THE HIGH COURT
Judicial Review

Record No.: 2021/864 JR

Between:

[redacted]

Applicant

AND

THE MINISTER FOR EDUCATION, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Respondents

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

SUBMISSIONS OF THE *AMICUS CURIAE*

A. INTRODUCTION

1. This is a challenge to the Scheme providing payments to victims of historic sexual abuse in schools.

2. The Scheme was established to implement the judgment of the Grand Chamber of the European Court of Human Rights in *O'Keeffe v. Ireland*, App No 35810/09, ECHR 2014-I. To be eligible for redress, an applicant must have 'issued legal proceedings against the State seeking damages for childhood sexual abuse in a recognised day school which occurred before November 1991 (primary) and June 1992 (post-primary)' before 1 July 2021. The Scheme was designed by the Minister for Education and adopted by the Government. It is administered by the State Claims Agency.

3. The Applicant, [redacted], was a victim of sexual abuse by a teacher, a Christian Brother, in his primary school between 1967 and 1970. In October 2011, he initiated civil proceedings claiming damages against his abuser and the Christian Brothers. Those proceedings have yet to be determined. [redacted] did not join the State as a defendant because, he argues, he had no cause of action against it.

4. [redacted] is excluded from the Scheme because he did not issue legal proceedings against the State before 1 July 2021. He now challenges that exclusion on the basis that it is unreasonable and discriminatory.

B. THE ISSUES BEFORE THE COURT

5. It is central to the function of any *amicus curiae* that it assists the Court in resolving the case before it: *Dowdall and Hutch v. DPP* [2022] IESC 36, *per* O'Donnell CJ, 29 July 2022, para 48.

6. One of the key issues identified in the issue paper and in the submissions of the parties is justiciability. Administrative schemes such as that at issue here are a feature of the State's response to historic human rights violations, so whether and how they may be challenged is of systemic importance. IHREC proposes to draw some recent case law to the attention of the Court which should assist in deciding the justiciability issue.

7. Among the arguments [redacted] makes in his challenge to the Scheme is an argument that the exclusion of victims like him who did not bring proceedings seeking damages against the State is invalid on equality grounds: in effect, that it makes an irrational distinction between groups of people who ought to be treated alike. Again, this is an issue with potentially systemic importance, and IHREC will seek to assist the Court in deciding it, again by reference to recent case law.

C. IS THE SCHEME JUSTICIABLE?

8. The Respondents make the preliminary point against [redacted] that the Scheme is not justiciable.

9. In IHREC's submission, there is an important difference between a challenge to an administrative decision made under the Scheme and a challenge to the terms of the Scheme itself. It is the difference between the application of a

principle, and the establishment of the principle in the first place. In this case, [redacted] is not challenging an administrative decision made by the State Claims Agency under the Scheme. He is challenging the Scheme itself, which was adopted by the Government in the exercise of its executive powers.

10. IHREC agrees with the Respondent that the judgment of the High Court (White J) in *MKL and DC v. Minister for Justice and Equality* [2017] IEHC 389, White J, 1 June 2017, cited by [redacted] in support of his challenge to the Scheme, is distinguishable from the present case. In that case, Ms L and Ms C challenged their exclusion from the redress scheme for women who had been admitted to and worked in the Magdalene Laundries. They did not challenge the terms of the Scheme itself.

11. The State argues that '[w]hile the procedures by which an *ex gratia* scheme operates may in certain circumstances be amenable to judicial review, it is an established principle that a court has no role in reviewing the conditions of eligibility of an ex gratia scheme.' IHREC cannot agree with this submission. The recent judgment of the Supreme Court in *Burke and Power v. Minister for Education and Skills* [2022] 1 ILRM 73 indicates that executive decisions to establish administrative schemes can be challenged on the basis of alleged interference in constitutional rights. In that case, the applicants, who had been home-schooled, successfully challenged their exclusion from the Government's calculated grades scheme for the 2020 Leaving Certificate examinations on the grounds that it amounted to an impermissible interference with the constitutionally guaranteed interest of the applicants and their freedom to provide and receive education at home. The Supreme Court (*per* O'Donnell CJ) held that the decision to exclude the applicants from the calculated grade scheme was a significant and substantial interference with, and a burden on, the freedom exercised by them. It could not be justified by the general considerations or specific explanations advanced on behalf of the State.

