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Submissions of the Irish Human Rights and Equality Commission to the Independent Assessor

In Relation to Independent Assessment of Claims for *Ex Gratia* Payment Arising from the Judgment of the ECtHR in *Louise O'Keeffe v Ireland*

Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
Irish Human Rights and Equality Commission

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Independent Assessment of Claims for *Ex Gratia* Payment Arising from the Judgment of the ECtHR in *Louise O'Keeffe v Ireland*

Submissions of the Irish Human Rights and Equality Commission to the Independent Assessor, Mr Justice Iarfhlaith O'Neill, dated 14th March 2019

The Third Submission on behalf of the Minister seeks to rely heavily on the role and functions of the Committee of Ministers (the "Committee") in its supervision of the *Louise O'Keeffe v Ireland* judgment ("*O'Keeffe*"). The legal status and effect of the Committee's decisions and resolutions, although a relevant consideration, should not distract from the central question, namely whether the imposition of the prior complaint criterion is consistent with, and a correct implementation of *O'Keeffe*. In this regard, the correct reference point for the proper interpretation of *O'Keeffe* must be the terms of the judgment itself.

The Minister accepts that the Committee is not a judicial body and has a supervisory role regarding European Court of Human Rights ("ECtHR") judgments. However, notwithstanding this the Minister seeks to rely on a single decision of the Committee in respect of *O'Keeffe* – i.e. to transfer its supervision status from 'enhanced' to 'standard' - as evidence that the Committee agrees that the precondition of a prior complaint in order to access the State's *ex gratia* scheme falls within the terms of the judgment. This is not the position of the Committee and no decision has been taken in respect of that particular matter.

The supervisory role of the Committee provides guidance on the measures taken by the State to enforce the *O'Keeffe* judgment. However, the interpretation of the judgment must be considered primarily by reference to the reasoning and findings of the Grand Chamber of the European Court of Human Rights (the "ECtHR"), rather than the non-judicial and supervisory mechanism of the Committee, which operates at a remove.

The Minister states that, in implementing *O'Keeffe*, the *ex gratia* scheme lies squarely within the State's margin of appreciation. As set out in the Commission's supplemental submission, while the State has discretion[1] on how it executes judgments it has no such discretion on how it interprets the terms of an ECtHR judgment. Moreover, the level of discretion afforded to a State by the Committee affirms the Commission's point that the supervisory and non-prescriptive considerations of the Committee provide limited guidance when considering the correct interpretation of *O'Keeffe*.

[1] As *per* Rule 6.1.b of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies).

The Minister argues that no significance should be placed on the Committee's decision not to terminate its supervision of Ireland's implementation of *O'Keeffe,* in circumstances where the State has not yet applied for closure by the Committee. Rule 17 provides that the adoption of resolutions to conclude supervision is a matter for the Committee and is not contingent on a State applying for closure:

> Final Resolution
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> *After having established* that the High Contracting Party concerned has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed, *the Committee of Ministers shall adopt a resolution* concluding its functions under Article 46 paragraph 2, or Article 39 paragraph 4 of the Convention has been exercised."
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> (emphasis added)

It is clear from the foregoing that the Committee's conclusion of supervision is not dependent on, or determined by, an application from a State. Moreover, the fact that the State has not applied to the Committee for closure may itself be seen as representing an acknowledgement by the State that such an application would be premature (that is to say until there is clarity around the operation of the *ex gratia* scheme and its effectiveness in providing redress to the survivors of historic child abuse in the education system).

The Minister asserts that the Commission unsuccessfully attempted, through the Rule 9 procedure, to have *O'Keeffe* referred to the ECtHR. This is not accurate. While the Commission requested this matter to be referred to the ECtHR under the Rule 9 procedure, no decision has yet been taken and this request has been neither accepted, nor refused.

The Minister states that the Commission accepts that the Committee recognises the validity of the Minister viewing a prior complaint as a "key element" of the judgment. This is not the Commission's position.

The Commission considers that the proper approach to the administration of the scheme, in order to ensure compliance with *O'Keeffe*, is to weigh the factors in relation to each set of circumstances on a case-by-case basis. Such an approach means that the existence, or absence, of a prior complaint is a reasonable consideration to be weighed along with other factors in each individual case, in a manner that is consistent with a "flexible and holistic" approach to considering whether a violation of a Convention right can be demonstrated by a complainant.

