**NOTE BY SENIOR COUNSEL**

**for**

**DAVID WHELAN and the members of FBGA**

The purpose of this brief Note is to explain to the clients the significance of the recent ruling made by the Chair of the Inquiry, Lady Smith, on the matter of the standard of proof to be adopted in the Inquiry. The Chair's Decision on this issue dated 25th January 2018 is now available for consideration on the Inquiry's website.

This Inquiry is governed by the *Inquiries Act 2005*. The Chair is required to state what facts she has found to be determined. Much of the evidence given in the course of the case studies will involve evidence, both oral and written, from persons who were subjected to abuse while in care. Based on the one case study thus far completed – that relating to the Daughters of Charity of St Vincent de Paul – witnesses have been led from the organisation denying that the abuse took place. The Chair has to determine whether the abuse took place in the way stated by the witness.

It is obvious that the witnesses will be talking about what are criminal acts. The *Inquiries Act 2005, section 2,* prevents the Chair from ruling on the criminal or civil liability arising out of the evidence. Accordingly, she cannot find that X committed the crime of assault, rape, against Y, but she can make findings of fact from which it may be inferred that is what happened.

In Scots Law (and indeed elsewhere in the UK) there are two standards of proof applied by the Courts to fact finding. In a criminal court where the State has brought a charge against an individual, the State is required to prove the charge beyond reasonable doubt; in a civil court where, for example, an individual is seeking damages against another, the claimant must prove his/her case on the balance of probabilities – that it is more likely that not that the critical event occurred.

Using assault as an example, the same event may be the subject of consideration in both the criminal and the civil courts, but in each proving the event is done by reference to the differing standards of proof.

Prior to making her ruling on the standard of proof, the Chair sought the views of the Core Participants. Having considered the approaches taken in a number of previous inquiries, I prepared a written submission suggesting that the criminal standard of beyond reasonable doubt was inappropriate; that the standard of balance of probabilities should be applied but that the Chair should be free to indicate the strength of the evidence by the use of expressions such as "I am clear that X occurred..." or "I am sure that X occurred…". I also suggested that the Chair should be able to make findings where there was suspicion that an allegation was true.

In her ruling the Chair has concluded that where she is required to make a finding of fact she will do so by reference to the civil standard of on the balance of probabilities. She has also concluded that where it is helpful to do so, she will make findings of what may possibly have happened and the strength of certain evidence. The Chair's ruling is accordingly very much in line with the submission made on behalf of the clients.

In a helpful observation, the Chair has indicated that where she finds evidence to be insufficient to warrant a finding of fact, it may still be useful in that it may show there was a real possibility that something occurred in the past.

As at the date of this Note the transcript of Day 45 which would include the submissions of Inquiry Counsel and the legal representatives of the Core Participants on the evidence led in the case study, has not been published on the Inquiry website and therefore it is not possible to make any observations on how the approved standard of proof has been applied by Inquiry Counsel and the other legal representatives.

***Postscript***

In looking at the ruling on Standard of Proof, I noticed that a decision that I was previously unaware of had been published on 19th January 2018, and that was in respect of an application

by the BBC to film the evidence to be given by two named witnesses and thereafter transmit that recording or parts of it. The witnesses were the senior representatives of the Daughters of Charity, and having read the transcript of their evidence (Day 44) I can well understand the public interest in seeing that evidence rather than just reading it. The Chair was of the view that the various factors in favour of the application were clearly outweighed by the contrary argument which included a concern expressed by Police Scotland about the potential threat to the witnesses' security, and she refused the application.

While every future application will be judged on its own merits, it seems to me that this does establish a precedent in this Inquiry. It should be made clear that any witness who requests anonymity, but who elects to give evidence in person, would not be filmed by a media organisation as that would obviously compromise anonymity. I also think that, in the event that an application were to be made to film the evidence of those accused of abuse or those who speak as representative of the organisations such as Quarriers, it would very likely be refused,

Stuart Gale QC

4th February 2018