Submission by the Minister for Education and Skills on behalf of the State on the Question Raised by the Independent Assessor of whether the imposition of the condition which required that there had to be evidence of a prior complaint of child sexual abuse on the part of the employee in question to the school authority (or a school authority in which the employee has previously worked), to establish eligibility for a payment under the *ex gratia* scheme, is consistent with and a correct implementation of the judgment of the European Court of Human Rights in the case of *Louise O'Keeffe v. Ireland*

Introduction

1. The Minister for Education and Skills and the Government are committed to fully implementing the judgment of the European Court of Human Rights (ECtHR) in the case of *Louise O'Keeffe v Ireland* and, to that end, have taken all of the steps outlined in the eight Action Plans submitted to the Council of Europe's Committee of Ministers, which is the body charged with overseeing the implementation of judgments of the Court.

2. In response to the question posed by the Independent Assessor, there are five central points, which will be expanded upon below:

(i) The imposition of the condition which required that there had to be evidence of a prior complaint of child sexual abuse on the part of the employee in question to the school authority [or a school authority in which the employee has previously worked], to establish eligibility for a payment under the ex-gratia scheme, is consistent with and is a correct implementation of the judgment of the ECtHR in the case of *Louise O'Keeffe v. Ireland*.

(ii) In *O'Keeffe*, the ECtHR found that there had been a breach of Article 3 of the ECHR in the circumstances of the case before it.

(iii) In its judgment in *O'Keeffe*, the Court's conclusions did not have the effect of finding that there had been a violation of the Article 3 rights of every child who has suffered sexual abuse in a day school, so that every such child is entitled to compensation irrespective of the facts of the case. The difficulty for those who suggest that the State has misinterpreted *O'Keeffe* is precisely that, when one examines the terms of the judgment, it is clear that the Court has not imposed this sort of strict liability. In order to propose an alternative interpretation of the judgment, it would be necessary to infer an implied intention on the part of the

Court to impose strict liability on the State. . Indeed, this is recognised by the UCC Child Law Clinic (CLC) and evidenced in its two papers dated April 22nd 2015 and November 4th 2016, in which it is suggested – in a "leap" of reasoning that is not supported by the text of the judgment - that the Court has imposed strict liability on the State in respect of all incidents of sexual abuse in primary schools. It is telling that this "leap" is the only way in which an alternative to the interpretation advanced by the State can be presented. If it was the true interpretation of the judgment, the ECtHR would have made it clear. But of course it did not do so, precisely because the *O'Keeffe* judgment was founded in its own factual matrix.

(iv) Under the terms of the Convention, the Committee of Ministers is responsible for supervising the execution of judgments of the ECtHR and, in particular, for overseeing the implementation by States of judgments in which findings have been made in favour of Applicants. That Committee has agreed that it is legitimate for the State to impose some criteria before individuals can qualify for compensation under the *ex gratia* scheme which are in line with the judgment of the Court. The criterion requiring evidence that a prior complaint of sexual abuse was made and not acted upon flows from and is consistent with the terms of the judgment.

(v) The Council of Europe Committee of Ministers received the UCC CLC papers in April 2015 and November 2016. Following consideration of the issue, the Committee was satisfied with the position that has been adopted by the State.

***O'Keeffe v. Ireland* – ECtHR Judgment**

3. The Applicant's case before the ECtHR was that the system of primary education in place in the State failed to protect her from abuse contrary to Article 3 of the Convention and that she did not have an effective domestic remedy for that breach contrary to Article 13 thereof.

4. In a vital passage at paragraph 144, the Court referred to the obligation imposed by Article 3 to ensure that individuals are not subjected to torture or inhuman and degrading treatment, including such ill-treatment administered by private individuals. The Court continued:-

   "This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should at least provide effective protection in particular of children and other vulnerable persons and should

include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."

The Court cited ample ECtHR authority for this approach.[1] Thus, it is not every case in which a child has been ill treated by a private individual that there will be a breach of Article 3. That will arise only where certain conditions or criteria are met, and in particular where there was a failure to take reasonable steps to prevent ill treatment "*of which the authorities had or ought to have had knowledge*." That knowledge will obviously not be present in every case in which a child is ill-treated. *Prima facie*, it will be present only where there has been a prior complaint.

5. That this is the correct criterion is evident from the Court's central conclusions, set out at paragraph 168. In its conclusions on whether Ireland had <u>in this case</u> met its positive obligations under Article 3 the Court noted at paragraph 168:

   "… *On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers. The consequences in the present case were the failure by the non-State Manager to act on a prior complaint of sexual abuse by LH, the applicant's later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School."*

6. The Court went on to note at paragraph 169 that:

   "*<u>In such circumstances</u>, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention." (emphasis added)"*

   Thus, the Court, was clear that it was "*in such circumstances…"* that there was a finding of a breach of Article 3. The only proper meaning to take from these passages is that, absent these circumstances, there would not have been a violation.

