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

On questions raised as to
whether the ex-gratia
scheme is consistent with
the ECtHR judgment
in *Louise O'Keefe v Ireland*



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

Irish Human Rights and Equality Commission



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Irish Human Rights and Equality Commission

Submissions by the Irish Human Rights and Equality Commission (the ‘Commission’) on the Question Raised by the Independent Assessor as to Whether the Imposition of the Conditions which required that there had to be Evidence of a prior Complaint of Child Sexual Abuse on the part of the Employee in question to the School Authority (or a School Authority for which the Employee had previously worked), to Establish Eligibility for a Payment under the Ex Gratia Scheme, is Consistent with and a Correct Implementation of the judgment of the European Court of Human Rights in the Case of Louise O’Keeffe v. Ireland

Background

1. On 28 January 2014, the Grand Chamber of the ECtHR delivered its judgment in **Louise O’Keeffe v Ireland** (Application no.35810/09) [hereinafter “the **O’Keeffe** case”], holding that the State had breached Article 3 ECHR in failing to have in place effective measures designed to prevent and detect child sexual abuse in schools and, furthermore, had breached Article 13 ECHR in failing to provide an effective remedy in domestic Irish law in respect of the said violation of Article 3.
2. In an effort to meet the State’s international obligations arising from those established breaches of the ECHR, on or about 28 July 2015 the Minister for Education and Skills published a Press Release announcing that the Government had approved an “*approach for those who discontinued their legal proceedings but who come within the terms of the ECtHR Judgment in Louise O’Keeffe*” in the form of a Scheme of Compensation [See Tab 1 for Press Release]. In Action Plans delivered by the State to the Committee of Ministers the Scheme was said to be also available as a means of providing redress to persons with extant claims against the State who are not statute barred and whose circumstances are otherwise captured by the terms of the **O’Keeffe** decision.
3. While the Scheme as announced purported to provide for compensation for abuse victims whose circumstances are captured by the terms of the **O’Keeffe** decision, the Press Release issued by the Minister for Education and Skills when announcing the Government Decision to introduce the Scheme also stated a requirement of eligibility under the Scheme that there must have been “*a prior complaint of sexual abuse to the school authority (or a school authority in which the employee had previously worked) prior to the issue of the Department of Education child protection guidelines to primary and post-primary schools in 1991/92*”.

4. Claims for compensation were invited to be submitted for adjudication together with relevant supporting evidence to the State Claims Agency (“SCA”). The Scheme made express provision for independent assessment of those claims rejected by the SCA at first instance. Specifically, the Press Release stated:

Where there is a disagreement with the State Claims Agency as to whether the criteria are satisfied, the application may be reviewed by an independent assessor. Where the State Claims Agency or independent assessor is satisfied that the criteria are met, the Department of Education and Skills will offer an ex-gratia payment up to a maximum of €84,000 plus a specified amount for costs to the survivor. This figure of €84,000 reflects the amount Ms O’Keeffe received from the State including the award from the Criminal Inquiries Compensation Tribunal and the amount the ECtHR decided the State should pay to her.

Appointment of Independent Assessor

5. Despite the announcement of the Scheme in July, 2015, it was not until November, 2017 that Mr. Justice Iarflaith O’Neill was appointed as Independent Assessor to review decisions of the SCA declining ex gratia payments. It appears from his letter of 1 of March, 2018 to the Minister for Education and Skills that a significant number of those claims which have come before him since his appointment were declined by the SCA on the basis that applicants did not come within the terms of the **O’Keeffe** judgment if they could not show proof of a prior complaint.
6. The Application Form and accompanying documentation used to submit an appeal to the Independent Assessor advises applicants that the application for assessment may be brought by persons “*on the basis that their claim fell within the parameters of the ECtHR judgment in the Louise O’Keeffe case but whose application has been declined*”. While no other Scheme documents have been seen by the Commission, the terms of the Application Form are consistent with the Independent Assessor having full discretion to assess claims as eligible where he is satisfied that the conditions in the **O’Keeffe** judgment are met. This suggests that the Terms of Reference governing the exercise of discretion under the Scheme by the Independent Assessor have evolved since the Scheme was first announced in that the Press Release issued by the Minister for Education and Skills when announcing the Government Decision to introduce the Scheme stated a requirement that there must have been “*a prior complaint of sexual abuse to the school authority (or a school authority in which the employee had previously worked)*” but no such requirement is specified in the application to the Independent Assessor whose jurisdiction under the Scheme appears to be determined by the parameters of the **O’Keeffe** judgment alone.
7. The change in the parameters of the Scheme signaled by the terms of the Application Form and accompanying documents gives the Commission to understand that the Independent Assessor has a wider power than the SCA in assessing the claims at first instance because the Independent Assessor is mandated to assess claims by reference to the parameters of the **O’Keeffe**

judgment and without requiring evidence of a prior complaint where an application comes within the parameters of that judgment.

8. Accordingly, while the SCA appear to have imposed the requirement to establish the existence of a prior complaint as a condition precedent to eligibility (possibly deriving from a diktat of the Government in establishing the Scheme as evidenced in the terms of the Press Release), this does not appear to be prescribed in Terms of Reference governing the parameters of the Independent Assessor's discretion to assess an applicant as eligible but instead the parameters of the Independent Assessor's discretion are fixed by reference to his construction of what is required, as a matter of Convention law, by the terms of the **O'Keeffe** judgment.
9. Thus, it is the Commission's view that it is for the Independent Assessor to determine whether the breach of rights and right to a remedy identified in the **O'Keeffe** judgment require that an applicant who demonstrates that they were the victim of historic child sexual abuse whilst attending school in the State should be assessed as eligible for compensation under the Scheme having regard to the terms of that judgment. What the Independent Assessor must be satisfied of under the Scheme summarized in the Application Form and its associated documentation is that the claim comes within the terms of the judgment in **O'Keeffe** and is not statute barred. To this end, the Independent Assessor is required to determine whether as a matter of law the judgment in **O'Keeffe** requires a victim of child sexual abuse to establish the existence of a prior complaint before the State's liability under that judgment is triggered or not. This question of law is integral to establishing the parameters of the jurisdiction of the Independent Assessor and is of fundamental importance if the Scheme is to achieve the intended purpose of providing redress for those persons who are entitled to a domestic remedy arising from the judgment of the Grand Chamber in **O'Keeffe**.

