



The Child Law Clinic
School of Law
University College Cork

Submission to the Independent Assessor of the Settlement Scheme
established by the State Claims Agency in response to *O'Keefe v
Ireland*, Application No. 35810/09, 28 January 2014 (Grand Chamber,
European Court of Human Rights)

May 31, 2018

Director: Professor Ursula Kilkelly

Deputy Director/Lead Author: Dr Conor O'Mahony



I. Introduction

1. In April 2018, the Minister for Education made a submission to the Independent Assessor defending the imposition of a condition that victims of sexual abuse in National Schools must demonstrate the existence of a prior complaint before being awarded compensation under the settlement scheme administered by the State Claims Agency as a general measure of implementation of the judgment of the Grand Chamber of the European Court of Human Rights in *O’Keeffe v Ireland* (2014). In this submission, numerous references were made to submissions made by the Child Law Clinic to the Committee of Ministers of the Council of Europe. The Independent Assessor has invited the Child Law Clinic to respond to the Minister’s submission.
2. In this response, it will be comprehensively demonstrated that the imposition of a condition of prior complaint is out of line with the rationale of the judgment in *O’Keeffe* and falls short of adequate implementation of that judgment. By excluding victims who are similarly situated to Louise O’Keeffe in every way other than the presence of a prior complaint, the Minister is saying that the presence of a prior complaint was the crux of liability in that case—that the State’s obligation under Article 3 of the ECHR to protect children in National Schools from sexual abuse was only engaged once a complaint had been made. The Minister’s submission effectively reduces the violation found in *O’Keeffe* to that one issue. As will be demonstrated below, this cannot be reconciled with the judgment of the Grand Chamber.
3. Though obvious, it bears observing that the premise of the *ex gratia* settlement scheme is that the State accepts and seeks to give effect to the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in *O’Keeffe v Ireland*. Since that case was decided under the legal standards set down in the European Convention on Human Rights (ECHR), care must be taken not to introduce into the application of the settlement scheme domestic law concepts of fault or negligence. By introducing an unwarranted condition of prior complaint, that, in effect, is what the Minister has sought to do.

II. The Judgment in *O’Keeffe* and the Issue of Constructive Knowledge

4. By focusing on the issue of prior complaint, the Minister incorrectly characterises the basis of liability in *O’Keeffe* as being one of constructive knowledge of the complaint made against LH and of the risk that LH presented to children in his school in Dunderrow. The judgment refers to matters of which the State “ought” to have been aware. The Minister incorrectly says that this refers to the prior complaint that was in fact made in *O’Keeffe*.
5. The Minister’s submission is fundamentally flawed in that it entirely misrepresents what the *O’Keeffe* judgment was referring to in respect of matters that the State “ought” to have been aware of. It will be demonstrated below that:
 - a. the ECtHR specifically found that the State did not have constructive knowledge of the complaint made against LH, and
 - b. the ECtHR repeatedly found that the State ought to have been aware that all children in the National School system were at risk of being abused and accordingly should have been protected against such abuse.

6. The Minister identifies at para.5 of his submission the “central conclusions” of the decision in *O’Keeffe* by a selective and partial quotation of para.168 of the ECtHR judgment as follows:

“... On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers (paragraph 163 above). The consequences in the present case were the failure by the non-State Manager to act on prior complaints of sexual abuse by LH, the applicant’s later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School.”

7. The Minister, for reasons not made apparent, omits the immediately preceding statement of the ECtHR of the principle on which it acted—also in para.168—without which para.168 cannot be properly understood. Thus, the Minister mischaracterises the basis of the judgment. The omitted text reads:

“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. On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers (paragraph 163 above). The consequences in the present case were the failure by the non-State Manager to act on prior complaints of sexual abuse by LH, the applicant’s later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School.”

8. The foregoing statement of principle lays no basis for prior complaint as essential to the reasoning of the Court and, as will be explained further below, that the precise facts in *O’Keeffe* were illustrative of the principle rather than exhaustive of it. That becomes even clearer from a review of the central elements of the ECtHR judgment, which will now be explored in depth. It will be established, through detailed direct quotation of the core of the Court’s reasoning and commentary thereon, that the Court’s judgment cannot reasonably be interpreted as turning on the issue of prior complaint or constructive knowledge, beginning at para.145:

“145. ... 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 ...
146. *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 ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards."*

