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

1. IHREC is Ireland's national human rights institution and makes these submissions pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements with regard to the execution of the judgment of the Grand Chamber of the European Court of Human Rights in *O'Keeffe v. Ireland*, no. 35810/08, ECHR 2014-I, under Article 46(2) of the European Convention on Human Rights.

2. IHREC welcomes the measures Ireland has taken to ensure that children currently attending Irish schools have real and effective protection against abuse, noting that guarantees of non-repetition are an important element in reparation for historic human rights violations.

3. However, IHREC is gravely concerned at the lack of progress made by Ireland in making reparation to victims of historic abuse in Irish schools.

4. In its update on general measures regarding discontinued litigation, Ireland states that 'an ex gratia Scheme was established in 2015 to provide an effective remedy for a specific category of people, namely those persons who had commenced domestic litigation but who had discontinued those proceedings following the High Court[1] and Supreme Court[2] judgements in Ms O' Keeffe's case and who were unable to re-commence their litigation in the domestic courts following the judgment of the Grand Chamber.'

5. The Scheme to which the Committee of Ministers has been referred in Ireland's action plan is explicitly an ex gratia one. It has no statutory basis, but is based rather on a Government decision of uncertain date. If it has formal terms, they have not been published. To the extent that its eligibility criteria are known, they appear in a ministerial press release of 28 July 2015. From this document two eligibility criteria can be discerned:

    a. First, that the person initiated and discontinued legal proceedings against the Minister for Education in respect of school child sexual abuse, and those proceedings were not barred under the Statute of Limitations prior to their being discontinued;

    b. Second, that the person was sexually abused while at school by a primary or post-primary employee in respect of whom there was a prior complaint of sexual abuse to the school authority (or a school authority in which the employee had

[1] Mr A and others V. Minister for Education and Sciences, Ireland and the Attorney General : [2016] IEHC 268 https://www.courts.ie/acc/alfresco/4a14a6a4-3a47-49e0-900f-d1b1ab3fc262/2016_IEHC_268_1.pdf/pdf#view=fitH
[2] Murray and others V. Minister for Education and Sciences, Ireland and the Attorney General [2017] IECA 216 https://www.courts.ie/acc/alfresco/0f1d6bf6-f6a5-4c79-a7c2-5e41f8868503/2017_IECA_216_1.pdf/pdf#view=fitH

previously worked) prior to the issue of the Department of Education child protection guidelines to primary and post-primary schools in 1991/92.

6. With regard to the first criterion, IHREC observes that the Scheme excludes the approximately 150 alleged victims of historic sexual abuse at school who commenced proceedings against the State after the Grand Chamber judgment was delivered, as well as the uncertain number who never commenced proceedings at all. In this regard, it is important to observe that there is no obvious connection between a victim's entitlement to an effective remedy and his or her having commenced and discontinued proceedings. The requirement that the proceedings not be statute-barred adds further unnecessary complication given the complexity of Ireland's limitation regime.

7. The second criterion of prior complaint was inserted on the basis of an erroneous interpretation of the judgment of the Grand Chamber. While, in that case, there was a prior complaint of abuse against the abuser, it is abundantly clear that the finding of a violation of Article 3 ECHR was made on the basis of a systemic failure on Ireland's part to put in place effective arrangements for detecting and reporting child sexual abuse incidents in schools until 1992.

8. Plainly, the second criterion for eligibility will have dissuaded many victims of abuse who were not in a position to furnish evidence of a prior complaint against their abuser from making an application under the Scheme. It is not clear how victims could reasonably have been expected to be aware of the making of such prior complaints, or how they were expected to furnish evidence of their having been made. This is especially so in circumstances where there was no effective mechanism to record the making of complaints in the first place.

9. The application of the 'prior complaint' criterion in the exclusion of 13 applicants was reviewed by the Scheme's independent assessor, the retired High Court judge Mr Justice Iarfhlaith O'Neill. On 5 July 2019, he issued a determination concluding that this condition was incompatible with the judgment of the Grand Chamber and that its application was a continuing breach of the right to an effective remedy of victims of child sexual abuse otherwise eligible for redress. IHREC agrees with the independent assessor's assessment in this regard, but notes with concern that the State continues to maintain in domestic proceedings that the 'prior complaint' criterion was 'appropriately imposed': see *BC v. Minister for Education and Skills, Ireland and the Attorney General*[3].

