



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

BY EMAIL ONLY

1 December 2021

Directorate General
Human Rights and Rule of Law
Department for the Execution of Judgments of the European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

By email: DGI-Execution@coe.int

Your ref: DH-DD(2020)1134
Our ref: 11-264/0001
Re: O’Keeffe v Ireland (Application no. 35810/09)

Dear Directorate General,

I write in respect of the execution of the judgment of the Grand Chamber in *O’Keeffe v Ireland* (Application no. 35810/09).

I enclose for the attention of the Committee of Ministers a communication made by the Irish Human Rights and Equality Commission, Ireland’s National Human Rights Institution, pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

Should the Committee of Ministers have any queries regarding the enclosed communication, please do not hesitate to contact the writer.

Yours sincerely,

Laurence Bond
Director

No signature due to COVID-19 remote working arrangements

Encl.

Communication of the Irish Human Rights and Equality Commission with regard to the Information submitted by Ireland on 8 June 2021 on the execution of the judgment of the Grand Chamber in *O’Keeffe v. Ireland*.

1. The Irish Human Rights and Equality Commission (“IHREC”) is Ireland’s national human rights institution. On 16 June 2021, IHREC made submissions, pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, with regard to the execution of the judgment delivered on 28 January 2014 by the Grand Chamber of the European Court of Human Rights in *O’Keeffe v. Ireland*, no. 35810/08, ECHR 2014 under Article 46(2) of the European Convention on Human Rights.
2. In those submissions IHREC advised the Committee that it is gravely concerned at the lack of progress made by Ireland in providing an effective remedy to victims of historic sexual abuse in Irish schools since judgement was delivered almost seven years ago. While Ireland announced an intention to establish a new ex-gratia redress scheme for victims in the third quarter of 2021, IHREC expressed concern at the State’s intention to include only victims who had already commenced legal proceedings against the State and to require applicants for redress to show how their abuse would have been prevented had an effective system of child protection been in place when they were abused. IHREC requested the Committee to transfer the case to enhanced supervision, on the basis that the mechanism of standard supervision had proved inadequate, with the question of execution still live seven years after the judgment.
3. On 21 July 2021, the Government of Ireland announced the establishment of a new ex-gratia redress scheme (the “Scheme”) to meet its obligations to survivors arising from the judgement of the Grand Chamber in *O’Keeffe v. Ireland* for its failure to implement an effective child protection framework in schools. Regrettably, the published terms of the Scheme restrict access of victims of historic abuse to this limited form of redress.
4. IHREC continues to have significant concerns about three aspects of the new Scheme:
 - a. First, pursuant to paragraph 7, the Scheme is open only to victims who sued the State before 1 July 2021 (that is, three weeks before the Scheme’s introduction). As a matter of principle, victims who sued the State are not more deserving of redress than those who did not. This is especially so in circumstances where the State has defended such proceedings vigorously. In circumstances where a revised redress scheme was promised, there was nothing improper or irrational in victims being circumspect in issuing proceedings, yet those who did not do so are now disadvantaged. IHREC further observes that there is no meaningful distinction to be made between a victim who sued the State before 1 July 2021 and a victim who commenced proceedings thereafter. The date appears to have been chosen arbitrarily.
 - b. Secondly, having required that applicants must have initiated proceedings against the State before 1 July 2021, the Scheme fails to make adequate provision for the discharge of those legal costs. Applicants are eligible for only

€4,000 towards these costs — which are likely to be substantially higher — with the effect that awards made to many victims will be diminished by outstanding legal bills for proceedings. This is unfair in circumstances where the State insists that eligibility for redress is dependent on having initiated those proceedings in the first place.

- c. Thirdly, paragraph 8 of the Scheme requires applicants to satisfy Ireland's State Claims Agency that, had the Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (Department of Education, 1991/1992) been in place at the time the sexual abuse occurred, there would have been a real prospect of altering the outcome or mitigating the harm suffered as a result. There can be no objective justification for subjecting people whose childhoods were shattered by sexual abuse to such an insensitive exercise, which can be based on no more than a series of hypotheticals. Placing the onus on victims to explain how their abuse would have been prevented is redundant when, as the judgment of the Grand Chamber makes clear, Ireland failed to put in place effective mechanisms of child protection in Irish schools notwithstanding the known risk of child abuse. Ireland's Special Rapporteur on Child Protection, Prof Conor O'Mahony agrees; in a letter to Minister for Education on 16 August 2021, he observed:

Ireland was found liable in O'Keeffe precisely because the 1991 Guidelines were not in place; what might have happened if they had been in place is irrelevant, since the salient point is that they were not. The terms of the scheme will result in the State Claims Agency engaging in a speculative make-believe exercise that ignores this central finding of the European Court of Human Rights.

In IHREC's view, evidence that a person was sexually abused at school ought to be sufficient to ground the redress claim. Comparison can usefully be made here with another ex-gratia redress scheme for victims of historic abuse: the Restorative Justice Scheme for survivors of the Magdalene Laundries operated by the Department of Children, Equality, Disability, Integration and Youth. Under that scheme, evidence that an applicant was admitted to and worked in a Magdalene Laundry is sufficient to entitle her to an award of redress. There is no requirement that she demonstrate that her ordeal could somehow have been prevented. There is no reason the same approach ought not to be adopted with respect to this Scheme.

5. For all of these reasons, IHREC respectfully repeats its submission that this case should now be transferred to enhanced supervision so that the process of execution may be more closely followed by the Committee of Ministers, with such supportive interventions for domestic execution process as may be deemed appropriate.

1 December 2021

Appendix

1. Ex gratia scheme – Implementation of the ECtHR Judgement in *O’Keeffe v Ireland*, 21 July 2021
2. The Terms of an Ex Gratia Scheme for Women who were admitted to and worked in Magdalen Laundries, St. Mary’s Training Centre Stanhope Street and House Of Mercy Training School Summerhill, Wexford Updated November, 2018

<https://www.justice.ie/en/JELR/Ex-Gratia%20Scheme%20FINAL.pdf/Files/Ex-Gratia%20Scheme%20FINAL.pdf>

3. Letter of Prof Conor O’Mahony, Special Rapporteur on Child Protection, to the Minister for Education, 16 August 2021 (including revised set of terms for the scheme)

Terms of Scheme

Ex gratia scheme – Implementation of the ECtHR Judgement in O’Keeffe v Ireland

Introduction

1. This ex gratia scheme (the Scheme) implements the decision of Government on 21 July 2021 to provide ex gratia payments to those who experienced sexual abuse as a pupil in a recognised day school prior to the issuing of the Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (November 1991 in respect of a primary school or June 1992 in respect of a post-primary school) and who had issued legal proceedings against the State in this regard.
2. An ex gratia scheme was established in July 2015 to address the ruling of the European Court of Human Rights (ECtHR) in *O’Keeffe v Ireland* (Application no. 35810/09) and, in particular, the Article 13 rights (right to an effective remedy) of those litigants who had issued legal proceedings against the State seeking damages for sexual abuse in day schools and who discontinued those proceedings following the decisions of the High Court [2006 IEHC 13] and the Supreme Court in *O’Keeffe v Hickey and Ors* [2008 IESC 72].
3. The Scheme has now been revised to provide ex gratia payments for that cohort, following due consideration of the report of the Independent Assessor on the ex gratia scheme which was published in July 2019. The Scheme has also been broadened in scope to allow applications from a further cohort of litigants, who, on or before 1 July 2021, issued legal proceedings against the State seeking damages for sexual abuse in day schools before 1991 and 1992 in primary and post-primary schools respectively and following the ECtHR ruling in *O’Keeffe v Ireland*.

Objectives of the revised Scheme

4. To ensure that the establishment and scope of the revised Scheme addresses the Article 13 rights arising from the ECtHR ruling for a group of people who discontinued their legal proceedings following the judgments of the High Court and/or Supreme Court and whose circumstances are encompassed by the ECtHR ruling on *O’Keeffe*.
5. In so doing, to allow the State to fully meet its obligations to the ECtHR following the reopening of the Scheme with an Action Report to be submitted in 2022.
6. To ensure that the establishment and scope of the revised Scheme is consistent with both the ECtHR ruling and the decision of the Independent Assessor.

