- On the grounds that the Scottish State, political authorities and establishment have failed to deal with the past systemic failures in the Scottish past care system and Quarriers Homes to-date and are seriously compromised by their repeated failures to act properly, so that were they to undertake the wide ranging investigations required, they would, effectively, need to put themselves up for investigation.
- It is in the Public, National and True Victim-survivors interest that there is full public disclosure of all the relevant facts and evidence concerning the Historical abuse issues of Scotland and its full impact on the True Victim Survivors.
- Holding the processes and meetings in secret and hiding behind confidentiality will only fuel the scepticism and suspicion already held by many True Victims-survivors with regards the Government and the past care organisations. True victim-survivors are concerned that these bodies have their own self interest agenda's. By not holding those accountable and responsible and making the process open and transparent with regards those who committed such crimes you endanger another generation of children in-care and fail the current victims.
- Establishing a Public Historical Record ensuring that all available facts and evidence are gathered including the full impact and consequences on True Victim-survivors lives and learnt from and promulgate in a final public report submitted to the Scottish Parliament and Scottish Government including any recommendations and proposals for the future.
- The Acknowledgement and Accountability process- Commission-Body, it is imperative that it must be able, under the terms of its mandate and remit, subpoena documents or witnesses to investigate fully the abuse claims being made by all individuals and any counter claims which challenge such claims.
- A full impartial and independent process with the full necessary legal powers and remit. The forum should have an underpinning legal basis which safeguards individuals, organisations and Government
- The process is credible fair and equitable to all including the organisations and those accused ensuring full representation by all parties to the process and can withstand public scrutiny ensuring true justice for all who participate.
- With the exception of the criminal cases previously prosecuted based on the facts and evidence available. A number of cases have not been prosecuted where there has been insufficient fact and evidence, where there is delay the quality of justice diminishes for all parties, claimants, and defenders. Serious decline in the quality of justice was inevitable.
- Witnesses may have died or be too infirmed or too incapacitated to testify, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice on all sides.
- The process to ensure that there is no real possibility of significant prejudice to any of the parties and the claimants. If the prejudice is a real possibility, rather than merely a possibility. Consideration of all the relevant available facts including any corroborating evidence presented or available must be given to prevent such prejudice or reinforce the possibility that abuse took place.

- A Government should strive to ensure that it protects the rights, honesty and integrity of all the True Victims-survivors, and others who may participate in a process of Acknowledgement and Accountability.
- Government and True Victims-Survivors should strive to prevent the True Victim-Survivors and former employees from being tarnished or tainted by other individuals who may participate in the process and who may embellish, collude or make false allegations in relation to their personal abuse experience in the process or have done so in previous processes.
- We the Quarriers Homes True Victims-Survivors were not deemed young offenders while in its care nor was it a secure unit. The Scottish Government, should ensure the process does not criminalise True Victim-survivors by aggregating all True-Victim- survivors from the various institutions through a single process.
- Due consideration should also be given to the issue of aggregating or aligning “True Victims-survivors” from a care residential organisation such as Quarriers Homes with other Victims from a young offenders institution or secure unit institutions as you may victimise, stigmatise and taint the Quarriers Homes “True Victims-survivors” by association and others not previously cared for in such institutions.
- Just as we would not expect decent and good former carers of Quarriers Homes in the process to be tainted nor aggregated by association with those ex-employees who had been convicted of abusing children in the Courts.
- A single process of Acknowledgement and Accountability would be considered appropriate, if managed and organised properly by treating the different institutions and organisations and the True Victims-survivors dealt within the single process separately. As has occurred in other countries who have dealt with similar multiple institutional abuse issues. **(Kaufman Report, History of Residential Institutions).**
- A full respect for all individuals Human Rights adhering to the United Nations and European Human Rights legislation-Acts.
- The True victim-survivors would see as imperative and necessary as a first step, that all the parties to all the processes all fully acknowledge and accept fully the previous Criminal Court Judgements and Findings. Where abuse has been upheld, the abusers have been convicted and held accountable to-date.
- Due consideration should also be given to previous Court cases where there were adverse findings against the claimants and where there were allegations of collusion.
- Setting up an Independent True Victim- survivor Trust, whereby the organisations where abuse took place and the Scottish Government can contribute funding.
- Scottish Bill of “Rights” for Children.