9. Here, the protective obligation of the State is emphasised, requiring special measures and safeguards. Shortly afterwards, at para.148, the Court stated that it:
"... would clarify that it considers, as did the Government, that there was no evidence before the Court of an operational failure to protect the applicant ... 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." (Emphasis added)
10. Thus, the liability of the State was in no way based on any prior complaint to the State or on any actual or constructive knowledge by the State of the abuse by the abuser. This passage is clearly inconsistent with a requirement of prior complaint – indeed, it was for the very reason of the absence of prior complaint that the State was absolved of operational failures. Crucially, however, it was still found to have breached its positive obligations under Article 3 of the ECHR due to other failures, which will be explored in more detail below. In imposing a condition of prior complaint, the Minister seeks to require claimants to prove operational failures that were not proven in the *O’Keefe* case itself and that were expressly excluded by the Court from its reasoning in holding against the State. It is paradoxical to require claimants to prove the very thing of which the ECtHR absolved the State.
11. As the judgment continues, the Minister’s mischaracterisation of the basis of liability becomes clearer still:
"149. It is also recalled that it is not necessary to show that "but for" the State omission the ill-treatment would not have happened. 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 ..."
12. Once again, this passage demonstrates that the imposition of a condition of prior complaint is incorrect: the only logic of requiring prior complaint is that the State ought to have known of the prior abuse and, "but for" the absence of a mechanism for handling complaints, would have acted to prevent the abuse of the complainant. That amounts to the "but for" test, expressly excluded by the ECtHR in para.149.
13. The judgment proceeds to clarify that the failures that the Court was concerned with were systemic rather than operational in nature, and extended beyond reporting to include prevention and detection:
"152. 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."

14. In assessing whether the State discharged this obligation, the Court placed considerable emphasis on the State's knowledge not of the complaints made against LH in Dunderrow, but of the general systemic risk of child abuse:

"159. Parallel to the maintenance by the State of this unique model of education, the State was also aware of the level of sexual crime against minors through the enforcement of its criminal laws on the subject.

...

161. Moreover, the evidence before the Court indicates a steady level of prosecutions of sexual offences against children prior to the 1970s. It has noted, in particular, the detailed statistical evidence provided by the Police Commissioner to the Carrigan Committee as early as 1931 ... Drawing a causal connection between the frequency of assaults on children and the impunity expected by abusers, the Committee's report recommended legislative changes and severer punishments leading to the adoption of the 1935 Act which, inter alia, created certain sexual offences as regards young girls. Professor Ferriter's Report, sponsored by the Ryan Commission and annexed to its Report (paragraph 82 above), analysed the statistical evidence of prosecutions gathered from criminal court archives covering the period after the Carrigan Report and until 1960s. In his report, he concluded, inter alia, that those archives demonstrated a high level of sexual crime directed against young boys and girls. Lastly, the Ryan Report also evidenced complaints made to State authorities prior to and during the 1970s about the sexual abuse of children by adults ... these earlier complaints still amounted to notice to the State of sexual abuse by adults of minors in an educational context.

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." (Emphasis added)

15. It is clear from the above that the Court was not attributing constructive knowledge to the State of the complaint against LH (and therefore of a particular risk in Dunderrow), but of the fact that all children in the primary school system were at risk of being sexually abused. Moreover, it is notable that the reference here to an obligation to establish reporting mechanisms was described as a "minimum" obligation. On foot of this risk, the State was obliged to take a range of measures, both preventive and reactive in nature, of which a reporting mechanism was only one. The Court went on to examine a range of measures other than a mechanism for handling complaints presented by the State as evidence of an effective child protection framework, and to reject each of them as inadequate:

"163. The first mechanism on which the Government relied was a reporting process outlined in the 1965 Rules and the Guidance Note of 6 May 1970 (paragraph 62 above). However, none of the material submitted referred to any obligation on a

State authority to monitor a teacher's treatment of children and none provided for a procedure prompting a child or parent to complain about ill-treatment directly to a State authority. On the contrary, those with complaints about teachers were expressly channeled to the non-State denominational Manager by the text of the Guidance Note of 6 May 1970 on which the Government relied. If a parent would have been hesitant to by-pass a Manager (generally a local priest as in the present case) to complain to a State authority, the relevant rules discouraged them from doing so.

164. The second mechanism invoked was the system of School Inspectors governed also by the 1965 Rules as well as by Circular 16/59 (paragraph 61 above). However, the Court notes that the principle task of Inspectors was to supervise and report upon the quality of teaching and academic performance. There was no specific reference, in the instruments on which the Government relied, to an obligation on Inspectors to inquire into or to monitor a teacher's treatment of children, to any opportunity for children or parents to complain directly to an Inspector, to a requirement to give notice to parents in advance of an Inspector's visit or, indeed, to any direct interaction between an Inspector and pupils and/or their parents. The rate of visits by Inspectors (paragraph 61 above) did not attest to any local presence of relevance. Consistently with this fact, the Government did not submit any information about complaints made to an Inspector about a teacher's ill-treatment of a child. As pointed out by Hardiman J in the Supreme Court, the Minister (via his Inspectors) inspected the schools for their academic performance but it did not go further than that: the Minister was deprived of the direct control of the schools because the non-State Manager was interposed between the State and the child (paragraph 35 above). 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." (Emphasis added)

