

## Terms of Scheme

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

## Introduction

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

## Objectives of the revised Scheme

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

## Scope of the Scheme

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

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

#### Criteria for the Scheme

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

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

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

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

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

#### Calculation of payment

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

#### Legal representation and other costs

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

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

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

## Advertisement of the Scheme

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

## Time Limit for Applications

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

## Procedure

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

## Supporting documentation

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

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

## Applications on behalf of individuals

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

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

#### Determinations, acceptance and payment

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

#### Waiver

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

#### Appeals mechanism

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

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

#### Definitions

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