



Email: fbga1@aol.com www.fbga.co.uk

Former Boys and Girls Abused in Quarriers (FBGA) Secondary Legislation proposals (pages 1-4

This submission has been compiled by David Whelan (FBGA representative on the Interaction Review Group) on behalf of FBGA following previous discussions on the issues with former Quarriers residents and others and is linked to the parliamentary evidence FBGA previously provided.

Questions on secondary legislation (regulations) A. Exceptions to eligibility – regulations under Section 23 Section 23 of the Act (power to create exceptions to eligibility) is intended to allow Ministers to fine-tune the eligibility requirements of the scheme to ensure they are consistent with its underlying purpose.

Abuse by persons such as peers We're considering using it to exclude some types of situation from the scheme, for example a fight between peers that wasn't known about by the organisation in question.

Q1. How do you think we should define "peers"? For example, should it only mean other children resident at the institution, and where they were of the same or a similar age or developmental stage? Should it include any other persons resident at the institution regardless of their age?

It should include all children resident at the institution taking account of the law as to what constitutes a child and age of responsibility in law during the various period (s) in question. We recognise that some children remained in the care of institutions through no fault of their own sometime (including where the person lacked capacity) after becoming of age and these cases should not be treated differently if they remained in the care of carers employed by the institution. All Peer-on-Peer cases should be assessed and determined by the Redress Panel on their own individual merits using the framework/assessment as guidance on threshold to be met and its severity.

Q2. Should only one-off fights be excluded from the scheme, or should this exclusion extend to a longer course of conduct between peers?

The Redress Panel should have the relevant experience and professionalism to make the appropriate decisions on what constitutes Peer on Peer abuse and the threshold to be met and its severity in determining redress financial awards. All award decisions must rest solely with the Redress Panel (s) in all circumstances.

Q3. What about the role of the organisation?

Should peer abuse only be excluded from the scheme if taking account of all the facts and circumstances the organisation could not reasonably have been aware of it?

Short-term placements such as, for example, holiday or respite care We're also proposing not to include some types of short term care, on the basis that children in these situations were not really "in care".

What we have in mind here are temporary arrangements which were for the purpose of, for example, respite or convalescence, or 3 holidays for children in need.

In these situations, parents would still have been responsible for the day-to-day care of their children, and this is not what the redress scheme is for.

Moreover, as reflected in the definition of “residential care facility” in section 19 of the Act, short-term residence in accommodation specifically for the purpose of meeting needs arising from a mental or physical condition such as, for example, medical needs, is not covered by the scheme.

Q4. Do you agree that children in these forms of temporary arrangement should not be eligible for the redress scheme?

Where an institution or the State, had a duty of care including relating to any such temporary facilities used and where abuse took place. Then the State, institution, and the temporary facility bear full responsibility in their failures to ensure a duty of care, oversight, and proper regulation.

ALL children regardless placed in such temporary facilities who suffered harm should be eligible for the redress scheme.

B. Waiver – regulations under Section 47

The regulations will set out the terms of the waiver which needs to be signed when an applicant wishes to accept an offer of a redress payment. They will also set out what information should be provided to the applicant in relation to waiver and its effects.

This might include information such as:

- the effects of the waiver, namely that the applicant must abandon any ongoing action against any scheme contributor, cannot reinstate such court action, and cannot initiate new court action (unless the waiver is revoked);
- the applicant’s rights to seek information before they make a final decision on accepting an offer of redress;
- a list of the contributors at the date the applicant’s redress application was determined;
- the effect of any subsequent retrospective revocation of waiver;
- the right to seek legal advice on the effect of the waiver, and that Scottish Government will meet the reasonable costs of that as set out in the Act (together with the costs of an interpreter, if required);
- the timescale to accept the offer and sign and return a waiver, and the effect of failing to do so on time.

Q5. Are there any other matters in relation to the waiver or its effects that you think this information ought to specifically cover?

Given that the Survivor is relinquishing several RIGHTS by signing a Wavier. The principle of the right to choose one’s own legal representative to represent the survivor’s interests must always prevail. Unfettered choice must remain at the heart of the redress scheme and the right of the survivors to choose who they wish to represent them in the Redress processes must remain too.

The Redress Scotland scheme should not (never) impose any such legal representatives on the individual survivors.

The right to choose a legal representative outside of the Redress Scheme including in future legal proceedings and including any such legal representative who may have represented the survivor (s) interests in the Redress scheme. Should be unfettered and not be interfered with by any of the parties including the Scottish Government, Redress Scheme, Redress Panel nor any institution directly affected by these issues.