16. These failings all applied on a systemic level, and applied in the same way whether or not a complaint had actually been made. They were therefore common to all victims of sexual abuse in National Schools in the 1960s and 1970s. By selectively focusing on the issue of complaint, the Minister seeks to wish this crucial passage out of existence.
17. On the basis of this detailed analysis of numerous issues that went well beyond the mere necessity for a mechanism for handling complaints, the Court concluded:

"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."
18. Notably, this conclusion regarding a failure by the State to discharge Convention obligations makes no mention of the issue of prior complaint. And although a complaint had been made in *O'Keefe* itself, the next paragraph clarifies that the facts of *O'Keefe* are seen by the Court as merely illustrative of the consequences of broader, systemic failures by the State rather

than exhaustive of the circumstances in which a failure to discharge Convention obligations might arise:

“166. The facts of the present case illustrate, in the Court’s opinion, the consequences of this lack of protection and demonstrate that an effective regulatory framework of protection in place before 1973 might “judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered” by the present applicant ...”

19. The Court returns to the issue of systemic risk to all children in National Schools rather than location-specific risk in Dunderrow at the end of its judgment:

“168. To conclude ... 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.”

20. The conclusion of the Court makes it clear that the basis on which the State was found to have violated Article 3 of the ECHR was not that it should have known about and responded to the complaint against LH, but that it should have known that all children in the National School system were at risk of sexual abuse and yet failed to take effective steps to control against the risk of such abuse occurring:

“[168.] 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.”

21. The above analysis demonstrates that in its analysis of how the relevant law applies to the facts of the case, the Grand Chamber did not focus on the specific complaint made against LH and on the operational failure to respond to that complaint; on the contrary, the Court specifically absolved the State of wrongdoing on that issue. Instead, a violation of Article 3 of the ECHR was found due to a much broader failure to respond to systemic risk to all children in the National School system. The judgment in *O’Keeffe* did not turn on or impose a condition of prior complaint as a basis for liability; indeed, the text of the judgment is inconsistent with any such condition. Since it is clear that the *O’Keeffe* judgment did not turn on constructive knowledge of the complaint, and that liability in the case turned on a range of factors (of which failure to respond to a complaint was just one), the presence or absence of a complaint cannot be used as the threshold for liability in other cases.

III. Strict liability

22. At para.2(iii) of the Minister’s submission, it is argued that the interpretation of the *O’Keeffe* judgment offered here would “impose strict liability on the State”. This is a distortion of the

meaning of the term strict liability, which is defined by the *Oxford Dictionary of Law* as “[l]iability for a wrong that is imposed without the defendant having to prove that the defendant was at fault”. There is no question of strict liability: the State’s liability stems from failings identified by the Grand Chamber other than the failure to have a mechanism for handling complaints, set out in detail at paras.164-165 of *O’Keeffe* (see para.15 above).

23. At para.4 of his submission, the Minister cites para.144 of the *O’Keeffe* judgment, in which the Court held that “not every risk of ill-treatment could entail a Convention requirement to take measures to prevent that risk”, and relies on that passage as evidence that the State was not obliged to take measures to protect children unless it had or ought to have had knowledge that they were being abused. But again, this distorts the judgment by ignoring the Court’s focus on the risk of abuse, and not the actual occurrence of abuse or complaints of abuse. The nub of the judgment is that in relation to this particular risk—namely, that children in schools might be sexually abused—the Court held that the State **was** obliged to take measures to protect children. The Minister could only properly seek shelter behind para.144 of the *O’Keeffe* judgment if the Court had found that the State was not obliged to take measures to protect children against the risk of sexual abuse in National Schools. This is the opposite of what the Court actually found.

IV. Factual matrix

24. In para.2(iii) of the Minister’s submission, it is argued that the violation in *O’Keeffe* could only have arisen due to the presence of a prior complaint because the judgment in *O’Keeffe* “was founded in its own factual matrix”. That is not so: as explained at paras. 8 and 18 above, the Court expressly found that the factual matrix in *O’Keeffe* illustrated a particular consequence of a broader State failure. This is inconsistent with the proposition that the factual matrix in *O’Keeffe* circumscribed or exhausted the Court’s finding of State failure. Furthermore, it is irreconcilable with both the finding of no operational failure (i.e. failure by reference to the particular factual matrix) and the finding of systemic failure.
25. Further, and as already explained, the Minister is seeking to isolate and assign undue importance to a single element of that factual matrix (namely, the presence of a prior complaint) while entirely ignoring all other aspects of the factual matrix (such as the inadequate inspection regime and the absence of direct State control over teachers).
26. Within that factual matrix, the emphasis of the judgment was on mitigating risk: on preventing abuse, not investigating abuse that had already occurred. The level of risk that existed was such that in National Schools in the 1960s and 1970s, child sex abusers were allowed to operate unhindered over prolonged periods of time. The widespread incidence of this abuse was acknowledged by the Supreme Court in the domestic proceedings in *O’Keeffe*.¹ Clearly, the prevalence of abuse was many times higher than the prevalence of