Scope of the Scheme

7. The Scheme has been revised and is open for applications to those who have issued legal proceedings against the State on or before 1 July 2021 seeking damages for childhood sexual

abuse in a recognised day school which occurred before November 1991 (primary) and June 1992 (post-primary).

Criteria for the Scheme

8. To qualify for a payment, an Applicant, who is part of the cohort described in Section 7, must demonstrate that the facts of their case come within the parameters of the O’Keeffe judgment. In particular, an Applicant will have to satisfy the following criteria -
 - a. Were sexually abused while a pupil at a recognised day school and that this occurred before November 1991 in respect of a primary school or June 1992 in respect of a post primary school.
 - b. That had the Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse. Department of Education, 1991/1992 been in place at the time the sexual abuse occurred there would have been a real prospect of altering the outcome or mitigating the harm suffered as a result
9. While the Scheme Administrator will take a holistic approach to the evidence furnished by an Applicant in respect of the above criteria, the onus remains on the Applicant to satisfy the Scheme Administrator, by relevant evidence verified by affidavit, statutory declaration or statement of truth, that they are eligible for an ex gratia payment within the terms of the Scheme.

In respect of 8a above, the Applicant must provide evidence to the Scheme Administrator that they have experienced childhood sexual abuse. Evidence may include but is not limited to –

- a. Medical reports confirming treatment of conditions consistent with the indicia regarded as being associated with childhood sexual abuse
 - b. Psychological reports/reports from a Counsellor confirming treatment of conditions consistent with the indicia regarded as being associated with childhood sexual abuse
 - c. Evidence of complaint (attested to by way of sworn affidavit, statutory declaration or statement of truth)
 - d. Evidence of report to An Garda Síochána or other authority (attested to by way of sworn affidavit, statutory declaration or statement of truth)
 - e. Any other relevant evidence available (attested to by way of sworn affidavit, statutory declaration or statement of truth)
10. The Scheme acknowledges the applicability of the real prospect test and will allow for individualised assessment of each application in this respect. Consistent with this, this Scheme requires an applicant to demonstrate that there would have been a real prospect that the outcome would have been altered or the harm suffered would have been mitigated had the guidelines as referred to above been in place before or at the time of the abuse.
11. This may include but is not necessarily limited to the following -
 - evidence of a prior complaint to An Garda Síochána or other authority about the abuser or

- evidence of other prior behaviour or suspicion of prior behaviour on the part of the abuser that should have come to the attention of the authorities

and may comprise of relevant documentary evidence and must be attested to by way of sworn affidavit, statutory declaration or statement of truth of the Applicant or other relevant individuals.

Calculation of payment

12. Applicants who meet the eligibility criteria for the Scheme will be offered an ex gratia payment of €84,000.
13. Applicants who have already settled a claim against the State in respect of the sexual abuse evidenced in this application will be entitled, subject to meeting the eligibility criteria, to the difference between the ex gratia amount, if higher, and the State's contribution to the original settlement.
14. For the avoidance of doubt, those who received payments under the ex gratia scheme established in July 2015 are not eligible for payment under this Scheme. Only one payment per individual will be made under this Scheme.
15. No interest payments or other damages will be paid in addition to this award as part of the Scheme.
16. Payments made to the Applicant are not liable for Irish income tax or capital gains tax.
17. All payments shall be made on an ex gratia basis.

Legal representation and other costs

18. As applications to the Scheme are not intended to be adversarial, it is not envisaged that the Applicant will require legal representation. An Applicant may wish to consult with a solicitor and take legal advice and assistance in applying for payment under the Scheme.

Where legal advice or other assistance is sought in relation to the application (including the drafting and swearing of an affidavit, statutory declaration or statement of truth) and where the Scheme Administrator determines that an Applicant is entitled to a payment under the Scheme, certain costs arising from work that was strictly necessary to prepare and submit an application to the Scheme will be paid. It is expected that, in respect of each application, this will be less than €4,000 plus VAT (to be paid over and above the ex gratia payment). The amount paid will be decided on a case by case basis and is intended to cover all costs and outlays incurred in making the application, including any appeal. In the event that agreement as to costs is not reached, the parties shall agree to the issue being referred to an independent Costs Accountant, with both parties agreeing to be bound by his/her determination and both being responsible for his/her fees on a 50/50 basis.

19. No costs or outlays shall be paid unless a payment of an award is made under the Scheme.

Advertisement of the Scheme

20. A notice advertising the Scheme and its commencement date shall be published in such national newspapers and other forms of media that the Scheme Administrator considers appropriate.

Time Limit for Applications

21. Applicants must submit their application according to the procedures as set out in Section 26 within 2 years of the commencement date of the Scheme. Applications will not be accepted after the closing date.

Procedure

22. The State Claims Agency will administer the Scheme on behalf of the State.
23. Applications shall be made in writing supported by relevant evidence in the form required.
24. The Scheme Administrator will issue a written acknowledgement of the receipt of the application normally within 5 working days of receipt of application.
25. Unless otherwise specified, all correspondence and communications relating to either the Scheme or any applications under the Scheme (including any applications for appeal) shall be sent to the Scheme Administrator at the postal or email address as set out.

Supporting documentation

26. The application for a payment shall include –
- a. a completed application form
 - b. proof of identity including date of birth, for example copy of birth certificate, passport, driving licence
 - c. supporting evidence of sexual abuse as set out in Section 9
 - d. copies of any of the following – (i) Plenary Summons and Statement of Claim (ii) Civil Bill or (iii) Personal Injury Summons in respect of legal proceedings commenced by the Applicant against the State that concern the sexual abuse evidenced
 - e. Supporting documentation and/or evidence setting out how the Applicant meets the real prospect test as outlined including, where relevant, an affidavit, statutory declaration or statement of truth

It is the responsibility of the Applicant to notify the Scheme Administrator of any changes of address or contact details.

Applications on behalf of individuals

27. Where an individual lacks capacity or is otherwise unable to make an application on their own behalf, an application can be made on their behalf where appropriate evidence is provided as to

the identity of the Applicant and that the representative is authorised to act on behalf of the Applicant.

Determinations, acceptance and payment

28. The Scheme Administrator shall consider and determine each valid application on the basis of the contents of the application form and supporting documentation. There shall not be any oral hearing for the purposes of determining the application.
29. If the Scheme Administrator rejects an application, their decision and reasons shall be notified in writing to the Applicant or their representative.
30. If the Scheme Administrator decides an application in favour of the Applicant, they shall notify the Applicant or their representative in writing of the decision, make the ex gratia offer as set out above and append a draft Deed of Waiver and Indemnity for signing by the Applicant.
31. If the Applicant accepts the conditional offer of an ex gratia payment, they shall have 40 working days from the date of such letter to notify the Scheme Administrator in writing of such acceptance, to furnish a signed Deed of Waiver and Indemnity and to furnish evidence of discontinuance of any legal proceedings.
32. Payment shall be made by the Department of Education and shall be made electronically either to the Applicant's personal account or to the client account of their nominated solicitor in accordance with the Applicant's choice as expressed on their acceptance of an offer. No payment shall be made unless the draft Deed of Waiver and Indemnity is executed.
33. If the Applicant does not accept the payment within 40 working days and as set out above, they will be deemed to have rejected the payment.

Waiver

34. Payment made under the Scheme is conditional upon the Applicant waiving any claim that they may have against the State arising out of the sexual abuse evidenced in their application and discontinuing any relevant extant legal proceedings. Any eligible Applicant who accepts the offer of a payment must therefore indicate acceptance by signing a Deed of Waiver and Indemnity forfeiting any claim that they may have against the State and, if relevant, discontinuing any extant legal proceedings within 40 working days of receipt of the letter of offer from the Scheme Administrator. A Notice of Discontinuance will be the only acceptable evidence of discontinuance.

Appeals mechanism

35. An Applicant whose application is rejected by the Scheme Administrator can appeal that decision to an independent Appeals Officer, who will be appointed from a specially constituted panel.