12. The State relies on comments by White J in *MKL and DC* that '[t]he court should not usurp the functions of the administrator of the scheme in deciding its essential components such as eligibility awards.' But as noted above, the

challenge in *MKL and DC* was to the Scheme's administration, not its terms, so White J's comments with regard to challenges to the Scheme's terms must be understood to be *obiter dicta*. To the extent that they may be inconsistent with the test laid down in *Burke and Power*, they are, in IHREC's respectful submission, not a fully correct statement of the law.

13. IHREC further observes that the State relied on the possibility of challenging an earlier iteration of the Scheme to defeat the complaint to the European Court of Human Rights of a sexual abuse victim on admissibility grounds. In *Allen v. Ireland* (dec) App No 37053/18, 12 December 2019, the Strasbourg Court ruled inadmissible a complaint of a sexual abuse survivor that the former Scheme was too narrow, stating at §§ 73-75:

> *The crux of the applicant's complaint, namely the requirement of a prior complaint as an eligibility criterion for payment under the Scheme, has never, according to the information available to the Court, been challenged by the applicant before a domestic court or yet determined by a domestic court in relation to others who have applied to the SCA but been unsuccessful on this ground*
>
> *...*
>
> *...In the Action Plan submitted to the Committee of Ministers, the respondent Government has stated that persons who are unsuccessful in their applications to the SCA may challenge the decisions of the latter before the domestic courts and the existence of this possibility has not been contested by the applicant.*

14. Clearly, had the Scheme been non-justiciable, whether or not Mr Allen had challenged it would have been irrelevant in assessing the admissibility of his complaint.

15. Accordingly, IHREC submits that the Scheme is justiciable and amenable to challenge by [redacted] on human rights grounds, and, *inter alia*, on the grounds that it involves an interference in his right to equality before the law as guaranteed by Article 40.1 of the Constitution.

D. IS SECTION 7 OF THE SCHEME DISCRIMINATORY?

16. While [redacted] makes a number of criticisms of the Scheme based on administrative law, given its particular mandate and the limited role of the *amicus curiae*, IHREC will confine its submissions to the argument that the requirement to have issued abuse proceedings against the State, as applied to [redacted], fails to hold him equal before the law as a victim of childhood sexual abuse as required by Article 40.1, which provides:

> *All citizens shall, as human persons, be held equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*

17. In response to this argument, the Respondents make two substantive points. First, they argue that this condition of the Scheme enables the State to fulfil its obligation to compensate victims of childhood sexual abuse in day schools who come within the terms of the *O'Keeffe v. Ireland* judgment. Second, the State says that the Scheme imposes legitimate limits which protect the State from exposure to an 'unlimited number' of applications and payments.

18. Discrimination in connection with exclusion of a claimant from a social welfare benefit may give rise to a complaint under Article 40.1: *Lowth v. Minister for Social Protection* [1998] 4 IR 321; *Michael v. Minister for Social Protection* [2020] 1 ILRM 1; *Donnelly v. Minister for Social Protection* [2022] IESC 32, *per* O'Malley J (O'Donnell CJ, MacMenamin, Dunne and Baker JJ concurring) 4 July 2022. There is no reason in principle why discrimination in exclusion from an administrative scheme which confers a financial benefit should be any different.

19. The Courts recognise a distinction between challenges based on infringement of a substantive constitutional right and a pure equality claim: *Michael* and

Donnelly, cited above. No-one has a right to a payment from the State under the Scheme, and so [redacted] discrimination argument appears to be a pure equality claim.

20. In *Donnelly v. Minister for Social Protection* [2021] IECA 155, 21 May 2021, the Court of Appeal (*per* Murray J) considered a father's complaint that his exclusion from entitlement to domiciliary care allowance because he was caring for his son in hospital rather than at home was contrary to Article 40.1. In that case, the Court analysed the complaint by reference to three variables: the alleged victims of the discrimination; an appropriate comparator; and the justification for the differential treatment as between the victim and the comparator. On appeal, the Supreme Court approved this analytical framework and so it is adopted here.

The alleged victim

21. According to the Supreme Court in *Michael* and *Donnelly*, differential treatment in the payment of a benefit must be addressed 'in the first instance' by reference to the position of the person in receipt of it. Here, the alleged victim is [redacted], to whom the payment would be made if he were admitted to redress. [redacted] evidence on affidavit about the abuse he suffered is uncontradicted and he appears to satisfy the first eligibility requirement of the Scheme in that he was sexually abused while a pupil at a recognised day school and that this abuse occurred before November 1991.