¹ In his dissenting judgment in *O’Keeffe v Hickey* [2009] 2 IR 302 at 346-347, Geoghegan J commented that “[r]egrettably, this court has become aware through the numerous judicial review cases seeking to stop criminal trials that in many instances there have been alleged sexual assaults by teachers in a semi-concealed fashion in the actual classroom while teaching.” The Supreme Court ([2009] IESC 39) subsequently declined to award costs to the State against Louise O’Keeffe specifically on the basis that her case concerned a complex point of law affecting “a substantive volume of [sex abuse] cases...a significant number of which involve

complaints, which explains why there are (according to the figures offered in the State's own action plans submitted to the Committee of Ministers) 360 known victims, but only 7 have been offered settlements (all on the basis of prior complaint against a single abuser). Thus, the level of failure by the State goes far beyond a mere failure to respond to complaints. The Grand Chamber in *O'Keefe* found that the State knew that there was a significant incidence of sexual crime against children, and thus ought to have known that there was a significant risk that children would be abused in National Schools. And yet the State chose to do precisely nothing to control against that risk. Many hundreds of children experienced horrific sexual abuse on countless occasions as a result. This was the product of a catastrophic and systems-wide failure by the State to take any preventive measures, choosing instead to ignore a risk of which it was aware.

27. The necessary implication of the Minister's submission is that the *O'Keefe* case came down to a failure to respond to a specific complaint against a specific individual in Dunderrow. The factual matrix of *O'Keefe*, and the reasoning given by the Court in finding a violation due to a failure to take proactive steps to mitigate a risk of sexual abuse (and not merely reactive steps to investigate complaints of sexual abuse), clearly demonstrate that that contention is untenable.

V. Shifting of onus from State to abuse victims who were unlikely to make complaints

28. By imposing a condition of prior complaint on the availability of redress, the State has shifted the onus from itself (to take proactive and preventive measures) to vulnerable children who are victims of sexual abuse (to make disclosures leading to complaints). Moreover, not only does the onus shift to the victims to report but do so contemporaneously with or shortly after the abuse (since delayed reports in adulthood will not have been made "prior" to the abuse of other victims).
29. This is an unconscionable position that ignores the reality that the vast majority of children who are victims of sexual abuse do not disclose that abuse. Those that do usually wait a significant period of time (mostly until adulthood) before doing so; and even in the minority of cases where the abuse is disclosed at or shortly after the time at which it occurred, this often does not result in a complaint to the authorities. This was particularly true in Ireland in the 1960s and 1970s, when the abusers were prominent pillars of society such as schoolmasters and members of the clergy, and the power imbalance inherent in cases of child sex abuse was magnified even further. The very fact that there was no proper State system in place for handling complaints against such individuals further mitigated against the making of such complaints to begin with—and yet the State now seeks to take advantage of its own failures in this regard by perversely turning those failures into a defence and a reason to limit the scope of liability.
30. In *O'Keefe*, the State rightly argued (and the Court upheld, at para.143) the principle that anachronistic hindsight should not be imposed on the events of many decades ago (through the Court rejected the State's argument of ignorance on the facts). However, the State now

teachers whose salary is paid by the State", and that "their number reflects the fact that they are the accumulation of claims of wrongdoing extending over the past three or four decades."

refuses the face the corollary of its argument against anachronism: that, in the Ireland of the 1960s and 1970s, the power imbalances between abused and abuser were far greater than they are today and were such as to stifle complaint in the absence of the protective measures required of the State by the Court.

31. Seen in this light, it is clear why only a single prior complaint has thus far been brought to the attention of the State Claims Agency within this settlement scheme, even though there are 360 known victims. Even in that case, the prior complaint was not made at the school attended by the seven victims who received compensation but was identified from documents associated with the Ryan Report.