36. The sole ground for an appeal shall be that the Scheme Administrator made a material error in reaching its decision not to make an award to the Applicant under the Scheme following consideration of whether they fulfil the criteria set out under Section 8. No other considerations shall be placed before the Appeals Officer. Each appeal shall be considered on its own merits.
37. There shall not be any oral hearing for the purposes of determining the appeal. The Appeals Officer(s) will rely on the same evidence and documentation as was available to the Scheme Administrator.
38. Any such appeal must be made within 40 working days of the decision of the Scheme Administrator and by completing the Notice of Appeal form. The Notice of Appeal must be submitted via the Department of Education who will provide administrative support to the Appeals Officer(s) and in order to ensure that they can properly perform their functions.
39. A final determination in respect of an appeal shall issue within 30 working days of receipt of the notice of appeal.

Definitions

40. The following definitions apply to the Scheme –

- i. An **Applicant** is an individual who has submitted a completed application form under the Scheme
- ii. The **Scheme Administrator** is the State Claims Agency who will administer the Scheme on behalf of the State.
- iii. **Sexual abuse** is as defined in Section 48A of the Statute of Limitations Act 1957 (as amended by the Statute of Limitations Amendment Act 2000).
- iv. **Working day** means every day from Monday to Friday inclusive but shall exclude any national holiday.
- v. A **recognised school** is a school that is recognised under section 10 of the Education Act 1998, as amended

**TERMS OF AN EX GRATIA SCHEME
FOR WOMEN WHO WERE ADMITTED TO AND WORKED IN
MAGDALEN LAUNDRIES,
ST. MARY'S TRAINING CENTRE STANHOPE STREET
AND
HOUSE OF MERCY TRAINING SCHOOL
SUMMERHILL, WEXFORD**

**Updated
November, 2018**

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INTRODUCTION

1. The Government has decided to provide, on an *ex gratia* basis, a scheme of payments and benefits for those women who are determined, under the application process set out below, to have been admitted to and worked in one of the 12 institutions listed at Appendix 1. Payments and benefits under the scheme will only be made to those women who comply with all of the terms of this Scheme (including the signing of the Form and Declaration at Appendix 2) and who waive any right of action against the State or against any public or statutory body or agency arising out of their admission to and work within one of the 12 institutions concerned.
2. The scheme is informed by the Report of Mr Justice John Quirke "On the establishment of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries" May 2013 which is referred to in this scheme as the Quirke Report.
3. A Restorative Justice Implementation Unit has been set up in the Department of Justice and Equality, for a limited period, to process applications and payments under the Scheme.

APPLICATION PROCESS

Application forms

4. Where a person is applying on their own behalf, an application form must be completed. Applications forms can be requested from the Restorative Justice Implementation Unit in the Department of Justice and Equality at telephone number + 353 1 4768660 or the Department's website – www.justice.ie
5. Completed application forms must be accompanied by:
Birth Certificate – Long Form
 - Proof of address (e.g. a household bill)
 - Proof of Identity, (Passport, Driving Licence, Marriage Certificate or Pension card)
 - Proof of your Personal Public Service Number (PPSN number) (e.g. your Social Welfare Card or Medical Card). For those resident outside the State, your Tax File Number or your National Social Insurance Number.
 - Records from the institution that you resided in and worked in stating the period of time you were there.
6. Incomplete forms will be returned and if all the necessary support documents have not been provided a further written request will issue requesting those documents. This letter may be supplemented by a telephone call if telephone contact details have been provided. The applicant will be advised that the processing of their application is suspended pending receipt of the outstanding information/documents.

7. The application forms also request applicants to consent to the provision of personal information to the Department of Justice and Equality by any Government Department, agency, health or educational institution and the religious congregations for the purpose of verification in relation to their application.
8. At any stage of the application process, the Restorative Justice Implementation Unit may request an applicant to meet with a staff member of the Unit for any purpose connected with her application including the verification of any matter relevant to the application or required under the scheme or the confirmation of the applicant's identity or capacity.
9. It is the responsibility of the applicant to notify the Restorative Justice Implementation Unit of any changes of address or contact details.

Acknowledgement of application

10. A written acknowledgment of receipt of the application will be sent to the applicant normally within 5 days of receipt of application. Original documents once copied will be returned to the applicant by registered post.

Term of the Scheme

11. The Scheme will run to at least the end of December 2018. When a decision is made to close the Scheme to new applications after that date, advance public notice will be given.

Applications on behalf of eligible women unable to make an application

12. Where a woman who was in one of the 12 institutions listed at Appendix 1 lacks the capacity to make an application, the application can be made on her behalf by a person properly authorised to do so. The Restorative Justice Implementation Unit will accept that a person is so authorised only where he or she provides the appropriate evidence –
 - a) as to the identity of the applicant;
 - b) that the woman who was in one of the relevant institutions is incapable of making an application, and
 - c) that the applicant is authorised to act on behalf of the woman who was in one of the relevant institutions for the purpose of the application.

Processing of Applications on behalf of eligible women who have died

13. Relatives of deceased women who were admitted to and worked in one of the 12 institutions are not covered by the Scheme with one exception. As recommended by Judge Quirke, where a woman who comes within the scheme was alive on 19 February 2013 and an expression of interest was or is received by the Department of Justice and Equality before her death, an application may be made on behalf of her estate. Such an application will be processed to finality even if the woman is now deceased or passes away before a payment can be made.

14. The lump sum to which the deceased person would have been granted under this Scheme to a maximum of €50,000 will be paid to the estate of the deceased person. No weekly instalments, payments or other benefits will be made in respect of a deceased woman.

Commencement Date for Scheme

15. On 5th November 2013, the Government decided that the 1st August 2013 was to be the commencement date for the Scheme. Where a woman is determined to be eligible for the scheme, any weekly instalments on the lump sum and weekly payment due from the Department of Social Protection will be backdated to the 1st August 2013.

DECIDING WHETHER A PERSON FALLS WITHIN THE SCOPE OF THE SCHEME

Notification of Provisional Assessment

16. The first phase of processing a properly completed application will be the making of a provisional assessment as to whether the applicant comes within the scope of the scheme. This assessment will be made on the basis of the records of the institutions concerned and any other records or statements available. On this basis, a decision will be made as to whether, on the balance of probabilities the applicant was admitted to and worked in one of the 12 institutions covered by the scheme and, if so, an assessment will be made of the length of time which she spent in the relevant institution. This provisional assessment will be set out in a letter to the applicant. An estimate of the lump sum payment which will be paid to the applicant subject to the requirements set out below will also be provided for information purposes. (The lump sum payment is just one of the benefits under the scheme but some of the other benefits which may be offered will depend on personal circumstances and a further process is required to determine exactly what other secondary benefits if any, will be due to persons under the scheme.)
17. The applicant will be asked whether she agrees with the provisional assessment. If she agrees with the provisional assessment, an applicant is required to notify the Restorative Justice Implementation Unit of her agreement within 2 months of the date of the letter. A formal offer in the same terms and subject to the signing of an Acceptance Form and statutory declaration will then be made, see below. If an applicant disagrees with the provisional assessment, she can seek a review of the assessment and should state the reasons why she disagrees with it and what evidence she has to support her view. If an applicant disagrees with the provisional assessment and seeks a review, she must notify the Restorative Justice Implementation Unit within 2 months of the letter. If an applicant fails to indicate her agreement or disagreement with the provisional assessment within 2 months of the date of the letter, her application will be deemed to have been withdrawn.

18. Where the Applicant has been determined to be eligible under the Scheme, as a condition precedent to the making of any payment or provision of any other benefit under this Scheme, she will be required to sign an Acceptance Form and complete a Statutory Declaration (see paragraphs 24 - 31 below) . (An applicant can indicate in writing that she only wishes to receive specified parts of the payments and benefits under the scheme.)

REVIEW/APPEAL PROCESS

19. If an applicant does not agree with a provisional assessment made by the Restorative Justice Implementation Unit, on whether she comes within the scope of the scheme or the duration of her stay in one of the relevant institutions, she can seek a review of that assessment within 2 months of the date of the letter of provisional assessment setting out her reasons. The application will be reviewed by an officer of a higher grade in the Department of Justice & Equality who will, having considered the matter, make a decision on the case and give written reasons for that decision. The applicant will be informed in writing of the decision, and the reasons for the decision and will also be advised that if she is not satisfied with the review decision, she may appeal that decision to an independent Appeals Officer – details will be provided.