The Redress Scheme and Redress Panel (s) may wish to appoint and nominate a number of nominated suppliers (legal firms) with regards legal representatives to the scheme.

We are mindful of the fact that “The Scottish Government” already has a conflict of interest in our view based on the SHRC submission at Stage 2. It would have been more appropriate for the Scottish Government not to be involved in the administration of any part of the Redress processes whatsoever as the State ultimately is responsible for these systemic in care historical failures whereby it has a conflict of interest and is not impartial.

Survivors who have not signed a Wavier have the right to take legal proceeding against any of the parties including the Scottish Government, the institutions, and others if they so wish.

C. Reimbursements of costs – regulations under Section 91 The Act provides an opportunity for applicants to receive a reimbursement for any reasonable costs and expenses incurred in connection with an application. The regulations will set out further details relating to the reimbursement of costs including but not limited to the following:

- the types of costs and expenses which may be reimbursed,
- the limits on costs and expenses which may be reimbursed,
- when and how any request for reimbursement must be made, and • the factors to be considered by the Scottish Ministers in assessing the reasonableness of any costs and expenses.

4 The types of costs we are considering for reimbursement include costs relating to records requests, record verification (certified copies) and costs incurred in relation to attending an oral evidence session, for example, travel, subsistence and accommodation costs. Appropriate limits will be placed on the costs which may be reimbursed.

Q6. Are there any costs and expenses which applicants might incur in relation to their application that they should be reimbursed for, which are not mentioned above?

Support costs such as a solicitor, carer or support worker attending oral hearing in support of the applicant or another person nominated by the survivor to support them at the oral hearing.

D. Payment of legal fees – regulations under Sections 94 and 95 The Act provides an opportunity for all applicants to access free legal advice.

The Act provides for a simplified system of fixed fees to be paid, subject to two important safeguards. The first is a mechanism to ensure greater consideration is given where there is a concern that work may not have been reasonably undertaken.

These cases will be decided by Redress Scotland. The second is to ensure that additional fees can be sought in cases in which legal work, over and above that encompassed within the fixed fee, is necessary.

Solicitors may apply for a bespoke assessment to be carried out by Redress Scotland in cases where there are exceptional or unexpected circumstances which the solicitor believes may justify the payment of an additional sum.

The regulations will set out any steps that must be taken prior to making a fee payment request. The regulations will also make further provision about the payment of legal fees including the level of fees that will be paid.

The revised Financial Memorandum published at Stage 2 contained two illustrations of potential approaches to legal fees. The first tied the fee to the process being undertaken and not to the amount of financial redress that was ultimately determined by Redress Scotland. This approach recognises that the work or complexity involved in an application for redress does not necessarily diminish or increase depending on the value of the redress payment. The second tied the fee to the redress payment determined.

Q7. Which approach do you consider most appropriate: legal fees tied to the process or legal fees tied to the ultimate value of the redress payment determined? The tables below illustrate these different approaches. The first table adopts a fixed rate fee payment. This means the amount of redress payment determined does not impact the amount of legal fees paid.

We consider legal fees tied to the actual process as the most appropriate to ensure the survivor has fully independent, impartial and informed legal advice at all stages of the Redress Process including legal representation at any review or dispute stage.

The legal fees should take into consideration and account each individual case as some may be more complex than others. The legal fees section in the Bill 88A through to 88E also states clearly the “Duty on Scottish Ministers to pay certain fees for legal work in exceptional cases”.

Q8. What are your views on the level of fees suggested in either table above?

The legal fees illustrated appear to be fair and appropriate recognising this is not the open market but a structured system within a State redress process.

Provided the Redress Scheme and Redress Panel ensures their full application in full, unrestricted, unfettered access and unhindered support of those survivors who would wish to access independent legal advice of their choosing at any stage of the redress processes including from initial application through to being provided with a determination of a Redress award and any subsequent appeal or dispute processes.

Q9. What information do you think should be provided along with a fee payment request, to establish that the legal work was reasonably undertaken.

Legal representatives should submit itemised invoices for any legal work undertaken. The Redress Scheme should publish publicly what it expects in terms of information required from legal representatives to avoid delays and misunderstandings. Invoices should be paid within the statutory timeframe (30 days).

Note: FBGA would request access to all the submissions to this consultation in respect of all the processes being wholly open and transparent and accessible to all survivors and the survivor community.