The Minister's submission refers exclusively to extracts from the Committee's decision concerning the *ex gratia* scheme to argue that this demonstrates evidence that the Committee is satisfied that the prior complaint criterion falls within the terms

of the judgment. However, this misrepresents the Committee's position, by focusing heavily on a particular part of the Committee's decision, without reference to the complete decision. The clearest statement by the Committee regarding its understanding of the judgment is set out under Committee's *Case Description*, which summarises the case as follows:

> The case concerns the responsibility of the Irish State for the sexual abuse of the applicant, aged nine, by a lay teacher, LH, in a National School in 1973. A prior complaint of sexual abuse by another pupil against the same teach had been made to the school manager and not acted upon at the time.
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> In finding no violation of the procedural obligations under Article 3, the European Court noted the criminal conviction of LH for sexual abuse in 1998 (following later complaints to the police) and the award of damages in civil proceedings payable by LH to the applicant. However, *the Court found that the Irish State had failed to meet its obligation to protect the applicant from sexual abuse in the 1970s because it had entrusted the management of primary school education to non-state actors (National Schools), without putting in place any mechanism of effective state control against the risks of such abuse.* On the contrary, at the time, potential complainants had been directed away from the State authorities and towards managers of National Schools (generally local priests).
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> The Court also found that none of the domestic remedies were effective as regards the applicant's complaint about the Irish State's failure to protect her from abuse (violation of Article 13, in conjunction with the substantive aspect of Article 3).
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> (emphasis added)

While it is undisputed that a prior complaint formed part of the facts of *O'Keeffe* (paragraph 1), it does not form part of the Committee's summary of the Court's reasoning (paragraphs 2 and 3). In this respect the Committee's case description aligns with the correct interpretation of the judgment, namely the State failed to protect the complainant by not taking proactive steps to have in place an effective child protection mechanism - and not the fact that in the complainant's case a prior complaint had been made but not acted upon.

The State's narrow interpretation of *O'Keeffe*, relied upon by it to justify the prior complaint criterion for the purpose of the implementation of the *ex gratia* scheme, is inconsistent with its approach to satisfying the requirements of the judgment more generally. In this regard, the numerous Action Plans submitted by the State to the

Committee list in detail the measures taken by it to address the lack of adequate reporting and child protection structures, including the publication of guidelines, the introduction of Garda vetting and child protection legislation. All such measures are consistent with the terms of *O'Keeffe*, in that the State's liability arose in circumstances where it had failed to provide an adequate legal framework for child protection, a risk that the State ought to have known. This is an acknowledgement by the State that the terms of the judgment go beyond the mere establishment of whether a complainant can demonstrate a prior complaint.

There is a clear inconsistency in the State's approach here. On the one hand, the State appears to accept that an inadequate reporting and child protection framework existed - and that addressing same fall squarely within the terms of the judgment - but, on the other hand, the Minister is seeking to narrow the interpretation of the judgment in terms of who can avail of redress (through the precondition of a prior complaint). This is not only at odds with the other general measures taken by the State to satisfy the judgment, it is also problematic where the State itself accepts that the reporting infrastructure was inadequate at the time - but then seeks to require the complainant prove that a prior complaint had been reported.

Finally, the Commission notes with some concern the figures referred to by the Minister at paragraphs 6 and 7 of the Third Submission and further the questions posed by the Independent Assessor regarding same and the response now received thereto. It is troubling that, to date, there was no clarity on this issue notwithstanding ongoing reporting obligations on the State, and where successive Action Plans have been filed.

The Commission is most concerned to learn that redress has been offered by the State Claims Agency only in cases where proceedings were extant and that not a single offer of redress has been made to any of the 50 applicants to the *ex gratia* scheme, which was introduced to comply with *O'Keeffe*. It is also notable that this fact has never been made clear in any of the Action Plans submitted to the Committee of Ministers. It is difficult to see how this scheme, under which not a single offer of redress has been made, can be presented as an "effective remedy" for the purpose of Article 13 of the ECHR.

The Commission's concern is further heightened in circumstances where, given the historical nature of the abuse, many of the applicants are advancing in age. In announcing an *ex gratia* scheme, survivors of abuse were given to believe that there would finally be an acknowledgement by the State, within a reasonable timeframe, of the wrong done to them. In the Commission's view that the successful conclusion of the *ex gratia* scheme process for a survivor of abuse is about so much more than just the monetary compensation, it is also an opportunity for the State, through its actions, to finally acknowledge the wrong done to that person during their childhood. Instead the reality of the scheme appears to be something quite different - no form of

redress has been extended to any applicant nearly 4 years after the establishment of this scheme.

In the Commission's view, for the State to establish a scheme of this kind, and then fail to operate it in any meaningful manner, likely amounts to an ongoing failure to provide an effective remedy under Article 13 of the ECHR, as well as a failure to vindicate the constitutional rights and ECHR rights (specifically article 3 and 8 of the ECHR) of those people who are the survivors of abuse.

The Commission respectfully urges the Independent Assessor to ensure, through his determination of the appeals pending before him, that applicants' cases are considered without further delay in accordance with the ECtHR decision in *O'Keeffe*, but equally importantly in light of the State's obligations under the Constitution and the ECHR.