CALCULATION OF LUMP SUM PAYMENT

20. The lump sum payment includes a general payment and a payment to reflect the work done in the laundries. These payments will be made after a formal offer has been made and accepted and the Acceptance Form and statutory declaration have been signed. The amount to be paid and how it is to be paid will be calculated in accordance with recommendations 3 and 4 and Appendix A of the Quirke report and is based on the time spent in the laundries. The Quirke Report provides a number of tables (Pages 65 – 67) showing precise calculations, for example, a woman who spent 5 months in the laundry will receive a general payment of €11,000 plus a work payment of €2,500 which will give her a total payment of €13,500. If a woman was in the laundry for 10 years or more she will receive a general payment of €40,000 and a work payment of €60,000 which would give her a total of €100,000.
21. However, Judge Quirke has also recommended (Recommendation 4) that if an applicant is to be given a cash payment above €50,000 it should be paid in the form of a lump sum of €50,000 plus an annual instalment related to the notional remaining lump sum to be paid weekly on the following basis:
- If the applicant is 66 years of age or older annual instalments will be calculated on the basis of Appendix D.1, page 75 of the Quirke Report.
 - If the applicant is under 66 years of age the instalments will be calculated on a two part basis:

- (a) an instalment to be made until the applicant reaches the age of 66 calculated on the basis of Appendix D.2 page 76 (but not to exceed €130 per week) and
 - (b) any part of that portion of the lump sum exceeding €50,000 remaining after the payments in paragraph (a) above to be paid in instalments calculated on the basis of Appendix D.1, page 75 .
22. Depending on the amounts involved, smaller weekly instalments will be accumulated and be paid on a monthly basis. If calculations give rise to potentially very small weekly instalments (e.g. less than €5 per week) the lump sum amount will not be converted to weekly instalments but will be paid as part of the lump sum.
23. Payments under this element of the scheme are not liable to Irish income tax or capital gains tax.

FORMAL OFFER

24. If the applicant confirms in writing that she will accept the provisional determination, then a formal offer in the same terms as the provisional assessment will be made in writing and payment will be conditional on the signing of an Acceptance Form and a statutory declaration:
- a) agreeing to participate in the scheme,
 - b) accepting its terms,
 - c) attesting to the truth and accuracy of the information and documentation submitted in her application and on foot of which the offer is made;
 - d) confirming that she is of sound mind (subject to paragraph 29 below)
 - e) accepting the offer made;
 - f) waiving any right of action against the State or any public or statutory body or agency arising out of her admission to and work in the institution or institutions concerned.
 - g) agreeing to discontinue any proceedings instituted by her against the State or any public or statutory body or agency arising out of the circumstances of her application
 - h) acknowledging the implications of making a false or misleading application including the acknowledgement that the making of a false statement in a statutory declaration is an offence.
25. This Acceptance Form must be witnessed by a practising solicitor and the Statutory Declaration must be witnessed by one of the persons specified under section 1 of the Statutory Declarations Act 1938 and set out in the template declaration form attached at Appendix 2.
26. If a solicitor witnesses the declaration, his or her fee for this service may be included in the fee for legal advice referred to below and, if so included, will be discharged by the Restorative Justice Implementation Unit and subject to the overall cap on the contribution which will be made towards legal fees outlined below.

27. Fees incurred by an applicant if the statutory declaration is witnessed by any other category of witness will not be discharged by the Restorative Justice Implementation Unit.
28. Before signing the Acceptance Form and statutory declaration the applicant is strongly advised to obtain legal advice. A contribution of up to a maximum of €500 + VAT will be made available to applicants residing either in Ireland or abroad towards the cost of obtaining their own legal advice. Any legal costs incurred by an applicant in excess of €500 + VAT will not be paid for by the State.
29. The applicant will be given 6 months from the date of the letter of formal offer to make a decision on the offer and to sign and return the properly completed and witnessed Acceptance Form and statutory declaration. However if it is established within that period that the applicant lacks the capacity to make the decision and there is no person with lawful authority to act on her behalf, that 6 month period will be extended until after the necessary legislation referred to below is enacted and commenced. The Restorative Justice Implementation Unit may ask for proof as to the capacity of an applicant and a medical certificate or other evidence may be required to be produced to the Unit before any payment can be made.
30. If the applicant accepts the offer and signs the Acceptance Form and statutory declaration, the applicant will be deemed to fall within the scheme.
31. If, on receipt of the letter of formal offer and prior to its acceptance, the applicant identifies any factual or methodological or other substantive error which has been made in the provisional assessment (and repeated in the letter of formal offer) and notifies the Restorative Justice Implementation Unit of that error and provides information to the Unit setting out what the applicant understands to be or maintains is the correct position then, notwithstanding her earlier indication of acceptance of the provisional assessment, that assessment will be reviewed in accordance with paragraph 19 above.

WOMEN LACKING CAPACITY

32. Special arrangements have to be made for a woman who does not have the capacity to apply, to make a decision regarding acceptance of the offer or to sign an Acceptance Form or statutory declaration. In such a case, only a person who has a legal power to act on behalf of the applicant may make the decision to accept an offer and sign an Acceptance Form or statutory declaration on her behalf. The fact that a person has made an application on behalf of a woman who may be eligible under the scheme does not mean that person has a legal right to act on behalf of the applicant. Where the applicant is a ward of court or has signed an enduring power of attorney, the relevant person or body appointed by the Court or empowered under that instrument will be entitled to act on behalf of the applicant. For other cases, as recommended by Judge Quirke, legislation has been enacted but not yet commenced to cater for these

cases where an applicant lacks capacity. It will provide for the appointment of a person by a court to act on behalf of the applicant for the purposes of this Scheme, including accepting an offer and signing an Acceptance Form and statutory declaration on her behalf.

PAYMENT

33. When a person has accepted the offer and signed the Acceptance Form and statutory declaration, arrangements will be made to process the lump sum payment. Such payment will only be paid into an account in a financial institution held in the sole name of the applicant. As referred to above, the Restorative Justice Implementation Unit may ask for proof as to the capacity of an applicant and a medical certificate or other evidence may be required to be produced to the Unit before any payment will be made.

OTHER SUPPORTS UNDER THE SCHEME

34. The Department of Justice and Equality will notify the other relevant Departments and agencies that a decision has been made that the applicant is eligible for benefits under the scheme once the offer has been accepted and the Acceptance Form and statutory declaration have been signed. In the case of weekly payments to be made by the Department of Employment Affairs and Social Protection, that Department may require further details to enable the payments to be calculated and paid. Similarly additional information may be required by the HSE before a card providing access to medical services can be provided. The relevant Department or agency will contact the applicant to obtain the necessary information.

ACCESS TO HEALTH SERVICES

35. Applicants who are determined to be eligible under the scheme and who have accepted the offer made to them and signed the Acceptance Form and Statutory Declaration will be granted access to a range of public health services. Legislation was required to provide these services. The Redress for Women Resident in Certain Institutions Act 2015 has been enacted and was commenced with effect from 1st July 2015. The Department of Justice and Equality will notify the Health Service Executive (HSE) of participants in the Ex Gratia Scheme. The HSE will then contact applicants to obtain relevant information.
36. The HSE will provide a 2015A card and an information note on the services covered. They will also provide contact details for the relevant Community Health Officers. The range of public health services offered will depend on the needs of the applicant and includes a general practitioner medical and surgical service, prescribed drugs and medicines and medical and surgical appliances, nursing services, home help services, dental, ophthalmic and aural services, counselling services, chiropody services and physiotherapy services. In addition, Statutory Instruments exempting Magdalen Women from hospital out-patient and in-patient charges were signed on 30 November 2017.

37. **Women living overseas** are entitled to access the specified health services if they visit or return to Ireland on or after 1st July 2015. They are advised to contact the relevant Community Health Organisation Contact Person for information before returning to Ireland. The woman will also be required to produce her card as evidence of eligibility to gain access to services in Ireland.

38. The HSE has set up the **Redress Reimbursement Scheme 2015** to deal with the healthcare costs for persons with a 2015A card living overseas. The Scheme aims to ensure that a 2015A cardholder living outside of Ireland can access the range of health services abroad that are specified in the RWRCI Act as free of charge since 1 July 2015. If a cardholder is charged for one of these services the Scheme will arrange to reimburse the amount of the charge. Cardholders are asked to keep all receipts and invoices for relevant health services in order to make a claim.