22. The Scheme also contains a requirement that applicants satisfy the State Claims Agency that, had the Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (Department of Education, 1991/1992) been in place at the time the sexual abuse occurred, there would have been a real prospect of altering the outcome or mitigating the harm suffered as a result. IHREC has raised its concerns about this requirement directly with the Council of Europe (see in particular IHREC's Communication of 8 June 2021, exhibit SG2 to Affidavit of Sinéad Gibney) but for present purposes it suffices to observe that no effective protective measures were in place for any school-

child before 1991, so it is not clear how it would ever be open to the State Claims Agency rationally to conclude that hypothetical protective measures would not have prevented a particular incidence of abuse.

The comparator

23. In *MR and DR v. An tArd Chláraitheoir* [2014] 3 IR 533, O'Donnell J (as he then was) observed that any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case, it is necessary to focus very clearly on the context in which the comparison is made. Here, the comparator is a person who was abused at school before 1991 but who initiated proceedings for damages against the State before 1 July 2021 and who is therefore eligible for redress.

24. An important piece of the analysis conducted by the Supreme Court in *Michael* and *Donnelly* was an assessment of whether the alleged victim and the comparator are actually the same for the purposes in respect of which the comparison is made.

25. In this context, it is instructive to consider what the Strasbourg Court said about domestic proceedings in *O'Keeffe v. Ireland* and the approach the State took in subsequent cases where victims sought to rely on the judgment in proceedings against the State in Ireland. In IHREC's submission, this analysis reveals that there is no meaningful or relevant distinction in the present context between a victim who took a case against the State and one who did not.

26. It will be recalled that in *O'Keeffe v. Ireland*, the Grand Chamber of the European Court of Human Rights found that under the Convention, which Ireland ratified in 1953, it was an inherent obligation of government to ensure the protection of children from ill-treatment, including child sexual abuse, especially in a primary-education context, through the adoption, as necessary, of special measures and safeguards. The State could not absolve itself of its

obligations to minors in primary schools by delegating those duties to private bodies or individuals. The Court therefore had to decide whether the State's mechanisms of detection and reporting had provided effective protection for children attending a national school against any risk of sexual abuse of which the authorities had, or ought to have had, knowledge at the material time, assessed from the point of view of facts and standards existing at that time.

27. The Grand Chamber examined whether the State should have been aware of a risk of sexual abuse of minors such as Ms O'Keeffe in national schools at the relevant time and whether it had adequately protected children, through its legal system, from such ill-treatment. It found that the State had to have been aware of the level of sexual crime against minors through its prosecution of such crimes at a significant rate prior to the 1970s. A number of reports dating from the 1930s to the 1970s gave detailed statistical evidence on the prosecution rates in Ireland for sexual offences against children, and the Ryan Report of May 2009 evidenced complaints made to the authorities prior to and during the 1970s about the sexual abuse of children by adults. Although that report focused on reformatory and industrial schools, complaints about abuse in national schools were also recorded. The Grand Chamber concluded that when relinquishing control of the education of the vast majority of young children to non-State actors, the State should have adopted commensurate measures and safeguards to protect those children from the potential risks to their safety through, at minimum, effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, and that the mechanisms that had been put in place, and on which the Government relied, were not effective. The Grand Chamber noted that a complaint had been made about Ms O'Keeffe's abuser in 1971 and found that, had adequate action been taken then, it could reasonably have been expected that her abuse could have been avoided. The Court concluded that the State had therefore failed to fulfil its positive obligation to protect Ms O'Keeffe from sexual abuse.

28. Importantly for present purposes, the Grand Chamber also held that Ms O'Keeffe had been entitled to a remedy establishing any liability of the State, but that the Government had not shown that any of the alleged national

remedies against it were effective. In this context, the Grand Chamber relied on remarks of Hardiman J in *O'Keeffe v. Hickey* [2009] 2 IR 302 which strongly suggested that claims of negligence or breach of constitutional rights against the State would also have failed.

29. Fundamentally, the Strasbourg Court found in *O'Keeffe v. Ireland* that Irish law was lacking in how it gave effect to Article 3 ECHR. It understood the majority judgments of the Supreme Court in *O'Keeffe v. Hickey* – and in particular that of Hardiman J – to mean that, at the material time, neither the common law, nor any rule of statutory law, nor the Constitution, required the State to protect children against sexual abuse in schools. The conclusion that no effective remedy was available for the purposes of Article 13 ECHR followed naturally because remedies are for breaches of rights, and as a matter of domestic law, the State had not breached Ms O'Keeffe's rights.