Invitation to Provide Written Submissions

10. Given the importance of this question to the operation and effectiveness of the Scheme, it is appropriate that the matter be the subject of a preliminary determination following appropriate consideration. In his letter to the Minister of 1 of March, 2018 and in subsequent correspondence with the Commission by letter dated 14 May, 2018 (copying the Commission with his request for submissions sent to the State on 1 March, 2018 and their submissions on foot of same delivered in April, 2018), the Independent Assessor has invited written submissions from the Commission on a specific question as follows:

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

11. For the reasons already set out above, the Commission respectfully agrees that there is a necessity for a preliminary ruling on the important question of what is required to bring the State into compliance with the **O’Keeffe** case to ensure that the Scheme under administration discharges the duty on the State to provide an effective remedy and finally discharge the State’s duties to the damaged victims of child sexual abuse within the educational system.
12. As the National Human Rights Institution, the Commission greatly appreciates the opportunity to make these submissions and is mindful of the fact, based on the information contained in the State’s Action Plans, that to date only 7 cases have been settled (despite authorisation given to the SCA in December, 2014 to offer out of court settlements to persons taking cases against the State where their cases come within the terms of the **O’Keeffe** judgment and are not statute barred)¹ and only 19 applications appear to have reached the Independent Assessor under the Scheme (despite the fact that the Scheme was announced in July, 2015).²
13. It is not clear from the State Action Plans whether any single applicant has been compensated under the Scheme where they had previously discontinued proceedings but are entitled to a remedy on foot of the **O’Keeffe** judgment. It seems likely that either no application or a worryingly few number of applications brought following the discontinuance of claims have been assessed as eligible for a payment by the SCA under the Scheme as otherwise one would expect to see the number of such persons appearing in the State Action Plan.³ This information is conspicuously absent. Furthermore, it appears from the State Action Plan that the State are opposing (successfully to date) applications to set aside notices of discontinuance filed in cases where no prior complaint is shown thereby frustrating attempts to have the question of the proper scope and ambit of State liability under the **O’Keeffe** judgment finally and properly determined by a domestic court so that the issue can then be properly raised before the ECtHR, if necessary.
14. The most recent State Action Plan does not record that a single new litigation case has been settled on foot of the **O’Keeffe** judgment. Further, it is understood by the Commission that while the SCA allowed plaintiffs they consider not to come within the terms of **O’Keeffe** a 21 days period within which

¹ It is understood by the Commission (on the basis of what is said in the State Action Plans) that offers have only been made in seven of thirty-five extant cases on the basis that the remaining twenty-eight extant cases did not disclose a prior complaint. It appears that the SCA has elected to treat the authorisation to settle given in December, 2014 as only extending to cases where evidence of a prior complaint is shown to exist thereby treating the existence of a prior complaint as a determining feature in the **O’Keeffe** case the absence of which would have excused the State from liability under the Convention in that case. The Commission would seriously dispute whether the SCA has been correct in this approach.

² The figure of 19 applications is the number given by the Independent Assessor in his letter of the 1 March, 2018 to the Commission, however, it is noted that the State Action Plan submitted to the Committee of Ministers in January, 2018 gives a figure of 21.

³ The latest State Action Plan records that as of January, 2018 the SCA had received 49 applications, of which 44 had been declined but it does not say what happened to the balance of 5 applications and no information is given as to whether these remain pending before the SCA or have been successful and payments made.

to withdraw their proceedings as against the State Parties with an assurance that they would not pursue costs in such circumstances, the Commission is not aware of any assurance having been given that parties who wish to have the question of liability under the **O’Keeffe** judgment determined by the Courts where they disagree that the requirement to show a prior complaint is core to the ratio in that case, will not be pursued in costs notwithstanding the statement in the State Action Plan that “*The Irish authorities explain that they will not seek costs from the unsuccessful plaintiffs*”. It is not clear to whom this assurance has been given and in what terms.

15. The Commission apprehends that a further effect of the State’s strategy in these cases is that ultimately it may be necessary for unsuccessful litigants, if willing and able and not too worn down, to bring fresh proceedings against the State in reliance on section 3 of the European Convention on Human Rights Act, 2003 in order to get a final court determination on whether the insistence on establishing the existence of a prior complaint is in breach of Article 13 rights identified in the **O’Keeffe** case. The same strategy being adopted by the state means that persons who may in due course be found to have been entitled to a remedy, may have died before ever securing that remedy.⁴
16. The structure which it is now proposed to follow in presenting the Commission’s submissions is to address each of the three areas of focus in the State’s submissions as follows: (i) the **O’Keeffe** judgment; (ii) the State Action Plans and (iii) the decision of the High Court in **Wallace v. Creevey & Ors, Naughton v. Drummond & Ors.** and **Kennedy v Murray & Ors.** before turning finally to look at the role of the Independent Assessor and the obligations on him pursuant to the provisions of the European Convention on Human Rights Act, 2003 and the Constitution.

The O’Keeffe Judgment and the Submissions of the Minister for Education and Science

17. The starting position for the proper interpretation of the **O’Keeffe** judgment and what is required in the correct implementation of the judgment must be the terms of the judgment itself.
18. As clear from the Commission’s previous submissions on this issue, the Commission contends that the *ratio* of the ECtHR judgment in **O’Keeffe** does not depend to any degree on the existence or otherwise of a prior complaint made in respect of an abuser and pre-dating the abuse of a victim seeking compensation from the States for breaches of the ECHR. While there was in fact a prior complaint in the **O’Keeffe** Case, the Commission considers that the ECtHR in no way predicated its’ finding of a breach of Article 3 ECHR on the existence of that prior complaint.

⁴ It is noted in this regard that the Independent Assessor whose appointment was promised in the Press release in June, 2015 was ultimately only appointed after proceedings had issued challenging the delays in appointing him as unlawful.

19. In light of the submissions delivered by the State in relation to what is contended is the true meaning of the Grand Chamber in **O’Keeffe** based on a small and selective number of extracts from the judgment, it is necessary to parse in some detail the entirety of the judgment of the Court. The Commission respectfully suggests that it is not appropriate to isolate selective extracts only from the judgment in reaching conclusions on the extent of State liability under **O’Keeffe** and all elements of the judgment need to be considered.
20. The Court describes at some length from paragraph 49 to 62 the history and structure of the primary education system in the State. This part of the judgment carefully identifies the role and connection of the State in the provision of primary education. This connection, and the failure on the part of the State to provide an adequate framework of protection for children, was core to the Court’s ultimate finding of a breach of positive duty and, it is submitted, is the principal blank of the judgment. Thus, the Grand Chamber identified the connections as follows:
- at paragraph 50, reference is made to section 4 of the School Attendance Act 1926 as making attendance at full-time education compulsory for all children between 6 and 14 years until 1969;
 - at paragraph 51, it is pointed out that the vast majority of primary school-going children attended State-financed and denominational-run primary education establishments;
 - at paragraph 53, it is stated that until the 1970s, the only choice effectively available to parents is the local National School;
 - at paragraph 56, reference is made to the Children Act 1908 as governing child protection, contemplating State intervention in the form of taking a child into care in cases of interfamilial abuse;
 - at paragraphs 56-57, the involvement of the State is acknowledged by highlighting the Rules for National Schools (“the 1965 Rules”) and relevant Ministerial Circulars which allowed the Minister to withdraw recognition from a school or withdraw an individual teacher’s licence if the 1965 Rules were not complied with (Rules 30 and 108 of the 1965 Rules, respectively);
 - at paragraph 58, the role of the State in approving teacher appointments is set out;
 - at paragraph 61, the role of school inspectors, agents of the Minister is acknowledged and their role in identifying issues which required to be addressed in the administration of the system is set out;
 - at paragraph 62, the absence of a power to initiate a complaint procedure external to the school is identified; and
 - at paragraph 62, further reference is made to the various powers of sanction, including the power to dismiss teachers, which vested in the Minister.
21. From paragraph 69 - 88, the Grand Chamber reviewed the state of knowledge in the State as to the existence of incidences of abuse as follows:
- At paragraph 69, reference is made to the **Carrigan Report** in 1931 which recorded an “*alarming amount of sexual crime increasing yearly, a feature*

of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years”;