32. An overwhelming body of international research demonstrates that children rarely disclose sexual abuse; if disclosures are made, this usually occurs only after reaching adulthood. Moreover, even in the rare cases where children do make disclosures (for example, to family members or friends) at the time of, or shortly after, the abuse, these do not always result in complaints being made to the authorities. The state of the research is summarised as follows by Olafson and Lederman:

“There appears to be a consensus among researchers that most child sexual abuse victims delay disclosing, often until adulthood. A number of well-designed retrospective surveys now show that the great majority of victims delay disclosing contact child sexual abuse during childhood (Finkelhor, Hotaling, Lewis, & Smith, 1990; Smith et al., 2000). These surveys also indicate that even when adults recall having told someone about the abuse, the majority of these cases were not then reported to the authorities.”²

33. Moreover, this research is not new; Olafson and Lederman observe that for over a century, *“there was statistical evidence that children often delay disclosure or remain completely silent about sexual victimization”*.³ The message from the research has been consistent over that time. In 1979, David Finkelhor found that in a study of 796 adults, 19.2% of the woman and 8.6% of the men had been sexually abused as children; but of these, 83% of the boys and 63% of the girls did not tell anyone.⁴ This trend has been repeatedly echoed in the research ever since. In a widely-cited 1994 study, Lamb and Edgar-Smith found that while the mean age at which the first incident of abuse occurred was 8, the mean age of first disclosure was 18.⁵ In a review of more recent research published between 2004 and 2007, Allnock comments that *“delayed disclosure is common”*, and that studies *“consistently show that between 46 and 69 per cent of adults abused as children never disclosed it in their*

² Erna Olafson and Judge Cindy S. Lederman, “The State of the Debate About Children’s Disclosure Patterns in Child Sexual Abuse Cases” (2006) *Family and Court Journal* 27 at 29, citing D. Finkelhor, G. Hotaling, I. Lewis & C. Smith, “Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors” (1990) 14(1) *Child Abuse and Neglect* 19-28 and D.W. Smith, E.J. Letourneau, B.E. Saunders, D.G. Kilpatrick, H.S. Resnick & C.L. Best, “Delay in disclosure of childhood rape: Results from a national survey” (2000) 24(2) *Child Abuse and Neglect* 273-287.

³ Olafson and Lederman (2006) at 28.

⁴ David Finkelhor, *Sexually Victimized Children* (New York: Free Press, 1979).

⁵ Sharon Lamb and Susan Edgar-Smith, “Aspects of Disclose: Mediators of Outcome of Child Sexual Abuse” (1994) 9(3) *Journal of Interpersonal Violence* 307 at 314-316.

childhood”.⁶ A study published by London *et al* in 2005 found that “approximately 60%-70% of adults do not recall ever disclosing their abuse as children, and only a small minority of participants (10%-18%) recalled that their cases were reported to the authorities”.⁷

34. In summary, the great majority of children who are victims of sexual abuse do not disclose the abuse at all during their childhood. Of those who do, there are often significant delays between the abuse and the disclosure; and even then, only a minority of disclosures result in a complaint being made to the authorities.
35. In light of this, it is impossible to see how a State system dependent on prior complaints which, in reality, would not be made, could be effective or meet the requirements of the *O’Keeffe* judgment. It is clear from international research that if the State’s obligation to take measures in response to the risk of child sexual abuse is only engaged once a complaint has been made by a child, the State’s obligation is reduced to a minimal level that is impossible to reconcile with the strong emphasis placed by the ECtHR on the obligation of the State to take measures to protect children in primary schools from the risk of sexual abuse. It suggests that risk only arises, and only becomes something of which the State ought to have been aware, once a complaint has been made. However, the entire tenor of the *O’Keeffe* judgment could not be clearer in identifying that the risk was inherent to the system itself, was system-wide and was one of which the State ought to have been aware (see, in particular, paras.145-146 and 161-162 of *O’Keeffe*). Thus, the State’s obligation was unquestionably engaged in all schools at all times even in the absence of prior complaint, and was not fulfilled for a variety of reasons, of which the absence of a mechanism for handling complaints was just one.
36. Moreover, given the lengthy delays typical in the minority of cases of sexual abuse that do generate a report to the authorities, the condition that the complaint must have been made prior to the abuse experienced by a particular victim if that victim is to be entitled to a settlement all but ensures that settlements will not be made.

VI. Supervision by Committee of Ministers

37. At paras.18-19 of his submission, the Minister seeks to place great weight on the fact that the Committee of Ministers has thus far accepted the condition of prior complaint as legitimate. At para.2(v), the Minister states—in error—that the Committee “received the UCC CLC [Child Law Clinic] papers in April 2015 and November 2016” and “[f]ollowing consideration of the issue, the Committee was satisfied with the position that has been adopted by the State.” The Committee has, to date, considered one submission by the Child Law Clinic (April 22, 2015) and one submission by the Irish Human Rights and Equality Commission (IHREC) (October 12, 2015). It has not yet considered two subsequent submissions—one each by the Child Law Clinic (November 4, 2016 – see Appendix A) and the IHREC (October 6, 2016; see Appendix B)—which have pointed out significant legal and

⁶ Debra Allnock, “Children and young people disclosing sexual abuse: An introduction to the research” (London: NSPCC, 2014), available at <http://www.childmatters.org.nz/file/Diploma-Readings/Block-2/Sexual-Abuse/3.4-children-and-young-people-disclosing-sexual-abuse-updated.pdf>.