7. Accordingly, the Court concluded that there was no action taken in relation to the complaint that was made to the non-State manager, but that a properly structured system of school management would have ensured that there was action on such a complaint. That meant that there was a breach of Ms. O'Keeffe's Article 3 rights. There is no tenable explanation of the case other than this and it is submitted that this is the proper meaning of the judgment as to assert otherwise would mean that the Court was deciding effectively that there has been an automatic breach of the Article 3 rights of every child who was a victim of sexual abuse in a day school in Ireland, at least in the years prior to 1973. The latter is clearly not the meaning of the judgment. Such a judgment would

[1] See eg Osman v. United Kingdom

have been contrary to all ECtHR authority. If that was the nature of the judgment, such a radical position would have been made absolutely clear by the ECtHR.

Ex Gratia Scheme introduced by the Government

8. As part of the State's implementation of the judgment, and in addition to settling extant cases which came within the terms of the judgment, the Government also established an *ex gratia* Scheme under which payments are made in respect of discontinued legal cases which come within the terms of the judgment, i.e. cases involving sexual abuse of a child by a primary or post primary school employee (not just teachers) in respect of whom there was a prior complaint of sexual abuse to a school authority (including an authority of a school in which the employee had previously worked) prior to the issue of the Department of Education guidelines to primary and post-primary schools in 1991 and 1992 respectively.

9. Applicants for payments under the Scheme who come within the judgment but who had discontinued their legal cases at the time of the judgment will be considered by the State Claims Agency (SCA) for *an ex gratia* payment in accordance with the terms of the Scheme.

10. While the judgment is confined to cases where a prior complaint was made but not acted upon, the State has nevertheless taken the most flexible approach possible to the question of whether a person claiming to be eligible under the Scheme comes within the judgment of the Court. For example, even though the judgment only deals with a failure to act on complaint of abuse occurring in a primary school, the State has taken the view that the same principle applies in respect of abuse occurring in a post primary school and claimants who can show that a prior complaint was made about their abuser to the school authorities of a post primary school.

11. The State Claims Agency does not adopt a strict interpretation of what constitutes a "prior complaint" e.g. this requirement does not mean that only in cases where there was a written report at the time will the State regard it as coming within the scope of the judgment. There is flexibility as to what constitutes a prior complaint and it will depend on the circumstances.

12. The SCA is proactive in seeking details from the claimants – it writes to claimants asking them to submit any information or documentation which they believe supports their contention that their application meets the "prior complaint" element of the qualifying criteria under the Scheme. It is not a matter of claims being rejected simply because they do not produce evidence of a prior complaint from the very first communication. Nor are claimants required to produce a specific type of proof. The State must be satisfied on the balance of probabilities that there was a prior complaint but it does not insist on a strict evidential standard in assessing the material put forward

by the applicant. Further, when responding to claimants, the SCA also informs the claimant that the Agency will undertake its own investigations with the Department of Education & Skills and the appropriate Congregation to supplement any material submitted by the claimant and to ensure that all relevant information is available and will form part of the assessment. In this way, the Agency undertakes an holistic analysis of applications under the Scheme. .

Action Plans

13. The State has lodged eight Action Plans to date with the Committee of Ministers setting out the progress that has been made in relation to the implementation of the judgment. The Committee of Ministers is responsible for supervising the execution of judgments of the ECtHR and, in particular, for overseeing the implementation by States of judgments in which findings have been made in favour of Applicants. Shortly after the judgment was delivered in *O'Keeffe*, the Committee indicated to the State that it was proposing to supervise the judgment under the enhanced procedure rather than the standard procedure. This means that the Respondent State's implementation of the judgment of the Court is more closely monitored by the Committee of Ministers. The State agreed with this proposal.

14. In its Action Plan dated July 2014, the State confirmed that relevant litigation regarding day school abuse cases was being reviewed to identify those cases that came within the parameters of the judgment. As set out in that report, the State was proactive in taking steps to review litigation and to invite people to contact the State Claims Agency rather than waiting for litigants to make their case.

15. In January 2015, the State informed the Committee of Ministers in its Action Plan that the Government had approved out of court settlements to those bringing cases of school child sexual abuse against the State where their case comes within the terms of the judgment.