- At paragraph 73, reference is made to the **Cussen Report** published in 1936 and the failure to implement its many recommendations;
- At paragraph 74, reference is made to the **Kennedy Report** published in 1970 which identified that the system of inspection had been totally ineffective and recommended the establishment of an independent statutory body to ensure the highest standards of child care and to act, inter alia, as a watchdog as well as other reporting mechanisms;
- From paragraph 75, the **Ryan Report** and the Commission to Enquire into Child Abuse is outlined and, in particular, the evidence of the Secretary General of the Department regretting the significant failings in its responsibility to children in the reformatory and industrial schools despite the *“clear responsibility to ensure that the care children received was appropriate and the Department had not ensured a satisfactory level of care”*;
- at paragraph 80, reference is made to Volume III comprised the **Report of the Confidential Committee** which heard evidence of abuse from 1930-1990 from 1090 persons about 216 institutions which concerned mainly reformatory and industrial schools but also included National Schools. It was recorded that certain witnesses underlined the public, and therefore evident, nature of the sexual abuse;
- at paragraph 82, reference is made to the **Ferriter Report** which recorded that the police had extensive contemporaneous knowledge of the existence of significant levels of sexual crimes against children;
- from paragraph 85, reference is made to later public inquiries and reports to include the **Ferns Report** (2005) which identified over 100 complaints of child abuse made between 1962 and 2002 against 21 priests of the Diocese of Ferns, the **Murphy Report** (2009) which concerned the handling by the Church and State of complaints of child abuse made between 1975-2004 against clergy of the Archdiocese of Dublin where it was accepted that child sexual abuse by clerics was widespread during the relevant period;
- at paragraph 88, reference is made to the **Cloyne Report** (2011).

While a number of these later reports are “look back” reports relating to historic events, others are contemporaneous with the events themselves and demonstrates a state of knowledge of risk which was not then addressed resulting in subsequent offending. Together they demonstrate such an appalling level of abuse that it becomes impossible to deny actual knowledge or to contend that the State should not be fixed with liability given that the level of abuse was such that the State ought to have known and the State ought to have acted.

22. Based on the foregoing, the Grand Chamber noted at paragraph 87 that:

“While the need for child protection legislation had been clearly recognised in the early 1970s, the legislative delay until the early 1990s was described as extraordinary.”

23. Despite this, as noted at paragraph 89 of the judgment, it was only in November 1991 that the Department issued guidelines on procedures for dealing with allegations or suspicions of child abuse (Circular 16/91) and it was only in 1999 that the first comprehensive framework for child protection was adopted by the State (“Children First: National Guidelines for the Protection and Welfare of Children”).

The Grand Chamber did not confine its considerations to the state of knowledge in Ireland about the need to protect children from abuse. From paragraph 91 it looked at recommendations of Parliamentary Assembly of the Council of Europe (“PACE”) concerning child protection dating to 1969 which recommended that States be invited to *“take all necessary measures to ensure that the competent ministries and departments are aware of the gravity and extent of the problem of children subject to physical or mental cruelty”* and, further, to *“request the official services responsible for the care of maltreated children to coordinate their action as far as possible with the work undertaken by private organisations”*. Other instruments were identified by the Grand Chamber in this part of its judgment as requiring States to protect children from maltreatment and establish appropriate social programmes for the prevention of abuse and the treatment of victims, including:

- the European Social Charter 1961 which provided in Article 7 that children and young persons have the right to special protection against physical and moral danger to which they are exposed, was also identified as part of the relevant international law and practice;
 - the Geneva Declaration of the Rights of the Child (adopted by the League of Nations) of 1924;
 - the UN Declaration of the Rights of the Child, 1959;
 - the Universal Declaration of Human Rights 1948 (“UDHR”);
 - the International Covenant on Civil and Political Rights (“ICCPR”);
 - the International Covenant on Economic, Social and Cultural Rights (“ICESC”); and
 - the International Convention on the Rights of the Child, 1989.
24. It is submitted that it is not insignificant that the Grand Chamber took such pains in the **O’Keeffe** judgment to outline the historic, social and legal context in which abuse was occurring to establish a state of knowledge of risk and knowledge of the requirement for protective measures. The extent of knowledge of risk to children and the acknowledgement of the need to protect children dating back decades is intrinsically linked with the Court’s finding of a breach of the positive duty to protect on the part of the Irish State.
25. It was against this background that the Grand Chamber came to consider the O’Keeffe complaint that the State failed to protect her from sexual abuse by a teacher in her National School and that she did not have an effective remedy against the State in that regard. It was this failure to protect her through taking proactive steps to have in place an effective child protection regime and not the fact that in her case a prior complaint had been made but not acted upon which was pivotal to the decision of the Court. Afterall, it was to be expected that in the

absence of an effective child protection regime, instances of child abuse which “*ought to have been known*” to the State, would not be reported.

26. The Grand Chamber discounted the Government’s contention that there was no State liability observing (at paragraph 116):

“The present case is substantively different from Costello-Roberts: the applicant in the latter case essentially challenged the application by a teacher of the law (allowing corporal punishment) whereas the present applicant challenged the State’s failure to legislate to provide an adequate legal framework of protection.”

thereby making it crystal clear that it considered the heart of the complaint to be the failure to legislate to provide adequate legal framework of protection and not the fact that in the particular case they were dealing with a prior complaint had been made but was not acted upon.

27. The Grand Chamber records, at paragraph 123 of the judgment, that the applicant’s core complaint was that the State had failed, in violation of its positive obligation under Article 3, to put in place an adequate legal framework of protection of children from sexual abuse, “*the risk of which the State knew or ought to have known*” and which framework would have countered the non-State management of National Schools. The problem identified by the Applicant in argument before the Grand Chamber as recorded in the judgment was that “*there were no clear or adequate legal obligations or guidance for the relevant actors to ensure they acted effectively to monitor the treatment of children and to deal with any complaints about ill-treatment including abuse*”. At paragraph 129 the Applicant’s submission that “*had there been an effective reporting mechanism, the 1971 complaint would have been reported and there was therefore more than a “real prospect” that the 1973 abuse would not have happened*” is recorded. The nub of this submission, however, is not the fact of a prior complaint but rather the absence of an “*effective reporting mechanism*”. It is therefore submitted that in the absence of an effective reporting mechanism, complaints will not be made whereas were an effective reporting mechanism in place, the possibility for effective response would facilitate a higher level of reporting.
28. The State argued before the Grand Chamber that it was fundamental to assess the question of the State’s constructive knowledge without the benefit of hindsight: They contended that in 1973 awareness of the risk of child abuse was almost non-existent and standards could not be retrospectively imposed on the early 1970s on the basis of today’s increased knowledge and standards. The judgment of the Grand Chamber records at paragraphs 131, 132 and 133 the Government position that the State had not in fact been aware, nor ought they have been, that there was a risk of a teacher abusing a pupil or of LH abusing the applicant. It was clear that the fact that the State had no actual knowledge of a specific risk to the applicant from LH was irrelevant to the question of State liability where inadequate protective measures had been provided.
29. The judgment records at paragraph 139 the submission of the former Irish Human Rights Commission in the following terms:

“In sum, in a typical National School, which most Irish children inevitably attended, school management had little guidance as to how to deal with allegations or suspicions of abuse, schools were under no duty to report such allegations to the Department or to the police, social services had limited powers to deal with any such allegations or suspicions and, finally, children and parents faced difficulties making any such complaints.”