⁷ K. London, M. Bruck, S.J. Ceci & D.W. Shuman, “Disclosure of child sexual abuse: What does the research tell us about the ways that children tell?” (2005) 11(1) *Psychology, Public Policy, and Law* 194 at 203.

factual errors made in the reasoning of the Committee of Ministers when accepting the condition of prior complaint as legitimate.

38. While the Committee's view is of interest, it is not determinative of the matter, for two reasons: first, it has no formal legal status, and second, as just noted, the Committee's consideration to date of the State's implementation of the *O'Keefe* judgment is tainted by legal and factual errors.
39. The lack of formal legal status of the Committee's findings is reflected in the Committee's own rules, which stipulate that the Committee may make interim resolutions "*in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution*".⁸ Note that an interim resolution may "*express concern and/or make suggestions*", but may not impose a binding requirement on a State. The Rules allow the Committee to pass a final resolution in cases where the High Contracting Party concerned has taken all the necessary measures to abide by the judgment that its functions have been exercised.⁹ No such resolution has been passed in respect of *O'Keefe*; and even if it had, it would not act as a bar to future litigation before the ECtHR. Ultimately, the power to interpret the ECHR rests with the Court, not the Committee. The Committee's rules provide that questions of interpretation of the Convention are to be referred to the ECtHR rather than resolved by the Committee.¹⁰ This is further reflected in the ECHR itself; Article 32(1) provides that "*[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto*", while Articles 42 and 44 provide that judgments of the Court "*shall be final*". There is no corresponding provision in the Committee's rules concerning the status of its resolutions. The recent Copenhagen Declaration stated that the ECtHR "*authoritatively interprets the Convention*".¹¹
40. The legal and factual errors in the Committee's consideration of the State's response to the *O'Keefe* judgment become clear when its commentary on the State's Actions Plans, and submissions made to the Committee regarding those Actions Plans, is examined. The rationale of the Committee was expressed as follows:
- "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. In addition, the Irish authorities have confirmed that, should an individual be dissatisfied with the assessment by the State Claims Agency, he or she is free to lodge a complaint before the domestic courts. This domestic judicial supervision of the settlement scheme should therefore provide an **effective, domestic safeguard and avoid repetitive cases being brought before the Court.**"*
(Emphasis added)

⁸ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 16, available at <https://rm.coe.int/16806eebf0>.

⁹ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 17, available at <https://rm.coe.int/16806eebf0>.

¹⁰ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rules 10 and 11, available at <https://rm.coe.int/16806eebf0>.

¹¹ Copenhagen Declaration, April 12-13, 2018, para.26, available at <https://rm.coe.int/copenhagen-declaration/16807b915c>.

41. Thus, the acceptance of the condition of prior complaint as legitimate was expressly made conditional upon effective supervision by the domestic courts and on a flexible and holistic approach being adopted by the State authorities, with the aim of avoiding repetitive applications to the Court.
42. It is clear that neither of these conditions is being met. First, there is no effective judicial supervision of the settlement scheme. As the Minister points out in para.17 of his submission to the Independent Assessor, the High Court has repeatedly held that litigation against the State in the domestic courts by victims of abuse in National Schools cannot succeed. In each of *Naughton v Dummond*,¹² *Kennedy v Murray*¹³ and *Wallace v Creevey*,¹⁴ the High Court held that in light of the Supreme Court decision in *O’Keeffe*, and separate precedents on the status of the ECHR in Irish domestic law, the claim against the State for either vicarious or direct liability was “bound to fail”. The claims in all three cases were struck out as disclosing no reasonable cause of action. More recently, in *Murray & Ors v Minister for Education*,¹⁵ abuse victims who had discontinued proceedings against the State under threat of costs following the Supreme Court decision in *O’Keeffe* were refused permission by the Court of Appeal to re-enter proceedings. Leave to appeal to the Supreme Court against this decision was denied in *Allen v Minister for Education*.¹⁶
43. Thus, while the Committee’s acceptance of the settlement scheme was predicated on the presence of “*domestic judicial supervision of the settlement scheme ... [providing] an effective domestic safeguard and [avoiding] repetitive cases being brought before the Court*”, the reality is that the domestic courts have repeatedly refused to entertain any and all litigation against the State by victims of abuse in National Schools. The inevitable result is that repetitive cases will be indeed brought before the ECtHR. The Child Law Clinic has been actively consulting with the solicitors of multiple victims, including the applicant recently refused leave by the Supreme Court in *Allen v Minister for Education*,¹⁷ and preparations for an application to the ECtHR are at an advanced stage. Thus, the prospects of effective judicial review and supervision of the settlement scheme are so remote as to be non-existent.
44. The second condition attached to the Committee’s acceptance of the legitimacy of the settlement scheme was that the State adopt a “*holistic and flexible approach*”. To date, just seven offers of settlements have been made under the scheme—all of which relate to prior complaints in respect of one single abuser—even though at least 360 cases arise for consideration.¹⁸ A settlement rate of just 2% is not indicative of a flexible and holistic approach.