For further information please contact:

Redress Reimbursement Scheme 2015
St. Joseph's Campus
Mulgrave Street
Limerick
V94 C8DV

Tel: +[353 \(0\)61 461138](tel:+353061461138)

Email: redress2015@hse.ie

WEEKLY PAYMENT

39. Applicants who are determined to be eligible under the scheme for a lump sum payment and who have accepted the offer made to them and signed the Acceptance Form and the statutory declaration will in addition and without regard to the lump sum payments receive **weekly top up payments** of up to €100 if under 66 and up to the equivalent of the State Contributory pension - €243.30 (wef Nov. 2018) - if over 66. These payments are to be calculated net of other Irish State benefits, see examples below.

- A person over 66 years of age receiving only a State non contributory pension would receive an additional payment each week to bring her up to the figure recommended by Judge Quirke.
- A person receiving primary State benefits in excess of the threshold recommended by Judge Quirke would receive no additional weekly payment.
- A person who has for example a private pension or income and is not receiving any State benefits would receive the full amount of €243.30 if over 66 and €100 if under 66 years of age.

40. Only primary benefits will be taken in to account when calculating what amount an applicant is receiving from the State above the minimum threshold (€100/€243.30) specified by Judge Quirke. Therefore, for example, an

applicant on a non contributory pension who has living alone and rent supplement might be receiving in excess of €243.30 in State benefits but for the purpose of this scheme only her primary benefit - i.e. her non contributory pension will be taken into account so she will receive a weekly top up to bring her up to €243.30. This will not affect her other benefits.

41. Weekly payments to women, under the Scheme, from the Department of Social Protection will date from 1st August 2013. These payments will not be liable for assessment for income tax purposes.
42. The Department of Social Protection will commence these payments, on a phased basis, from mid June 2014. Applicants will be paid the arrears dating back to 1st August 2013. The Department of Social Protection will also take over, from the Department of Justice, payment of the weekly instalments for those in receipt of the balance of lump sums in excess of €50,000. The Department of Social Protection will contact all eligible applicants in relation to their payments in due course.

UK RESIDENTS

43. Provision will be made for the additional payment of a maximum of STG£1,000 in the case of an applicant who is determined to be eligible under the scheme and who has accepted the offer made to her and signed the Acceptance Form and statutory declaration and who resides in the UK towards the cost of establishing an appropriate personal injury trust fund, if they wish to establish such a fund. Contact should be made with the Restorative Justice Implementation Unit before incurring any expenditure on the establishment of such a trust fund.

APPENDIX 1

The twelve institutions covered under the Magdalen Scheme

• THE TEN MAGDALEN LAUNDRIES

Good Shepherd Sisters

The Magdalen Laundries at

- St Mary's Cork Road, Waterford
- St Mary's New Ross, Wexford
- St Mary's Pennywell Road, Limerick
- St Mary's Sunday's Well, Cork.

Sisters of Our Lady of Charity

The Magdalen Laundries at

- St Mary's Refuge, High Park, Grace Park Road, Drumcondra, Dublin 9
- Monastery of Our Lady of Charity Sean McDermott Street (formerly Gloucester Street), D1;

Sisters of Mercy

The Magdalen Laundries at

- Magdalen Home (formerly Magdalen Asylum), 47 Forster Street, Galway
- St Patrick's Refuge, Crofton Road, Dun Laoghaire, Co. Dublin

Sisters of Charity

The Magdalen Laundries at

- St Mary Magdalen's, Floraville Road, Donnybrook, Dublin
- St Vincent's, St Mary's Road, Peacock Lane, Cork

• TWO OTHER INSTITUTIONS

Sisters of Mercy

House of Mercy Training School Summerhill, Wexford (Laundry operated in the Training School)

Sisters of Charity

St Mary's Training Centre Stanhope Street (Laundry operated in the Training Centre)

APPENDIX 2

Template – Acceptance Form and Statutory Declaration

ACCEPTANCE FORM

EX GRATIA SCHEME FOR WOMEN WHO WERE ADMITTED TO AND WORKED IN MAGDALEN LAUNDRIES, ST. MARY'S TRAINING CENTRE STANHOPE STREET AND HOUSE OF MERCY TRAINING SCHOOL SUMMERHIL, WEXFORD

I, A.B., of [insert address] having made an application under the above Scheme hereby:-

- i. agree to participate in the above Scheme and I accept all of the terms of the Scheme as set out in the document entitled "*Terms of Magdalen Restorative Justice ex-gratia Scheme*"
- ii. accept the offer made to me by the Restorative Justice Implementation Unit by letter dated [insert date of letter].
- iii. waive any right of action against the State or any public or statutory body or agency arising out of my admission to and work in [insert name of institution or institutions concerned].*
- iv. agree to discontinue any proceedings instituted by me against the State or any public or statutory body or agency arising out of the circumstances of my application.
- v. confirm that I understand and acknowledge that any false or misleading documentation or information submitted by me in relation to this application will result in a withdrawal of the offer or, if the offer has been accepted, will result in a requirement to repay all monies received by me under this Scheme and all benefits granted to me under this Scheme will be withdrawn. Further, I understand that the making a false statement in a statutory declaration is an offence.
- vi. acknowledge that, prior to signing this document, I have been advised by the Restorative Justice Implementation Unit in the Department of Justice and Equality of my entitlement to obtain my own legal advice as to its meaning and effect in law and I understand that it would be in my best interest to obtain such advice. [I further acknowledge that I have received such advice before signing this document] (*delete as appropriate*)

Signed: [A.B.]

Witnessed: [name and address of solicitor]

Date: [insert]

FORM OF STATUTORY DECLARATION

**MAGDALEN RESTORATIVE JUSTICE EX GRATIA SCHEME
EX GRATIA SCHEME FOR WOMEN WHO WERE ADMITTED TO
AND WORKED IN MAGDALEN LAUNDRIES, ST. MARY'S TRAINING
CENTRE STANHOPE STREET AND HOUSE OF MERCY TRAINING
SCHOOL SUMMERHIL, WEXFORD**

I, A.B., of *[insert address]* and being of sound mind do solemnly and sincerely declare that:-

- i. I have made an honest and truthful application under this Scheme;
- ii. The documents which I have submitted, and on foot of which an offer has been made to me under the Scheme, are true and genuine documents and, where copies of documents have been furnished by me, they are true copies of the relevant document;
- iii. The details set forth in those documents and any other material submitted by me in relation to this application (including the details on the application form submitted) are true and accurate;
- iv. I have waived any right of action against the State or any public or statutory body or agency arising out of my admission to and work in *[insert name of institution or institutions concerned]*.*

and I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1938.

[Signed] A.B.

[Address]

Declared before me.....*[name in capitals]* a [solicitor]
[notary public] [commissioner for oaths] [peace commissioner] [person
authorised by *[insert authorising statutory provision]*.....
to take and receive statutory declarations] by A.B.

[who is personally known to me],

or

[who is identified to me by C.D. who is personally known to me]

or

[whose identity has been established to me before the taking of this Declaration
by the production to me of

passport no. [*passport number*] issued on [*date of issue*] by the authorities of [*issuing state*], which is an authority recognised by the Irish Government]

or

national identity card no. [*identity card number*] issued on [*date of issue*] by the authorities of [*issuing state*] [which is an EU Member State, the Swiss Confederation or a Contracting Party to the EEA Agreement]

at.....[*place of signature*] this.....day
of.....[*date*]

.....
[*signature of witness*]”.

FAO Norma Foley TD
Minister for Education

16 August 2021

Dear Minister Foley,

I write in relation to the recent announcement of the re-opening of the *ex gratia* scheme for survivors of sexual abuse in schools. As you are aware, Ireland is obligated, on foot of the judgment of the European Court of Human Rights in *O’Keeffe v Ireland* (2014), to provide compensation to people who experienced sexual abuse during the period in which the State failed to implement adequate measures to safeguard against such abuse. The previous version of the scheme was found by retired Judge Iarfhlaith O’Neill in 2019 to have been “inconsistent with the core reasoning of the judgment of the ECtHR in the Louise O’Keeffe case”, having rejected every single application to it due to failure to demonstrate the existence of a prior complaint.