30. Turning then to the curial part of the decision of the Grand Chamber from paragraph 143, the Court reiterated in strong terms (at paragraph 144) that Article 3 enshrines one of the most fundamental values of democratic society stating:

“It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.”

31. The State in their Submission to the Independent Assessor rely on the next part of the paragraph only namely:

“This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, §§ 21–27; A. v. the United Kingdom, 23 September 1998, Reports 1998-VI, § 22; Z and Others v. the United Kingdom, cited above, §§ 74–75, ECHR 2001-V; D.P. and J.C. v. the United Kingdom, no. 38719/97, § 109, 10 October 2002; and M.C. v. Bulgaria, no. 39272/98, § 149, ECHR 2003-XII).”

32. In the State’s Submission this extract is described as “vital” (paragraph 4 of the State’s Submission). The Commission does not demur from the description of paragraph 144 as “vital” but considers that the State has adopted an interpretation of this paragraph which is at odds with the plain and ordinary meaning of the language used in the paragraph read as a whole and is unduly restrictive or narrow in its derived understanding of the principles established by the **O’Keeffe** case. In particular, by adopting the position that liability only arises where conditions or criteria are met, including a condition expressly identified of “knowledge”, the State ignores the fact that the Grand Chamber does not limit State liability to situations of actual knowledge but very clearly extends it to situations where the State “ought to have had knowledge”. It is only by ignoring

the key phrase “*ought to have had knowledge*”, a term of art which can but have been designedly chosen by the Grand Chamber, that the State can maintain that knowledge of a prior complaint is a condition or criteria for State liability.

33. It appears that this selective interpretation of what the Grand Chamber says at paragraph 144 is then relied upon to restrict the ambit of the judgment to cases involving prior complaint. Viewed in this way, it is clear that the State’s interpretation of the meaning of the **O’Keeffe** judgment and its implications in terms of the requirement on the State to provide a remedy, is not constructed on a firm or stable bedrock.
34. The State proceeds at paragraph 5 of its submission to contend that the reference to knowledge (ignoring situations of “*ought to have had knowledge*”) at paragraph 144 is a “*correct criterion*” which is “*evident from the Court’s central conclusions*” set out at paragraph 168. When one reads paragraph 144 of the judgment in its entirety (as opposed to the extracts selected by the State in their submissions), however, it is respectfully submitted that it is impossible to interpret that judgment as confined to situations of actual knowledge based on the existence of prior complaint as this is simply not what the paragraph says.
35. Rather than reconcile its contention that the judgment requires the making of a prior complaint with the clear and contradictory language of paragraph 144 of the judgment when it refers to knowledge which the State “*ought to have had*”, the State submission instead skips from paragraph 144 of the judgment to paragraph 168. In doing this, it overlooks the following:
 - At paragraph 145 the Grand Chamber stated: “*The Court’s case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities (Grzelak v. Poland, no. 7710/02, § 87, 15 June 2010; and Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, no. 19986/06, § 35, 10 April 2012).*”
 - At paragraph 146 the clear injunction which unarguably links liability with the absence of measures and safeguards in the following terms: “*In sum, having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from illtreatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards.*”
 - At paragraph 147 the identification of a necessity to take “*special measures for the protection of children*” at the material time in 1973 and continuing to recall its early decision in the 1979 Case of **Marckx v. Belgium** where the Court described the positive obligations under Article 8 and the seminal case of **X and Y v. the Netherlands** where it was found that the absence of legislation criminalising sexual advances to an adolescent with a mental disability meant that the State had failed to fulfil a positive obligation to protect the Article 8 rights of the victim stating that:

“In so concluding, the Court rejected the Government’s argument to the effect that the facts were “exceptional” and that the legislative gap was unforeseeable. The Court found that the respondent State should have been aware of a risk of sexual abuse of mentally handicapped adolescents in a privately run care home for children and should have legislated for that eventuality”;

- At paragraph 148 reference is made to the case-law of the Court as to the content of the positive obligation to protect, recalling that effective measures of deterrence against grave acts, such as at issue in the present case, can only be achieved by the existence of effective criminal-law provisions backed up by law enforcement machinery (**X and Y v. the Netherlands**, cited above, § 27; as well as, for example, **Beganović v. Croatia**, no. 46423/06, § 71, 25 June 2009; **Mahmut Kaya v. Turkey**, no. 22535/93, § 115, ECHR 2000-III; and **M.C. v. Bulgaria**, cited above, § 150)”;
- At paragraph 148, and of particular significance, the Grand Chamber expressly records the fact that in the **O’Keeffe** case *“there was no evidence before the Court of an operational failure to protect the applicant (Osman v. the United Kingdom, at §§ 115-16). Until complaints about LH were brought to the attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teacher, LH, posed a risk to this particular pupil, the applicant”;*
- At paragraph 149 it is recalled that *“a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (E. and Others v. the United Kingdom, cited above, § 99)”;*
- At paragraph 150 the Grand Chamber states that *“the question raised by the present case is whether the system so preserved contained sufficient mechanisms of child protection.”*

36. It is the Commission’s position that it is impossible to interpret these paragraphs as authority for any other proposition than that the positive duty on the State under Article 3 was such that the failure to adopt adequate special measures would result in the imposition of liability under the Convention even in the absence of actual knowledge of a specific issue involving a particular individual. Just as the failure in the Netherlands to fulfil a positive obligation to adolescents with mental disabilities arose regardless of whether the specific instance of abuse was known or ought to have been known to the authorities on the basis of a complaint against an individual, likewise, the Grand Chamber, in the essence of its judgment decides in the **O’Keeffe** judgment that in the case of school abuse in Ireland, the State is liable where it failed to introduce measures to protect children in schools from the risk of sexual abuse. None of these paragraphs can be properly construed as compatible with a situation where the State is only liable where a prior complaint has been made against the abuser. The Commission notes that the State makes no attempt to explain how these paragraphs fit with their contended requirement of a “prior complaint”. This is arguably a concession by the State that the statements of principle rehearsed in these paragraphs are irreconcilable with an attempt to restrict liability to cases where prior complaint was made. What the Grand Chamber repeatedly says in this part of its judgment is that the State has a positive obligation to introduce

effective protective measures and where it fails to do so it is fixed with liability on the basis that it knew or ought to have known that the failure meant that children, including the applicant, were at an unacceptable risk of abuse.