¹² [2016] IEHC 290.

¹³ [2016] IEHC 291.

¹⁴ [2016] IEHC 294.

¹⁵ [2017] IECA 216.

¹⁶ [2018] IESCDT 33.

¹⁷ [2018] IESCDT 33.

¹⁸ 1259 Meeting, 7-9 June 2016,

https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168064e699.

45. The reason for the derisory settlement rate is that it is virtually impossible for most applicants to prove the existence of a prior complaint against their abuser. As demonstrated in Part V above, international research demonstrates that in most cases, a prior complaint is highly unlikely to have been made to begin with; and even in the rare cases where a prior complaint was made, there is unlikely to be accessible evidence available of such a complaint. In *O’Keefe*, it was accepted that no State authorities were aware that a complaint had been made against the applicant’s abuser (para.15). Since the Guidance Note of 6 May 1970 directed complaints to school managers and away from the State authorities (para.163), it is fair to assume that the same situation would apply to most complaints. If State authorities are not aware of a particular complaint due to the failure of a school manager to act upon it, it must be questioned how anyone else—and particularly a child—could be aware of that same complaint, or be in a position to provide proof as to its occurrence. The accessibility of evidence of complaints is further hindered by the fact that the State Claims Agency is not in a position to compel the production of records by school authorities for the purposes of assessing applications for settlements (a weakness built into the settlement scheme by the State, which now seeks to benefit from that weakness).
46. The requirement to demonstrate prior complaint is a key reason why so few applications have thus far been made to the redress scheme. Potential applicants who cannot prove prior complaint have simply not been applying, because they know that their application will fail. They have no remedy available to them via either redress scheme or (as demonstrated earlier) via the courts. Their only remaining course of action is an application to the ECtHR.
47. In this regard, it should be noted that the Convention does not require applicants to exhaust domestic remedies which have no prospect of success (see, inter alia, *A, B and C v Ireland*, Application No. 25579/05, Judgment of 16 December 2010 (Grand Chamber) at para.149). Since the majority of victims have no prospect of success in either the domestic courts or in the redress scheme, they are free to apply directly to the ECtHR. Accordingly, the redress scheme, coupled with judicial supervision, will not act to prevent repetitive cases coming before the Court.
48. Since neither of the conditions that were attached to the Committee’s acceptance of the legitimacy of the settlement scheme are being met, both the Child Law Clinic and the IHREC have requested that the Committee exercise its discretion under Rule 10(1) to refer the matter to the ECtHR for an interpretive ruling clarifying whether it is necessary to demonstrate the existence of a prior complaint which was not acted upon in order for a case to come within the terms of the *O’Keefe* decision. This request has not yet been considered. Until such time as it has been, or until a subsequent application comes before the Court (as seems highly likely at this time), the issue has not yet been settled as a matter of ECHR law. The Committee’s initial acceptance of the scheme, tainted as it is by significant legal and factual error, is not determinative of the matter.

VII. “Contrary to all ECHR authority”

49. At para.22 of his submission, the Minister states that the submission made by the Child Law Clinic to the Committee of Ministers that the failings identified in *O’Keeffe* were systemic in nature and not limited to the particular circumstances in Dunderrow is “contrary to all ECHR authority”. It is striking that the Minister’s submission (which, according to its cover letter, was prepared “with the advice and assistance of the Attorney General and senior counsel”) does not cite a single ECHR authority in support of this sweeping contention. If indeed the Child Law Clinic’s submissions are “contrary to all ECHR authority”, it should be a simple matter to cite such authority.
50. The Court did not refer to other victims because other victims were not before the Court. This does not mean that the judgment has no implications for other victims: hence the establishment of the settlement scheme administered by the State Claims Agency. It is a fundamental principle underpinning the Convention that similarly situated victims must be afforded redress. This is what the system of “general measures of implementation” is premised on—i.e. State are obliged to respond not just to the judgment’s impacts on the applicant, but to its impact on any similarly situated individuals, so as to prevent repeat violations and repetitive cases coming before the Court. As noted in the Council of Europe’s *Guide to the Execution of Judgments*:
- “... ‘it is inevitable that the Court’s decision will have effects extending beyond the confines of [the] particular case, especially since the violations found stem directly from the contested provisions and not from the individual measures of implementation’. This enhanced binding effect is apparent from the obligation on the state to adopt general measures in addition to measures for the benefit of the applicant.”¹⁹*
51. For the reasons already outlined, all children in the primary education system are similarly situated to Louise O’Keeffe, since the State’s failures were systemic in nature and not confined to failing to respond to a specific complaint. Rule 6(b)(ii) of the Rules of the Committee of Ministers for the supervision of the execution of judgments provides that general measures of implementation must both prevent new violations and put an end to existing violations. In this instance, as long as compensation is denied to individuals who were victims of sexual abuse in a National School system in which the State had failed to discharge its positive obligations under Article 3, there is a continuing violation of Articles 3 and 13 of the ECHR in respect of those individuals.