The Process

- Independent and Impartial body-commission inquiring into past child abuse in Scotland with relevant powers backed by Scottish Parliament with structures which are victim centred to be established with a clear mandate and remit.
- An Independent and Impartial Judicial outside chair, human rights personnel representation, independent legal representation for the parties and other independent representation.
- Independent and impartial adjudicators with experience in evaluating credibility, reliability, honesty for these types of analogue claims.
- Independent Advocacy. True Victim Survivor and Family representation.
- An Independent and impartial arbitration process within the process to resolve any disputes once the process commences.
- Reconciliation is both a goal and a journey within a process and a stepping stone which True victim-survivors may make or seek through the process leading to healing.
- The full public acknowledgement of 'untold suffering and injustice' would help to restore the dignity of victims and afford perpetrators the opportunity to come to terms with their own past.
- A due fact finding investigation process into all the individual abuse claims made is essential to ensure the process is open, transparent, credible and fair to all and can withstand public scrutiny while gaining and establishing all the true facts.
- The process can establish the accuracy, veracity and truthfulness of the claims being made while ensuring that they are fully validated and scrutinised independently while being sensitive to the needs of the claimants.
- Former staff who had no part in the abuse may wish to participate should be treated with respect and dignity in the process while ensuring that the testimonies provided are accurate, fair, balanced, validated and scrutinised.
- A sensitive and non-fault approach would need to be taken to encourage staff and others from historical institutional organisations to come forward who had no part in the specific abuse but were part of a organisational culture.
- In addition, approaches could be made to senior staff of current childcare institutions, organisations via their place of work, to request volunteers-representatives, Union representation.
- A policy of contacting all those accused who have not been in a "Court of Law" giving the individual the full opportunity of a Right of Reply and fair trial/hearing which is consistent with (Article 6 of the European Convention on Human Rights).
- Unless guilt has otherwise been proven in a previous Court of Law. All Defendants regardless should be considered innocent until such times as guilt is proven in a Court of Law. There must be a presumption of innocence in all cases not previously prosecuted.

Benefits, Redress, Restitution and support programmes for True Victims-survivors and others.

- Generally, within the process, there should be equitable and consistency in the reparation-compensation, benefits scheme/program awarded or provided to similarly situated True Victims-Survivors.
- Whether that be support and help for education, retraining and reemployment support, medical assistance, counselling services or additional financial reparation within a devised scheme/program no matter where True victim-survivors reside as many reside outside of Scotland.
- Enhanced reparation-compensation should be scaled based on the merits of each individual case, the type of abuse, severity of the abuse and the impact on the individual and any other contributing factors.
- We believe that an Independent “True Victim Survivor Trust” is the most appropriate body to administer any such Benefits, Redress, Restitution and support programmes to the victims.
- All True victim-survivors abused in Scotland’s past care are eligible for all of the above in equal measure regardless of where they reside and at their own choosing.
- True Victim-survivors who have the capacity can determine what is appropriate and acceptable to them based on their own personal needs.
- Enabling individual True Victim-survivors independently of Government and other such agencies to make informed choices for themselves which will aid and contribute to their own personal recovery and growth.
- It would be appropriate for the process to offer support systems to former and current staff who had no part in the abuse throughout the process and thereafter who wish to participate in the process.
- It would also be appropriate for the process to offer support to any former staff and their families or former management who fully acknowledge and accept responsibility for the abuse and for any organisational failures in preventing abuse.

Statement by FBGA

- If the organisations such as Quarriers and Government will not accept liability or apologise unreservedly, even in cases which have been prosecuted successfully and upheld in the Courts including Appeal Courts.
- What purpose or benefit will be gained by the True victim-survivors crossing the divide and engaging with the forum if the status quo continues to remain the same and the process continues to cover-up the original abuse by hiding behind a culture of secrecy?
- We the True Victim-survivors of in-care, institutional historical abuse call for Justice, Accountability, Restitution, and Reparation for the unimaginable crimes committed against children in-care in the institutions and organisation in Scotland.
- Heinous crimes were perpetrated against the most innocent and vulnerable, vile acts were perpetrated with life lasting effects and carried out under the guise of the mission of Christ.
- While FBGA are committed to engaging at this stage of the process and wish to contribute to help resolve the historical abuse issues during this consultation process.
- FBGA wish to state clearly and unequivocally that the group have not taken a final position or decision on the Acknowledgement and Accountability Consultation process. (it is in our view purely a consultation process at this stage).
- With regards “ Terms of Reference for the Forum”, Acknowledgement and Accountability or which ever name the process is eventually given, until such times as these are agreed and debated fully then FBGA will not take a position.
- If and When the “Terms of Reference”, “Mandate” “Remit” and “Name” are agreed for the Forum then FBGA reserve the right to consult with the group and the wider survivor community before coming to a decision to accept or reject the Terms of Reference of the Forum-Mandate-Remit-Name.

This FBGA document pages 1- 9 is in addition to the FBGA submission document to the Scottish Government for Acknowledgement and Accountability consultation dated 13/01/2009 and our further note dated 17/05/2009 submitted to the Scottish Government.