37. That this is the true import of the judgment is made crystal clear by the Grand Chamber at paragraph 153 where it states:

“In sum, the question for current purposes is therefore whether the State’s framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a National School against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973.”

38. On the evidence before it the Grand Chamber concluded that in the case of Ireland (paragraph 162):

“The State was therefore aware of the level of sexual crime by adults against minors. Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have been aware, given its inherent obligation to protect children in this context, of potential risks to their safety if there was no appropriate framework of protection. This risk should have been addressed through the adoption of commensurate measures and safeguards. Those should, at a minimum, have included effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State (paragraph 148 above).”

39. Having reviewed the mechanisms identified by the State as fulfilling this obligation the Grand Chamber concluded (at paragraph 165):

“The Court is therefore of the view that the mechanisms on which the Government relied did not provide any effective protective connection between the State authorities and primary school children and/or their parents and, indeed, this was consistent with the particular allocation of responsibilities in the National School model.”

40. Looking at the scale of abuse perpetrated by LH over a protracted period the Grand Chamber said (at paragraph 166):

“Any system of detection and reporting which allowed such extensive and serious ill conduct to continue for so long must be considered to be ineffective (C.A.S. and C.S. v. Romania, no. 26692/05, § 83, 20 March 2012).”

41. True it is that the Court refers to the fact of a prior complaint in the **O’Keeffe** case by adding:

“Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the present applicant being abused two years later by the same teacher in the same school”

but the inclusion of this statement cannot be viewed in isolation from the previous sentence which refers to the system of detection and reporting. An adequate system of detection and reporting would have reduced the risk either because prior complaints would be dealt with properly or because complaints, not otherwise made because of the absence of an effective system of detection and reporting, would be made.

42. In addition, it is submitted that the State has sought to extract meaning from the latter part only of paragraph 168 and has not addressed the first part of paragraph 168. By focusing on the latter part of the paragraph, which is directed to what happened in the specific case before the Court, the State does not address the clear statement of principle contained in the first part of that same paragraph, as follows:

“To conclude, this is not a case which directly concerns the responsibility of LH, of a clerical Manager or Patron, of a parent or, indeed, of any other individual for the sexual abuse of the applicant in 1973. Rather, the application concerns the responsibility of a State. More precisely, it examines whether the respondent State ought to have been aware of the risk of sexual abuse of minors such as the applicant in National Schools at the relevant time and whether it adequately protected children, through its legal system, from such treatment. The Court has found that it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, inter alia, its prosecution of such crimes at a significant rate, nevertheless 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.”

43. The reliance on the use of the phrase *“In such circumstances”* in paragraph 169 of the judgment at paragraph 6 of the State’s submissions seeks to construe paragraph 169 as if it did not contain within the ambit of the term *“such circumstances”* all those circumstances referred to in the previous paragraph. Properly construed, it is respectfully submitted, paragraph 169 read in its entirety does not identify a liability on the part of the State only in cases where there had a prior complaint as *“in the present case”*. Even the use of the words *“in the present case”* in the manner in which they appear at paragraph 169 makes it clear that what follows relates to what happened in the **O’Keeffe** case but not what happened in every case of a breach of positive obligation by the State. The Court is merely describing the facts in the **O’Keeffe** case and is not purporting to prescribe a principled restriction on the test for establishing State liability in the manner contended by the State.

44. The State's submission at paragraph 6 that the "*only proper meaning*" to take from these passages is that absent these circumstances there would not have been a breach is simply untenable when one reads paragraph 169 in its entirety and in the light of what is contained in all of the paragraphs between 144 and 168 of the judgment.
45. It is accepted that every case falls to be decided on its own facts and on the facts in **O'Keeffe**, a prior complaint had been made, even if knowledge of this prior complaint had not reached the State. The principles identified in **O'Keeffe** are not so confined and other circumstances, beyond the particular circumstances present in **O'Keeffe** of a prior complaint, result in breach. Just as the failure to ensure that prior complaints are acted upon demonstrates the absence of an effective system of protection, evidence of an ineffective system of protection may also be found in the absence of complaint. There is evidence that abuse was very widespread within the school system, however, it likely given the social and legal culture at the time, that the vast majority of victims would not have disclosed abuse contemporaneously, even to their families. Afterall, absent an effective system of complaint it is questionable as to what confidence a victim could have in coming forward to make a complaint. The State is not exonerated by the principles established in **O'Keeffe** from liability in circumstances where, because the system of reporting and detection is so ineffective, complaints are either not made or are not properly recorded. It is respectfully submitted, that this could not be the effect of the judgment given the clear condemnation of the State in the judgment in its failure to provide appropriate protective measures.
46. Accordingly, although there had been a prior complaint in **O'Keeffe**, this was not central to the Court's conclusions which were based on a positive, proactive duty to introduce measures to prevent and detect and not just a reactive duty following receipt of a complaint (see paragraph 149 of the judgment). The Court detailed at length the lack of an "*effective protective connection*" with the State demonstrated on the evidence. The Court identified factors such as the absence of a complaint mechanism providing for investigation of complaints and the absence of an obligation to monitor a teacher's treatment of children or any obligation to inquire into or monitor a teacher's treatment of children.
47. It is respectfully submitted that if, as the State claims in the submissions to be the case, there is a commitment on the part of the Government to the full implementation of the judgment, then the Commission considers that the State should confirm that the judgment applies to cases where children were abused because of demonstrated inadequate State protection in the form of effective detention and reporting measures. The State should further accept, it is submitted, that there is no necessity for an applicant to benefit under a Scheme designed to give effect to the judgment to provide proof of a prior complaint to bring his or herself within the ambit of the Scheme where **O'Keeffe** liability is established.
48. It bears note that in asserting, as the State does at paragraph 7 of its submission, that a wider interpretation of **O'Keeffe** to one which imposes liability in the case of a prior complaint, is "*contrary to all authority*", not a single authority is identified. It suffices to refer only to those authorities cited by the Grand

Chamber in **O’Keeffe** as establishing a positive duty to provide for special protection measures to show that the positive duty is engaged whether or not the State knows of a risk from a specific or identifiable individual because of a complaint previously made. While some of the cases record prior complaints, others do not and this feature is not decisive. Far from being “*radical*” as the State contends in its written submissions, the principles established in **O’Keeffe** are but a logical application long established precedent dating to cases such as **X & Y v. the Netherlands** (1985) and **Markx v. Belgium** (1979).⁵