VII. Inequality between victims

52. The condition of prior complaint creates a clear inequality between victims of sexual abuse which took place in a National School system which the Grand Chamber of the ECtHR has found to have involved an inherent risk of sexual abuse which the State took no measures whatsoever to guard against. First, it establishes a position whereby the State is liable for the abuse of some victims and not liable for the abuse of others based on the presence or absence of an arbitrary condition which would have made no difference to the course of

¹⁹ Council of Europe, *The execution of judgments of the European Court of Human Rights*, pp.7-8, available at [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2008\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf).

events either way, given the State's wilful blindness towards child protection matters in National Schools.

53. Second, and more disturbingly, it establishes a position where—by definition—the State can never be found to share any blame for the first act of abuse committed by any particular abuser, no matter how comprehensively it had abdicated its responsibility to protect children in that particular school. In essence, this is a free pass for first offences. It is a grotesque echo of the old and long-discredited “free bite” rule. It is impossible to reconcile this position with a judgment that found that protecting children from sexual abuse was an “inherent obligation” of the State which was of “acute importance in a primary education context” and which “was not fulfilled when the Irish State ... 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” (para.168 of *O’Keefe*).

VIII. Substantive versus procedural violations

54. A violation of Article 3 of the ECHR can take the form of either a substantive violation (in which the State bears direct or indirect responsibility for the infliction of inhuman and degrading treatment), or a procedural violation (in which the State bears no responsibility for the treatment itself but has failed to investigate a complaint of such treatment).
55. A substantive violation occurs either where a State has directly inflicted inhuman and degrading treatment on an individual (breach of negative obligations) or, as in *O’Keefe* where a State fails to take measures to prevent inhuman and degrading treatment being inflicted by private actors (breach of positive obligations).
56. By contrast, procedural violations occur where the State fails to investigate a complaint of inhuman and degrading treatment (whether inflicted by an agent of the State or by a private actor).
57. In the context of abuse against children, the leading case on the procedural obligations arising under Article 3 is *CAS and CS v Romania* (26692/05, March 20, 2012), which concerned an investigation into an allegation of repeated serious and violent sexual abuse of a seven year-old boy. The Court set out the key principles as follows:
- “... the absence of any direct State responsibility for acts of violence that meet the condition of severity such as to engage Article 3 of the Convention does not absolve the State from all obligations under this provision. In such cases, Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals ... Even though the scope of the State’s positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official investigation are similar. For the investigation to be regarded as “effective”, it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The*

authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation ...”
(Paras.69-70)

58. *O’Keeffe* is clearly distinguishable from *CS and CA v Romania*, in that the State was found to be partly responsible for the abuse itself due to its failure to discharge its positive obligations, and thus to have committed a substantive violation. Indeed, the Court in *O’Keeffe* rejected the argument that a separate procedural violation had occurred, finding that the prosecution and conviction of the abuser, albeit several decades later, discharged the procedural violation (paras.170-174).
59. By focusing on the issue of prior complaint to the exclusion of all other failings of the State, the Minister is reducing a judgment in which a substantive violation of positive obligations was found to a case of a mere procedural violation—i.e. that the State failed to investigate the complaint rather than that the State bore partial responsibility for the abuse due to its failure to take proactive, preventive measures.

IX. Conclusion

60. The settlement scheme does not have to be open-ended. As noted by the Committee of Ministers, it is reasonable that some limit be placed on liability. For example, the settlement scheme could be limited to abuse occurring before a specific date when some more effective child protection measure was implemented. However, any such limit must be consistent with the terms of the *O’Keeffe* judgment by providing a remedy under Article 13 of the Convention to anyone who was a victim of sexual abuse in a National School system within which the State was failing to discharge its obligations under Article 3.
61. The difficulties inherent in attempting to prove prior complaint, and the fact that only a single such complaint has yet been proven, demonstrates that the condition in question was not designed to limit the scope of liability: it was designed to effectively eliminate it by confining *O’Keeffe* to its own facts. This falls far short of full implementation of the judgment in *O’Keeffe* and denies compensation to victims entitled to it. We urge the Independent Assessor to seize this opportunity to rectify this error before Ireland is once again found by the ECtHR to be in breach of its Convention obligations.