16. The State has advised, in its Action Plans, that, for

> "*[t]he purposes of the settlement of litigation and the Government's ex gratia scheme, there is no strict interpretation as to what constitutes a "prior complaint." The State must be satisfied on the balance of probabilities that there was a prior complaint but the State does not insist on a strict evidential standard in assessing the material put forward by an applicant. A holistic analysis of the case is undertaken and a flexible approach is adopted.*
>
> *In assessing whether a settlement will be offered or whether an applicant comes within the ex gratia scheme, the State will consider instances of abuse which occurred in both primary and post-primary schools.*

In assessing a case or application, the State works on the basis that a prior complaint includes not only complaints made to teachers but also complaints made to any person(s) in authority in a school."

17. In each of its last three Action Plans, the State noted :-

> "*The High Court recently gave Judgments in three related historic day school abuse claims (Wallace v. Creevey and Others [2016] IEHC 294 , Naughton v. Drummond and Others [2016] IEHC 290 and Kennedy v. Murray and Others [2016] IEHC 291) on, inter alia, whether the claims disclosed a cause of action against the State Defendants. The Judge (Mr Justice Seamus Noonan) found that, on the facts of these cases, there was no evidence of liability on the part of the State Defendants as there was, inter alia, no allegation or evidence of a prior complaint in respect of the abuser. Accordingly, the Judge held that the claims were distinguishable from the Louise O'Keeffe case. The Judgements have not been appealed by the Plaintiffs and the State has agreed to no orders as to costs, i.e. the State Defendants will bear their own legal costs."*

18. It is important to note that, in June 2016, in view of the progress achieved by Ireland in relation to the implementation of the judgment, the Committee of Ministers was satisfied to reduce the level of oversight of the State's implementation of the judgment. Following an assessment, the Committee decided to move the supervision of the implementation of this judgment from the enhanced procedure (which involves a greater level of scrutiny by the Committee) to the standard procedure. It was noted by the Committee of Ministers that civil society representatives have raised concerns that the approach taken by the State interprets the judgment too narrowly and that compensation should be offered to any individual who was sexually abused in an Irish school. In this regard, the Committee of Ministers noted as follows:

> "*Nonetheless, it appears legitimate for the Irish authorities to impose some criteria to be met for individuals to qualify for compensation. Moreover, the criterion of a prior complaint of sexual abuse to have been made and not acted upon appears to have a reasonable link to the violations found in this case. In that connection, it may be noted that the Court specifically criticised the State for having inadequate mechanisms of detection and reporting of abuse and, as a result, for not responding to prior complaints of abuse."*[2]

[2] CM/Notes/1259/H46-15, 1259 Meeting, 7-9 June 2016
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168064e699

The Committee of Ministers went on to note that:

> *"In sum, the limits imposed on the settlement scheme appear acceptable as long as the authorities ensure that the flexible and holistic approach of the State Claims Agency is maintained.[3]"*

It concluded that:

> *"in light of the above, and in particular the developments in child protection mechanisms in schools and the establishment of a settlement procedure to avoid similar violations in future, enhanced supervision no longer appears to be necessary."[4]*

19. As pointed out above, the Committee of Ministers is the body charged with supervising the implementation of judgments of the ECtHR. It has correctly concluded that the inclusion of the criterion of a prior complaint is a legitimate one, and makes a reasonable link to the violation found in the *O'Keeffe* case. The view of the Committee (the role of which is to ensure compliance with judgments) is clearly in accordance with the terms of the judgment, but also with the general tenor of ECHR jurisprudence.

Conclusion

20. Thus, the imposition of the condition which requires that there has to be evidence of a prior complaint of child sexual abuse on the part of the employee in question to the school authority (or a school authority in which the employee has previously worked), to establish eligibility for a payment under the *ex gratia* scheme is consistent with and a correct implementation of the judgment of the ECtHR in the *O'Keeffe* case.

21. Further, it is respectfully submitted that, as set out above, the Committee of Ministers - being the body charged under the Convention with the task of monitoring the implementation of judgments of the Court - has agreed that it is legitimate for the State to impose some criteria before individuals can qualify for compensation under the *ex gratia* scheme which are in line with the judgment of the Court. The criterion requiring evidence that a prior complaint of sexual abuse was made and not acted upon flows from and is consistent with the terms of the judgment.

22. The alternative interpretation of the judgement which suggests that the Court has imposed strict liability on the State such that there has been an automatic breach of the Article 3 rights of every child who was a victim of sexual abuse in a day school in Ireland, at least in the years prior to 1973, is wrong. Such a development would have

[3] Ibid.
[4] Ibid.

been contrary to all ECtHR authority. Such a radical position would have been made absolutely clear by the ECtHR.

April 26th 2018