49. The State appear to seek to rely on a floodgates argument in a manner which it is respectfully submitted disrespects the seriousness of the breach of rights concerned. The approach adopted also fails to acknowledge that the test established by the Court in **O’Keeffe** is properly stated as a duty to take reasonable steps to protect children from risks of which the State knew or ought to have known and that the State is entitled, as it does, to limit a right to compensation to claims that are not otherwise statute barred. Indeed, it is posited by the Commission that not every case of a prior complaint would necessarily result in a situation where the State could be faulted on the basis that it knew or ought to have known of an unacceptable risk e.g. in the case of a spurious prior complaint. Accordingly, the existence of a prior complaint, while potentially relevant to establishing that the State knew or ought to have known of an unacceptable risk, is not dispositive of the question of State liability and should not be relied upon as a condition precedent to establishing such liability.
50. A careful review of the decision of the Court in **O’Keeffe**, in the context of the established jurisprudence of the ECtHR supports the conclusion that the judgment properly interpreted establishes the following:
 - (i) the ECtHR did not consider that constructive knowledge of a specific complaint was a necessary ingredient of a violation of Article 3 ECHR, as the State had knowledge of a widespread, general risk of abuse to children in a school setting from *inter alia* the prevalence of prosecutions in respect of such offences and “*was therefore aware of the level of sexual crime by adults against minors ... when relinquishing control of the education of the vast majority of young children to non-State actors*”;
 - (ii) the clear terms of the ECtHR judgment refer to a proactive obligation on the State to prevent child sexual abuse rather than simply a reactive obligation to respond to a complaint if and when made. The ECtHR considered that the State “*did not provide any effective protective connection between the State*

⁵ Far from being “*radical*” a positive obligation on the State to provide protection against inhuman or degrading treatment as well as against torture had been found to arise in a number of cases dating back to the early days of the Court’s jurisprudence: see, for example, *A. v. the United Kingdom* (cited above) where the child applicant had been caned by his stepfather, and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V) (2002) 34 EHRR 3 where four child applicants were severely abused and neglected by their parents.

authorities and primary schoolchildren and/or their parents”, and expressly acknowledged that “it is not necessary to show that ‘but for’ the State omission the ill-treatment would not have happened”; and

- (iii) the evidence in **O’Keeffe** itself was to the effect that the national authorities were unaware of the abuse suffered by Louise **O’Keeffe** until in or around 1995.

State Action Plans communicated to Committee of Ministers on Execution of Judgment and Reliance thereon in State Submissions

- 51. In its submissions the State suggests that it has been generous in settling cases under the Ex Gratia Scheme. However, it appears from the State’s Action Plans that offers have been made in only seven cases in all (and these appear to have been in litigation cases where proceedings were extant). It further submits that its approach has been “*holistic*” and “*flexible*”. However, the State’s contention is clear: establishing a prior complaint (albeit on “*flexible*” or “*holistic*” evidence) is a condition precedent to eligibility under the Scheme because the Scheme only provides for that which is required to give effect to the judgment. Thus, there no room for flexibility in this approach. Indeed, it would appear that the logic of the State’s position is that the Independent Assessor would err in law if he construed the judgment as potentially requiring a remedy in cases where there had been no prior complaint.
- 52. The State in their submissions to the Independent Assessor on the question posed attach weight to the fact that the Committee of Ministers, the body responsible at Council of Europe level for overseeing the implementation of judgments reduced its level of oversight of Irish implementation from “*enhanced*” to “*standard*” in June 2016 (at paragraph 18 of the State Submissions) but fail to expressly acknowledge that most cases follow the standard procedure. The enhanced procedure is only used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments).
- 53. Following the introduction of important measures of law reform such as the Children’s First Act, 2015 (which complemented other newly introduced measures such as the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012 amended and extended by the recently enacted Criminal Law (Sexual Offences) Act 2017) and the announcement of a Scheme of Compensation for persons falling with the parameters of the **O’Keeffe** judgment, it is not surprising that the requirement for enhanced supervision which applies in a very limited number of urgent cases (such as cases of ongoing imminent risk) was relaxed.
- 54. The Commission considers that it would be incorrect to construe this as an indication that the Committee of Ministers is satisfied that the State is now compliant with its obligations under the Convention. The State remains under supervision by the Committee of Ministers and the extent to which redress compliant with the terms of the **O’Keeffe** case is available under the Scheme will only crystallize at European level at the conclusion of the domestic process.

While it remains open to the Independent Assessor to conclude that there is no requirement in establishing **O’Keeffe** liability for a prior complaint in every case (as it clearly does), it may be considered premature for the Committee of Ministers to pronounce a difficulty with the Scheme until final assessments under the Scheme have been made. The very fact that the Independent Assessor is engaged in the process of addressing a preliminary issue as to whether a prior complaint is a condition to **O’Keeffe** liability shows that the scope of the Scheme remains to be crystallized.

55. To date the State has communicated a total of 8 Action Plans to the Committee of Ministers (See Tab 2 for consecutive copy Action Plans) including a number of plans delivered since supervision was relaxed from supervision under the enhanced procedure to supervision under the standard procedure. The most recent was delivered on 26 January, 2018. While the Action Plans delivered openly adopt the approach that to come within the terms of the **O’Keeffe** judgment an applicant must show evidence of a prior complaint, the State has sought to soften the effect of this approach by assuring the Committee of Ministers that a “*holistic*” analysis is made in each case and a “*flexible*” approach is taken to the evidence required in relation to the existence of a prior complaint.
56. It may be as a result of this apparent obfuscation as to how the Scheme has been administered by the SCA that the Committee of Ministers has not confronted the State on the fact that the “*flexible*” approach adopted has not extended to dispensing with the requirement of prior complaint in any case regardless of the circumstances and the “*holistic*” analysis could not render a claim eligible on assessment by the SCA (who have adopted the position that the existence of a prior complaint is a condition precedent to any liability on the part of the State under **O’Keeffe**) in the absence of evidence of a prior complaint. Alternatively, it may simply be that the position remains to be clarified and the Independent Assessor has a discretion to award compensation to claims coming within the ambit of the **O’Keeffe** judgment simpliciter.
57. The Commission has previously made submissions to the Committee of Ministers pursuant to rule 9(2) of the Rules Committee (29 of October, 2015 and 6 of October, 2016). These submissions have already been furnished to the Independent Assessor by letter from the Commission dated the 28 March, 2018 [and are re-produced for ease of reference at Tab 3 hereto].
58. In the Commission’s earlier submissions to the Committee of Ministers, it focused on the criteria adopted by the SCA in identifying cases that fall within the scope of the ECtHR’s judgement in **O’Keeffe** and that may therefore be the subject of ex gratia settlements. In particular, the Commission has argued that the requirement that a prior complaint of sexual abuse must have been made by the individual concerned to the relevant school managerial authority represents a misinterpretation of the ECtHR’s judgment, such that the matter should be referred back to the ECtHR pursuant to Article 46(3) of the Convention. The Commission relies on those submissions and do not propose to repeat them here save to the extent necessary to logically explain the Commission’s position in these submissions.

59. In its capacity as the body responsible for supervising the execution of judgments of the ECtHR, the Committee of Ministers last examined and commented on this case in June, 2016. It is fair to say that the Committee of Ministers has not adopted a clear position on the prior complaint criterion. There is a contradiction in the terms of the Committee of Minister's observations which on the one hand appear to condone the adoption of eligibility criteria by the State including a criterion based on the existence of a prior complaint but the Committee goes on to say:

"...it should be underlined the claims are of a sensitive nature, the claimants were minors at the time the abuse may have occurred; and the authorities must be considered to have been aware of the sexual abuse of children by adults at the time through, inter alia, its prosecution of such crimes at a significant rate (paragraph 168)....in sum, the limits imposed on the settlement scheme appear acceptable as long as the authorities ensure that the flexible and holistic approach of the State Claims Agency is maintained."