While it is welcome that the *ex gratia* scheme has (two years after the above finding) finally re-opened, and that survivors of sexual abuse are no longer barred from even applying for compensation, considerable concerns remain about the restrictive conditions of the revised scheme. It is my considered view that these terms remain inconsistent with the *O’Keeffe* judgment and will result in survivors who are legally entitled to be compensated having their applications refused. This is for the following reasons:

1. Exclusion of abuse survivors who had not litigated against the State prior to July 2021

The revised scheme contains a precondition that applicants must have instituted court proceedings against the State prior to 1 July 2021 in order to qualify for an *ex gratia* payment. This condition is just as much at variance with the *O’Keeffe* judgment as the condition of prior complaint which retired Judge O’Neill considered in 2019. It suggests that the entitlement to compensation derives from whether and when a person instituted legal proceedings rather than from the rights violations experienced by children who were sexually abused in schools. This is clearly not the case.

As the Court noted in the *O’Keeffe* judgment, the Irish State’s obligations towards children were not fulfilled when the State, “which must be considered to have been aware of the sexual abuse of children by adults ... continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring” (see §168 of the judgment). The judgment makes no reference whatsoever to the question of whether and when legal proceedings were instituted against the State.

Professor Mark Poustie
Dean of The School of Law

Dr Kay Taaffe
Manager

Ollscoil na hÉireann, Corcaigh
National University of Ireland, Cork

The entitlement to redress derives from the fact that children were sexually abused in a school system in which the State had failed to implement effective safeguards. The rights of those who had not instituted court proceedings prior to 1 July 2021 were violated in precisely the same way as the rights of those who had instituted proceedings. This condition is therefore inherently discriminatory and at variance with the *O’Keeffe* judgment. If, for example, two individuals were abused by the same abuser in the same school, their rights were violated in the same way. It would be contrary to the ECHR to provide compensation to one of these individuals but not the other based on the incidental question of whether and when they had litigated a claim against the State.

Moreover, the cut-off date of 1 July 2021 was announced three weeks after it had passed, making it impossible for applicants to meet it by adjusting their position. It is an entirely arbitrary date, with no basis in either the *O’Keeffe* judgment or the Statute of Limitations, and seems designed only to exclude deserving applicants from the scheme.

I note the Minister’s suggestion on RTE Radio on 21 July that the courts remain open to anyone excluded from the scheme. This ignores the fact that all attempts since 2014 to litigate claims against the State related to sexual abuse in schools have been dismissed by the Irish courts as “bound to fail” (see, eg, *Mr A v Minister for Education* [2016] IEHC 268; *Naughton v Dummond* [2016] IEHC 290, *Kennedy v Murray* [2016] IEHC 291 and *Wallace v Creevey* [2016] IEHC 294). This is on the basis that the ECHR has no effect in domestic law in respects of events occurring prior to 1 January 2004; as such, the decision of the European Court of Human Rights in *O’Keeffe* cannot be relied on in an Irish court.

It must be emphasised that many applicants had good reasons, deriving from the State’s own conduct between 2009 and 2021, for not instituting court proceedings against the State if they had not already done so:

- 1) It is well documented that the State sought to pursue litigants (including Louise O’Keeffe herself) for enormous legal costs in the aftermath of the Supreme Court decision in *O’Keeffe*. This stance by the State had a significant chilling effect on litigation. It is entirely unreasonable to require applicants to have exposed themselves to substantial costs orders by pursuing court proceedings which the courts have described as “bound to fail”.
- 2) Even following the European Court of Human Rights decision in *O’Keeffe*, the State excluded applicants from the *ex gratia* scheme if proceedings were before the courts in respect of their abuse. I enclose a letter sent by the State Claims Agency to an applicant in 2016 that demonstrates this point. This approach acted as a further deterrent to litigation.
- 3) Finally, following retired Judge O’Neill’s decision in 2019, the Taoiseach, Leo Varadkar TD, stated in the Dáil on 9 July 2019:

“The best apology we can make to Louise O’Keeffe and all other survivors is to say further action will be taken. The State failed them at the time and failed them again when it did not own up to its responsibility. We will not fail them a third time.”

On foot of this statement, as well as multiple further statements made by the Department of Education in response to parliamentary questions and media queries between 2019 and 2021, it was eminently reasonable for abuse survivors to wait and see what came of the review of the *ex gratia* scheme. Indeed, any competent lawyer would have advised them to do so, on the basis that litigation in the domestic courts was “bound to fail” and would expose them to liability for costs; whereas the Taoiseach had assured survivors that the revision of the scheme would meet the State’s obligations to them. The terms of the revised scheme now punish survivors for relying on the assurances of the Taoiseach and the advice of their lawyers by excluding them from the scheme if they adopted a wait-and-see stance.

Applicants would have a good claim against the State in the European Court of Human Rights based on the precedent established in *O’Keeffe*. However, such a claim would take many years to come to a hearing and judgment. Forcing deserving applicants to pursue this route rather than including them in the

ex gratia scheme would be morally indefensible, as well as more expensive for the State (which would have to pay its own legal costs even if it successfully defended the claims, as well as the applicant's costs in successful cases). It would also represent a fundamental breach of the State's obligations under the ECHR, under which it is up to the State Party in the first instance to provide a remedy for violations of Convention rights. The ECtHR clearly stated this principle in *Kudla v Poland*:

"... Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at a national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court." (30210/96, 26 October 2000 at §152)

If States fail to provide effective remedies at national level, "individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened" (see §155 of the judgment).

For all of the above reasons, I call on the Minister to remove the condition of prior litigation from the revised *ex gratia* scheme and to assess claims solely by reference to the abuse experienced by the applicants. This would avoid excluding and further traumatising deserving applicants, and avoid repeat claims before the European Court of Human Rights that would be both expensive and embarrassing for the Irish State.

2. Provision for legal costs

The revised *ex gratia* scheme makes provision for covering "costs arising from work that was strictly necessary to prepare and submit an application to the Scheme", up to a maximum of €4,000 plus VAT. This minimal provision for legal costs ignores the fact that since applicants are required by the scheme to have instituted legal proceedings against the State as a pre-condition to qualifying for an *ex gratia* payment, they will have incurred very substantial legal costs – in some cases, running to tens of thousands of Euros – that will not be covered by the scheme. This will significantly reduce the value of the €84,000 award that will be made to them.

The figure of €84,000 was calculated as a means of putting successful applicants in the same position as Louise O'Keeffe, who was awarded €30,000 by the European Court of Human Rights and €54,000 by the Criminal Injuries Compensation Tribunal. Crucially, however, the European Court of Human Rights also awarded Louise O'Keeffe her legal costs (amounting to €85,000 plus VAT – see §209 of the judgment). The effect of this was that Louise O'Keeffe benefitted in full from the €84,000 compensation, and did not need to cover any legal expenses from that amount.

As currently designed, the revised *ex gratia* scheme will not put applicants in the same position as Louise O'Keeffe, since all successful applicants will be forced to use a substantial portion of their €84,000 award to cover legal costs incurred in the course of the litigation which the terms of the scheme requires them to have undertaken. I call on the Minister to amend the scheme to make provision for all legal costs incurred in prior litigation against the State, so as to ensure that successful applicants benefit from the full amount of the €84,000 *ex gratia* payment.

3. "Real prospect of altering outcome or mitigating harm" test

In order to qualify for an *ex gratia* payment, applicants "must be able to demonstrate ... that, had the Department of Education's Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (November 1991/June 1992) been in place at the time the sexual abuse occurred, there would have been a real prospect of altering the outcome or mitigating the harm suffered as a result". This

condition places an onus on applicants to prove an entirely hypothetical point. The central finding of the *O’Keeffe* judgment, as noted above, was that the Irish State had failed to implement an effective child protection framework in schools. It was on this basis that the State was found to have violated Louise O’Keeffe’s rights. Assessing claims by reference to what *might* have happened *if* an effective framework had been in place is inconsistent with the reasoning of the Court in the judgment. Moreover, it lends itself to a subjective and restrictive application that may lead to many deserving applications being refused.