10. The Scheme's suspension has had the effect of preventing the making of new applications by people who discontinued proceedings against the State after the judgment of the Supreme Court in *O'Keeffe v. Hickey* [2009] 2 IR 302 on 19 December 2008 but before the judgment of the Grand Chamber in *O'Keeffe v. Ireland* on 28 January 2014 and who did not have evidence of prior complaint. The information submitted by Ireland refers to the making of payments to 16 applicants having received compensation following the Independent Assessor's determination. Yet on Ireland's

[3] High Court Record No. 2020/688 JR.

own account[4], approximately 210 plaintiffs discontinued proceedings against the State after the judgment of the Supreme Court but before the judgment of the Grand Chamber. The State's delay in re-opening the scheme is especially regrettable given the advancing age of the victims and the differential impact of the Covid-19 public health emergency on older people.

11. IHREC is concerned that the Committee may be given the incorrect impression, from the information supplied by Ireland, that the question of reparation for victims of historic abuse in schools has largely been resolved. In fact, the State's operation of the Scheme has compounded the situation as victims are now unable to obtain even such limited satisfaction as an award under the Scheme might afford them.

12. In the absence of specific assurances as to how it will be operated (including who will be eligible and how eligibility will be determined), Ireland's imprecise commitment that a 'new or revised' Scheme will be commenced in the third quarter of 2021 offers potential applicants little consolation. Legal submissions filed in ongoing legal proceedings in Ireland indicate that any new Scheme will be a very narrow one, raising the real possibility of further disputes about eligibility and the scope of the Grand Chamber judgment. The State's determination to make the revised Scheme as narrow as possible is illustrated by its submissions in the *BC v. Minister for Education and Skills, Ireland and the Attorney General* case, referred to above, which will be heard in July 2021:

> *The judgment of the EctHR in O'Keeffe therefore did not find that there had been a breach of the Article 3 rights of every person who had suffered sexual abuse in a day school. The Article 3 rights of Ms O'Keeffe had been breached "in such circumstances" as pertained to that case. That language, and the requirement for the absent mechanisms to have a "real prospect of altering the outcome or mitigating the harm", clarifies the Court's intention that a victim of sexual abuse in a day school must demonstrate some additional element before the State would become liable for a violation of that person's Article 3 rights.*

13. The 'real prospect' test has also been referred to in paragraph 17 of Ireland's most recent Action Plan. In IHREC's view, a requirement that every applicant to the new Scheme show how an entirely hypothetical mechanism of oversight would have had a real prospect of saving them from sexual abuse is legally unsustainable. Placing the onus on victims to explain how their abuse could have been prevented is redundant when, as the judgment of the Grand Chamber makes clear, Ireland failed to put in place effective mechanisms of child protection in Irish schools notwithstanding the known risk of child abuse. It is clear that the State's concern is to prevent 'a flood of claims', and not to offer redress to its citizens whose childhoods were shattered by sexual abuse.

[4] Action Plan O'Keeffe v. Ireland Application no 35810/2000 Grand Chamber Judgment 28 January 2014 Information submitted by the Government of Ireland 28 January 2016.

14. IHREC refer to the Annual Report for 2020 of the Special Rapporteur for Child Protection, an independent expert appointed by the Minister for Children to review and report on specific national and international legal developments for the protection of children; to examine the scope and application of specific existing or proposed legislative provisions and to make comments/recommendations as appropriate; and to report on specific developments in legislation or litigation in relevant jurisdictions. The current Special Rapporteur is Dr Conor O'Mahony, senior lecturer at the School of Law at University College Cork and Director of the School's Child Law Clinic said as follows, with regard to the review of the Scheme:

> *In November 2019, the Minister for Education stated that the matter was being treated with the "most urgent attention" and that he was "confident we will have a report back within the next few weeks". However, at the time of writing in June 2020 (almost exactly one year after the ruling), the scheme remains closed and under review. No timeline has been published indicating when it is expected that the review will be completed and the scheme re-opened.*
>
> *The Government's failure to re-open the ex gratia scheme places Ireland in continuing violation of Article 13 of the European Convention on Human Rights, and causes significant trauma to those affected (who have already been denied their rightful entitlement for over six years since the O'Keeffe judgment). Moreover, many of the survivors are of advanced age and do not have the luxury of time. There is no justification for further delays in vindicating the right of survivors of abuse in schools to an effective remedy.*

15. Regrettably, the information submitted to the Committee of Ministers by Ireland indicates that its execution of the judgment of the Grand Chamber has been reluctant and partial, and is likely to remain so. That even the inadequate redress scheme established by the State has now been suspended points to a major structural problem. The fact that the question of execution remains live more than seven years after judgment was delivered demonstrates that the mechanism of standard supervision is inadequate.

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