60. The Committee of Ministers' observations lack clear direction. Notwithstanding, like the Committee of Ministers, the Commission accepts that evidence of a prior complaint may be a relevant consideration, on the facts of any particular case, in establishing State liability on the basis that it is clearly one means of demonstrating that the State "*knew or ought to have known*" of an unacceptable level of risk to a child and failed to protect that child, but; as the Committee of Ministers clearly acknowledge in the passage quoted at paragraph 9 above, it is not the only way of establishing this.
61. While allowing that the existence of a prior complaint may be relevant, the Commission cannot accept that it is permissible within the parameters of **O'Keeffe** that it should be determinative, or treated as a condition precedent to accessing the Scheme. The Commission does not object to the existence of a prior complaint being weighed by the Independent Assessor as a relevant consideration to be weighed together with other considerations, however, that one consideration (among others which are capable of establishing the requisite degree of knowledge on the part of the State) should not become determinative to the exclusion of other relevant considerations arising in the particular circumstances of each individual case.
62. Ultimately, of course, it merits emphasis that the Committee of Ministers is not a judicial authority and only the ECtHR can expound definitively on the meaning and effect of its judgment. In the meantime, it is a matter for the Independent Assessor, as organ of the State bound to exercise functions in accordance with the European Convention on Human Rights Act, 2003, to interpret the parameters of the Scheme in a manner which gives full effect to that judgment (insofar as the Independent Assessor, as a matter of law, understands it to apply).

The High Court decision in Wallace v. Creevey & Ors, Naughton v. Drummond & Ors. and Kennedy v Murray & Ors. (June, 2016) and Reliance thereon in the State's Submissions

63. The State submission refers the Independent Assessor to that part of the last three Action Plans which include reference to the High Court decision in June, 2016 (Noonan J.) in three related historic abuse cases of **Wallace v. Creevey & Ors**, **Naughton v. Drummond & Ors**, and **Kennedy v Murray & Ors**. (paragraph 17 of the State Submission) laying emphasis on the fact that the claims were dismissed and that Noonan J. made findings that there was no evidence of liability on the part of the State Defendants as there was, inter alia, no allegation or evidence of a prior complaint in respect of the abuser and were therefore distinguishable from the **O'Keeffe** case. Three distinct points need to be made.
64. Firstly, it is undeniable that part of the factual matrix in **O'Keeffe** was that a prior complaint was made. This may be a distinguishing factual feature from other cases. The existence of a distinguishing factual feature does not mean that the principles determining legal liability of the State identified in **O'Keeffe** have no application. Afterall, rarely are two cases identical on the facts but cases based on different facts are routinely relied upon for the legal principle they establish. Differences in the facts of cases do not prevent common and over-arching principles of law being identified as to the legal test for liability to be applied to those different factual circumstances. Thus, in the present context, where there is a proper evidential basis for concluding that a breach of duty has been made out on a "*holistic*" and "*flexible*" approach to the evidence (in this case, the failure to have in place appropriate protective measures where it was known or ought to have been known that children were at risk), then the fact that this is established by reference to different fact scenarios does not detract from a finding of **O'Keeffe** liability.
65. Secondly, the State Submission next refers to the fact that the judgments have not been appealed. This is correct as a statement of fact but it would be misleading to suggest that because the judgments were not appealed, there is an acceptance that the Court was correct in its approach to the requirement for a prior complaint to come within the terms of **O'Keeffe**. What is omitted from the State submission is the fact that a determining feature of the judgments in these cases, against which an appeal could not realistically have been maintained, was the fact that the cases were statute barred. Even a perfunctory review of the judgments demonstrates why this is so. Given the State reliance on the absence of an appeal as significant, however, it is important that the position be spelt out in black and white terms.
66. The judgments delivered reveal that each of the three related sets of proceedings issued many years previous to the application to dismiss coming before the Court. At the time of issue the State was not joined as a party (presumably because of the domestic line of **O'Keeffe** jurisprudence which has since been established to be contrary to the ECHR). In each of the three cases it was only following the **O'Keeffe** judgment that application was made to join the State. There is no exception to the Statute of Limitations arising from a failure to join the correct defendants resulting from a failure to anticipate future pronouncements on the law. As Noonan J. put it: *It seems to me that as a matter of principle, the proposition that a cause of action, apparently long since statute barred, can be somehow revived or indeed conferred ab initio as a result of an expansive*

development of the law by judicial decision, cannot be well founded.” Any proceedings against the State based on the joinder of the State many years later was therefore doomed to fail by reason of being instituted more than two years after the cesser of any claimed disability on the part of a plaintiff. Given that the plaintiffs in those cases had issued proceedings against other parties more than two years previously, it could not be conceivably maintained that the statute did not apply to parties joined belatedly in an attempt to benefit from the subsequent clarification of the law which resulted from the decision of the ECtHR in **O’Keeffe**.

67. Thirdly, while the argument was advanced before Noonan J. to the effect that Irish law must now be seen to have evolved, in line with other common law jurisdictions, to provide a remedy based on principles of vicarious liability, the High Court considered itself constrained to follow the majority judgment of the Supreme Court in **O’Keeffe** on the basis that a pronouncement in any evolution would be a matter for the Supreme Court. In his minority judgment in the Supreme Court in **O’Keeffe**,⁶ Geoghegan J. found in favour of the Plaintiff on the basis that vicarious liability was not necessarily confined to the tortfeasor's employer in the contractual sense and relied on other common law jurisdictions such as Australia, Canada and England identified as having long abandoned the principle that there could not be vicarious liability for deliberate unauthorised acts.⁷
68. Were the question of State liability fully revisited now in appropriately constituted proceedings and in the light of the subsequent decision of the ECtHR in the **O’Keeffe** case where Irish law was found to have failed the Plaintiff in the vindication of her Convention rights, it seems possible, perhaps even probable, that the dissenting judgment of Geoghegan J. in **O’Keeffe** when the Supreme Court sat in 2008, was prescient of changes to come in Irish law. The Commission considers that his judgment is likely to be the judgment which most accurately reflects the state of Irish law post **O’Keeffe** by reason of an evolution in common law protections under ordinary tortious principles influenced by the jurisprudence of the ECtHR and other common law jurisdictions.⁸ If this is correct, the Commission consider there is every prospect that the Irish Supreme would now find that in the circumstances of the relationship between Church and State, in relation to schools, exemption from vicarious liability by the State is not just, as there was quite sufficient connection between the State and the creation of the risk to render the State liable in the manner already found by Geoghegan J. in **O’Keeffe**.

The Role of the Independent Assessor under the Convention and the Constitution

⁶ [2009] 2 IR 302

⁷ Specifically, Geoghegan J. cited consideration of *Bazley v. Curry* (1999) 174 D.L.R. (4th) 45; *Blackwater v. Plint* [2005] 3 S.C.R. 3; *Lister v. Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 A.C. 215 and *Jacobi v. Griffiths* (1999) 174 D.L.R. (4th) 71 in his judgment.