In reality, this test appears to be merely the “prior complaint” criterion by another name. The 1991 Guidelines are threadbare with respect to how abuse might be prevented or detected. They refer to circumstances where teachers might have had a “suspicion” that a child was being abused, but contain no effective guidance on how such a suspicion might have been substantiated. In truth, the only substantial element of the Guidelines which might have altered the outcome or mitigated the harm in most cases of sexual abuse in National School was the requirement to notify the Director of Community Care/Medical Officer of Health (DCC/MOH) where an allegation was made against a teacher. Self-evidently, this would only apply where a prior complaint has been made. It is far from clear how else the Guidelines might have altered the outcome or mitigated the harm in most cases of abuse by teachers. Paragraph 11 of the terms of the revised *ex gratia* scheme list evidence of a prior complaint as one way of meeting this condition for an *ex gratia* payment; but it should be recalled that not a single applicant to the original scheme was able to provide evidence of prior complaint.

By way of illustration of the difficulties posed by the “real prospect” criterion, it is not even clear that the 1991 Guidelines would have had a real prospect of altering the outcome or mitigating the harm experienced by Louise O’Keeffe in her case. Paragraph 4.3.2 of the 1991 Guidelines provided:

“The Chairperson should inform the employee concerned of the suspicion or the allegation which has been made. If it appears to the Chairperson that there are reasonable grounds for the suspicion or the allegation he/she should report the matter to the DCC/MOH, including the employee’s response if the employee so desires.”

Had the 1991 Guidelines been in place when the first complaint against Leo Hickey (Louise O’Keeffe’s abuser) was made in 1971, it is by no means clear that the complaint would have come to the attention of the Department of Education, who were the only State body in a position to remove Leo Hickey from a teaching role. First, the obligation to report the abuse was not mandatory. The Guidelines afforded space to the school manager to assess whether there were “reasonable grounds” for the allegation. The manager was free to decide not to report the allegation to anyone else on the basis that it was not supported by reasonable grounds.

Given the standing in the community of a school principal, the close relationship between the school principal and school manager, and the absence of direct evidence of child sexual abuse (which often involves one person’s word against another), it is by no means clear that the school manager would have assessed the allegation as supported by “reasonable grounds” and reported it to the DCC/MOH. It is highly relevant in this respect that the school manager did not act on the 1971 complaint at all; and when further complaints against Leo Hickey were made in 1973 (and a meeting of parents was held about these allegations and chaired by the school manager), the complaints were still not reported to the Gardaí, the Department of Education or any other State authority. The result was that Leo Hickey resigned from his post and moved to another school, where he abused again. This pattern of events makes it plausible, if not likely, that the 1971 complaint would not have been reported to the DCC/MOH.

Second, even if the complaint had been reported to the DCC/MOH, these officials were health officers who were not attached to the Department of Education. The 1991 Guidelines stated in section 5 that “[i]t is possible that a teacher may subsequently be invited to attend a case conference by the DCC/MOH”. However, they provided no details on the purpose of such a case conference, the procedures to be followed at it, or the possible outcomes and actions. Section 7 of the Guidelines stated that:

“There is an absolute need to maintain confidentiality in dealing with any alleged instance of child abuse. The communication of information must be confined to those who have an obligation to receive it and third parties should not be privy to allegations unless it is necessary to involve them as matters unfold.”

No guidance was provided by the Guidelines as to when the point is reached at which the DCC/MOH were obliged to report an allegation of child abuse to the Department of Education, nor about the steps that should be taken by the Department of Education to assess that allegation and suspend or remove a teacher from teaching duties. As such, even if the school manager in Dunderrow had reported the 1971 complaint to the DCC/MOH, it is far from clear how the Guidelines would have ensured that Leo Hickey would have been removed from his post by the Department of Education before he began abusing Louise O’Keeffe in January 1973.

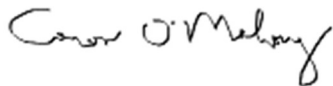
All of this is to illustrate that if Louise O’Keeffe were to apply to the *ex gratia* scheme as currently designed, it is plausible that her application would be refused (on the basis that had the 1991 Guidelines been in place at the time the sexual abuse occurred, there would not have been a real prospect of altering the outcome or mitigating the harm suffered). Even if successful, this would be solely by virtue of the existence of a prior complaint – the very criterion which retired judge O’Neill ruled incompatible with *O’Keeffe*.

Ireland was found liable in *O’Keeffe* precisely because the 1991 Guidelines were not in place; what might have happened if they had been in place is irrelevant, since the salient point is that they were not. The terms of the scheme will result in the State Claims Agency engaging in a speculative make-believe exercise that ignores this central finding of the European Court of Human Rights. It will inevitably result in deserving applicants whose case histories closely align with that of Louise O’Keeffe being denied *ex gratia* payments. As such, I call on the Minister to remove this condition from the revised *ex gratia* scheme.

I enclose for your attention a suggested revised set of terms for the scheme that incorporates all three changes that I have called for above. I would be delighted to engage further with your officials on this matter with a view to ensuring full compliance with Ireland’s obligations under the *O’Keeffe* judgment and avoiding further trauma for abuse survivors who have (as the Taoiseach noted in 2019) been repeatedly failed by the State.

Thank you for your time and consideration.

Sincerely



Professor Conor O’Mahony, Special Rapporteur on Child Protection
School of Law, University College Cork



Gníomhaireacht Bainistíochta an Chisteáin Náisiúnta
National Treasury Management Agency

Gníomhaireacht Stáit um Éilíní
State Claims Agency

10th November 2016

Strictly Private & Confidential

Our Ref: SW/KOF/109383

Please quote our reference number on all correspondence

Your Ref:

Dear [REDACTED]

Re: Application to Ex-Gratia Redress Scheme

We refer to the above and acknowledge receipt of your letter dated 3rd November with enclosures.

We note that your then solicitors issued legal proceedings on your behalf in [REDACTED] under Record No. [REDACTED]. These legal proceedings were discontinued as against the State Defendants in [REDACTED]. However, in [REDACTED] your solicitors initiated a Motion seeking to set aside your Notice of Discontinuance. That matter was determined by [REDACTED] in the High Court in [REDACTED] and in this judgment the Judge declined to set aside the Notice of Discontinuance. Your solicitors have appealed [REDACTED] decision and that Appeal is presently before the Court of Appeal.

Unfortunately, as your claim is presently before the Courts, we cannot consider your application at this time and we trust you understand, in the particular circumstances.

Yours sincerely,


Simon Watchorn
Executive Head of Claims
General Indemnity Scheme



Terms of Scheme (Suggested revisions by Special Rapporteur on Child Protection)

Ex gratia scheme – Implementation of the ECtHR Judgement in O’Keeffe v Ireland

Introduction

1. This ex gratia scheme (the Scheme) implements the decision of Government on 21 July 2021 to provide ex gratia payments to those who experienced sexual abuse as a pupil in a recognised day school prior to the issuing of the Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (November 1991 in respect of a primary school or June 1992 in respect of a post-primary school).
2. An ex gratia scheme was established in July 2015 to address the ruling of the European Court of Human Rights (ECtHR) in O’Keeffe v Ireland (Application no. 35810/09) and, in particular, the Article 13 rights (right to an effective remedy) of those litigants who had issued legal proceedings against the State seeking damages for sexual abuse in day schools and who discontinued those proceedings following the decisions of the High Court [2006 IEHC 13] and the Supreme Court in O’Keeffe v Hickey and Ors [2008 IESC 72].
3. The Scheme has now been revised to provide ex gratia payments for that cohort, following due consideration of the report of the Independent Assessor on the ex gratia scheme which was published in July 2019. The Scheme has also been broadened in scope to allow applications from those who had not issued legal proceedings.

Objectives of the revised Scheme

4. To ensure that the establishment and scope of the revised Scheme addresses the Article 13 rights arising from the ECtHR ruling for people who experienced sexual abuse while a pupil at a recognised day school before November 1991 in respect of a primary school or June 1992 in respect of a post primary school..
5. In so doing, to allow the State to fully meet its obligations to the ECtHR following the reopening of the Scheme with an Action Report to be submitted in 2022.
6. To ensure that the establishment and scope of the revised Scheme is consistent with both the ECtHR ruling and the decision of the Independent Assessor.

Scope of the Scheme

7. The Scheme has been revised and is open for applications to those seeking damages for childhood sexual abuse in a recognised day school which occurred before November 1991 (primary) and June 1992 (post-primary).

Criteria for the Scheme

8. To qualify for a payment, an Applicant, who is part of the cohort described in Section 7, must demonstrate that the facts of their case come within the parameters of the O’Keeffe judgment. In particular, an Applicant will have to demonstrate that they were sexually abused while a pupil at a recognised day school and that this occurred before November 1991 in respect of a primary school or June 1992 in respect of a post primary school.

9. While the Scheme Administrator will take a holistic approach to the evidence furnished by an Applicant in respect of the above criteria, the onus remains on the Applicant to satisfy the Scheme Administrator, by relevant evidence verified by affidavit, statutory declaration or statement of truth, that they are eligible for an ex gratia payment within the terms of the Scheme.

In respect of 8 above, the Applicant must provide evidence to the Scheme Administrator that they have experienced childhood sexual abuse. Evidence may include but is not limited to –

- a. Medical reports confirming treatment of conditions consistent with the indicia regarded as being associated with childhood sexual abuse
- b. Psychological reports/reports from a Counsellor confirming treatment of conditions consistent with the indicia regarded as being associated with childhood sexual abuse
- c. Evidence of complaint (attested to by way of sworn affidavit, statutory declaration or statement of truth)
- d. Evidence of report to An Garda Síochána or other authority (attested to by way of sworn affidavit, statutory declaration or statement of truth)
- e. Any other relevant evidence available (attested to by way of sworn affidavit, statutory declaration or statement of truth)

Calculation of payment

10. Applicants who meet the eligibility criteria for the Scheme will be offered an ex gratia payment of €84,000.

11. Applicants who have already settled a claim against the State in respect of the sexual abuse evidenced in this application will be entitled, subject to meeting the eligibility criteria, to the difference between the ex gratia amount, if higher, and the State's contribution to the original settlement.

12. For the avoidance of doubt, those who received payments under the ex gratia scheme established in July 2015 are not eligible for payment under this Scheme. Only one payment per individual will be made under this Scheme.

13. No interest payments or other damages will be paid in addition to this award as part of the Scheme.

14. Payments made to the Applicant are not liable for Irish income tax or capital gains tax.

15. All payments shall be made on an ex gratia basis.

Legal representation and other costs

16. As applications to the Scheme are not intended to be adversarial, it is not envisaged that the Applicant will require legal representation. An Applicant may wish to consult with a solicitor and take legal advice and assistance in applying for payment under the Scheme. Where legal advice or other assistance is sought in relation to the application (including the drafting and swearing of an affidavit, statutory declaration or statement of truth) and where the Scheme Administrator determines that an Applicant is entitled to a payment under the Scheme, certain costs arising from work that was

strictly necessary to prepare and submit an application to the Scheme will be paid. It is expected that, in respect of each application, this will be less than €4,000 plus VAT (to be paid over and above the ex gratia payment). The amount paid will be decided on a case by case basis and is intended to cover all costs and outlays incurred in making the application, including any appeal.

17. Successful applicants will also be entitled to claim documented costs and expenses incurred in the course of litigation concerning sexual abuse in school in which the State was named as a defendant.

18. In the event that agreement as to costs is not reached, the parties shall agree to the issue being referred to an independent Costs Accountant, with both parties agreeing to be bound by his/her determination and both being responsible for his/her fees on a 50/50 basis.

19. No costs or outlays shall be paid unless a payment of an award is made under the Scheme.

Advertisement of the Scheme

20. A notice advertising the Scheme and its commencement date shall be published in such national newspapers and other forms of media that the Scheme Administrator considers appropriate.

Time Limit for Applications

21. Applicants must submit their application according to the procedures as set out in Section 26 within 2 years of the commencement date of the Scheme. Applications will not be accepted after the closing date.

Procedure

22. The State Claims Agency will administer the Scheme on behalf of the State.

23. Applications shall be made in writing supported by relevant evidence in the form required.

24. The Scheme Administrator will issue a written acknowledgement of the receipt of the application normally within 5 working days of receipt of application.

25. Unless otherwise specified, all correspondence and communications relating to either the Scheme or any applications under the Scheme (including any applications for appeal) shall be sent to the Scheme Administrator at the postal or email address as set out.

Supporting documentation

26. The application for a payment shall include –

- a. a completed application form
- b. proof of identity including date of birth, for example copy of birth certificate, passport, driving licence
- c. supporting evidence of sexual abuse as set out in Section 9

d. copies of any of the following – (i) Plenary Summons and Statement of Claim (ii) Civil Bill or (iii) Personal Injury Summons in respect of legal proceedings commenced by the Applicant against the State that concern the sexual abuse evidenced

It is the responsibility of the Applicant to notify the Scheme Administrator of any changes of address or contact details.

Applications on behalf of individuals

27. Where an individual lacks capacity or is otherwise unable to make an application on their own behalf, an application can be made on their behalf where appropriate evidence is provided as to the identity of the Applicant and that the representative is authorised to act on behalf of the Applicant.

Determinations, acceptance and payment

28. The Scheme Administrator shall consider and determine each valid application on the basis of the contents of the application form and supporting documentation. There shall not be any oral hearing for the purposes of determining the application.

29. If the Scheme Administrator rejects an application, their decision and reasons shall be notified in writing to the Applicant or their representative.

30. If the Scheme Administrator decides an application in favour of the Applicant, they shall notify the Applicant or their representative in writing of the decision, make the ex gratia offer as set out above and append a draft Deed of Waiver and Indemnity for signing by the Applicant.

31. If the Applicant accepts the conditional offer of an ex gratia payment, they shall have 40 working days from the date of such letter to notify the Scheme Administrator in writing of such acceptance, to furnish a signed Deed of Waiver and Indemnity and to furnish evidence of discontinuance of any legal proceedings.

32. Payment shall be made by the Department of Education and shall be made electronically either to the Applicant's personal account or to the client account of their nominated solicitor in accordance with the Applicant's choice as expressed on their acceptance of an offer. No payment shall be made unless the draft Deed of Waiver and Indemnity is executed.

33. If the Applicant does not accept the payment within 40 working days and as set out above, they will be deemed to have rejected the payment.

Waiver

34. Payment made under the Scheme is conditional upon the Applicant waiving any claim that they may have against the State arising out of the sexual abuse evidenced in their application and discontinuing any relevant extant legal proceedings. Any eligible Applicant who accepts the offer of a payment must therefore indicate acceptance by signing a Deed of Waiver and Indemnity forfeiting any claim that they may have against the State and, if relevant, discontinuing any extant legal proceedings within 40 working days of receipt of the letter of offer from the Scheme Administrator. A Notice of Discontinuance will be the only acceptable evidence of discontinuance.

Appeals mechanism

35. An Applicant whose application is rejected by the Scheme Administrator can appeal that decision to an independent Appeals Officer, who will be appointed from a specially constituted panel.

36. The sole ground for an appeal shall be that the Scheme Administrator made a material error in reaching its decision not to make an award to the Applicant under the Scheme following consideration of whether they fulfil the criteria set out under Section 8. No other considerations shall be placed before the Appeals Officer. Each appeal shall be considered on its own merits.

37. There shall not be any oral hearing for the purposes of determining the appeal. The Appeals Officer(s) will rely on the same evidence and documentation as was available to the Scheme Administrator.

38. Any such appeal must be made within 40 working days of the decision of the Scheme Administrator and by completing the Notice of Appeal form. The Notice of Appeal must be submitted via the Department of Education who will provide administrative support to the Appeals Officer(s) and in order to ensure that they can properly perform their functions.

39. A final determination in respect of an appeal shall issue within 30 working days of receipt of the notice of appeal.

Definitions

40. The following definitions apply to the Scheme –

- i. An Applicant is an individual who has submitted a completed application form under the Scheme
- ii. The Scheme Administrator is the State Claims Agency who will administer the Scheme on behalf of the State.
- iii. Sexual abuse is as defined in Section 48A of the Statute of Limitations Act 1957 (as amended by the Statute of Limitations Amendment Act 2000).
- iv. Working day means every day from Monday to Friday inclusive but shall exclude any national holiday.
- v. A recognised school is a school that is recognised under section 10 of the Education Act 1998, as amended.