⁸ As recognised by the Supreme Court in cases such as *W v. W* [1993] 2 IR 476, common law rules are judge made law and may be modified depending on the current policy of the court.

69. The State has undertaken to provide an effective remedy for victims of childhood sexual abuse who come within the parameters of the **O’Keeffe** judgment and whose claims are not statute barred under the terms of an ex gratia scheme. While the Scheme is stated to be “*ex gratia*”, for it to achieve its purpose of providing an “*effective remedy*”, the proper parameters on the exercise of discretion under the Scheme fall to be exercised in a Convention compliant manner and the discretion given to the Independent Assessor appears to be wide enough (in circumstances where his terms of reference or the terms of the Scheme as fixed by the Executive do not limit his mandate to making assessments where applicants establish a prior complaint) to encompass a power to assess as eligible all applicants which he considers come within the ambit of the **O’Keeffe** judgment.
70. In the context of identifying what legal principles should inform the approach of the Independent Assessor under the Scheme and in interpreting what the Scheme covers, it is recalled that the Independent Assessor is an “*organ of State*” within the meaning of section 1 of the European Convention on Human Rights Act, 2003 and is exercising a function within the meaning of section 3. Accordingly, as a matter of law, the Independent Assessor is obliged to exercise his discretion under the Scheme in a manner which vindicates and respects the rights of victims of child sexual abuse who qualify for a remedy under the Convention jurisprudence. To the extent that the question which has been posed raises an issue of interpretation as to the parameters prescribed by the terms of a Scheme which is designedly *ex gratia* in nature but which the Independent Assessor has power to make effective through the interpretation adopted in its application to the cases coming before him for assessment, then it is the Commission’s submission, informed by sections 2 and 4 of the 2003 Act, that the Independent Assessor should adopt that interpretation of his powers which best accords with providing an effective remedy for victims of childhood sexual abuse against which the State had a duty to protect them but failed. On this basis, the Commission contends that the Independent Assessor is constrained to reject the very narrow approach of the State as elaborated upon in their submissions.
71. It is the Commission’s considered position that were the Independent Assessor to conclude that the Scheme only applies to victims of historic child sexual abuse who can show that a prior complaint was made, then the State will be further exposed to actions in damages for failure to implement the terms of the judgment by the provision of an effective remedy. In seeking a narrow construction of the parameters of the Scheme, it is the Commission’s position that the State has not considered the longer term implications of this approach for the State and its position before the ECtHR.
72. While the remedy provided in the form of the Scheme is required to vindicate Convention rights, it is respectfully submitted that once that remedy is provided for under the law of the State it then attracts constitutional protection. The Commission considers that this manifests itself in two ways here.
73. Firstly, as the purpose of the Scheme is to provide an effective remedy in Irish law, the Scheme falls to be construed in a constitutionally compliant manner to the extent possible (and it seems under the Scheme anything required by the

O’Keeffe judgment is possible) which means in a manner which vindicates and respects personal rights in accordance with Article 40.3 of the Constitution. An overly restrictive interpretation of the parameters of the Scheme could therefore engage potential State liability under the Constitution as a failure to protect and vindicate rights safeguarded under Article 40.3.

74. Secondly, persons whose claims are rejected under the Scheme have a potential right of recourse to the Courts under section 3 of the European Convention on Human Rights Act, 2003 to vindicate their Convention rights to a remedy based on **O’Keeffe** as sought to be implemented under the Scheme. The right of recourse under section 3 of the 2003 Act to give effect to Article 3 rights is constitutionally protected and a failure to vindicate that right may be in breach of the constitutionally protected right of access to the Courts under Articles 34 and/or 40.3 of the Constitution as recognized since **Macauley v. Minister for Post and Telegraphs** [1966] IR 345.

Conclusion

75. The Commission is very concerned that victims of historic child sexual abuse whilst in school, many of whom should be considered as vulnerable, are still being forced through the Courts to vindicate their rights based on such a questionable interpretation of the implications of the **O’Keeffe** judgment as manifests itself in the State’s Submission to the Independent Assessor.
76. The Commission has proceeded in these submissions on the basis that the Independent Assessor’s Terms of Reference provide for eligibility for payments under the Scheme where he is satisfied that the claimants have shown that they come within the terms of the **O’Keeffe** judgment and are not statute barred. This approach is consistent both with the Scheme as discernible from the Application Form and documentation provided to persons making application to the Independent Assessor and the position adopted by the Independent Assessor in seeking submissions on the proper meaning of the judgment as a condition precedent to establishing the parameters on a Scheme which he is required to interpret as encompassing a remedy for persons coming within the terms of the **O’Keeffe** judgment. It is the Commission’s respectful position that the Independent Assessor is mandated both by the terms of the European Convention on Human Rights Act, 2003 and the Constitution to operate the Scheme in a manner which vindicates the right to a remedy identified under **O’Keeffe** as it falls to be given effect to by the terms of the Scheme.
77. If the Commission is wrong in proceeding on this basis and the State has instead sought to curtail the Independent Assessor’s discretion under the Scheme by imposing, as a condition of eligibility under the Scheme a requirement that an applicant show there had been a prior complaint in the manner of the approach taken by the SCA, then the issue which arises for the Independent Assessor is as to whether the Scheme as adopted is in continuing breach of the State’s obligations under the European Convention on Human Rights. Such a curtailment of his discretion under the Scheme, would in the respectful submission of the Commission, be incompatible with the judgment of the Court in **O’Keeffe** with the result that the Independent Assessor should, it is submitted,

seek to have the Scheme extended to bring the State into compliance with its obligations.

78. It is important to stress that, like the Committee of Ministers, the Commission does not adopt the position that the existence of a prior complaint is wholly irrelevant in assessing eligibility under the Scheme (i.e. not a condition precedent). Instead, it is considered that it may be one of a number of relevant considerations which might be relied upon to inform a decision as to whether State liability has been established. Other relevant considerations include the assumed knowledge of the State authorities of the occurrence of sexual abuse of children at the material time based on extrinsic evidence such as the prosecution of such crimes at a significant rate. Accordingly, it is the Commission's respectful submission that evidence of a prior complaint may properly be treated as a consideration which informs the decision making process but not as a condition precedent to eligibility because to do so would exclude applicants who fall within the parameters of the **O'Keeffe** judgment but who have been unable to find evidence of a prior complaint.
79. Finally, the Commission notes that the terms of reference of this submission was to address the specific issue of whether the "prior complaint" criterion is consistent with the **O'Keeffe v Ireland** judgment of the ECHR. In the interest of clarity the Commission reserves its position on the approach taken by the State regarding those parties who have been excluded from seeking a remedy under the Scheme because they are statute barred from initiating proceedings against the State. The Commission notes that many of these parties became statute barred because of their failure to join the State in the proceedings against the relevant school boards. In this regard, the Commission notes with concern that in a large number of these cases the decision not to join the State in the relevant proceedings was based on the correct law at the time following the Supreme Court decision in **O'Keeffe**, and that this technicality has now left parties outside the parameters of the statutory scheme.