30. Following the delivery of the judgment in *O'Keeffe v. Ireland*, some victims of sexual abuse in schools tried to rely on the judgment domestically. Some had had legal proceedings against the State but had discontinued them (under considerable pressure from the State's solicitors) after *O'Keeffe v. Hickey*. When they sought to withdraw their notices of discontinuance after *O'Keeffe v. Ireland*, this was opposed by the State. In *Mr A v. Minister for Education* [2016] IEHC 268, the High Court found that the notices could not be withdrawn. On appeal, the Court of Appeal in *Murray and Others v. Minister for Education and Science* [2017] IECA 216, Finlay Geoghegan J (Peart and Hogan JJ concurring), 21 July 2017, made clear that *O'Keeffe v. Ireland* 'did not change domestic law' with respect to allegations of negligence, vicarious liability and breach of constitutional rights relating to abuse which is alleged to have occurred before the coming into force of the ECHR Act 2003: see in particular paragraphs 36-37. Leave to appeal to the Supreme Court was refused, and when the case went to the European Court of Human Rights as *Allen v. Ireland*, cited above, it was deemed inadmissible because the applicant's application to the Scheme (as it was initially constituted) had not actually been refused yet.

31. Other victims who had proceedings in being but had not joined the State sought to do so, but they were also successfully resisted in *Naughton v. Drummond* [2016] IEHC 290, *Kennedy v. Murray* [2016] IEHC 291 and *Wallace v. Creevey* [2016] IEHC 294, Noonan J, 1 June 2016. In those cases, joinder was set aside on the grounds that the claims were statute-barred but also because the claims in negligence and vicarious liability were bound to fail by reference to Hardiman J's judgment in *O'Keeffe v. Hickey,* and because it had been established in *Dublin City Council v. Fennell* [2005] 1 IR 605 and *Byrne v. An Taoiseach* [2011] 1 IR 190 that the European Convention on Human Rights Act 2003 does not have retrospective effect.

32. In *LM v. Garda Commissioner* [2015] 2 IR 45, O'Donnell J (as he then was) observed that some of the assumptions made by the Grand Chamber in *O'Keeffe v. Ireland* in relation to the effectiveness of domestic remedies would need to be considered anew in cases involving the liability of the State. IHREC, for its part, has consistently argued that the Irish Constitution provides a level of protection at least as high as that required by the international treaties to which the State is a party, and that a conforming interpretation ensures that Ireland exercises its sovereignty domestically in accordance with its international obligations. Yet it is clear from the judgments in *Naughton*, *Kennedy* and *Wallace* that Noonan J fully accepted Hardiman J's assessment in *O'Keeffe v. Hickey* that even if a claim in negligence or for breach of constitutional rights had been before the court in the case, it would have to have been rejected.

33. IHREC concludes from this review of the relevant authorities that no victim of sexual abuse at school before 1991 had a stateable cause of action against the State for failure to protect him or her. No-one who brought such a case could succeed, and so those who brought cases and those who did not are for all intents and purposes in the same position insofar as domestic judicial remedies for violation of the rights under the Convention are concerned.

The justification

34. When the State discriminates in favour of, or against, a person or category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of: *Dillane v. Attorney General* [1980] ILRM 167, 169.

35. The Respondents have referred the Court to six principles set out by O'Malley J in *Donnelly*. For convenience, those principles are:

> *(i) Article 40.1º provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1º.*
> *(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
> *(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*
> *(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.*
> *(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case.*

36. IHREC acknowledges the application of these principles in the present context and agrees with the Respondents that the differential treatment complained of in this case is not based on matter which can be said to be intrinsic to the human sense of self. Differential treatment which falls into that category is more difficult to justify, but that is not to say that differential treatment such as that at issue here does not require rational justification.

37. It should also be stressed, with regard to the principles set out in *Donnelly*, that the Scheme is not entitled to any presumption of constitutionality because it has not been adopted through the ordinary legislative process. This is a matter to which the Court should have regard in assessing whether the discrimination inherent in the Scheme is rational on its face.

Is the distinction the Scheme makes arbitrary, capricious or irrational?

38. The justification put forward for the differential treatment as between victims who sued the State and victims who did not is twofold.

39. The first justification offered is that there is a 'legitimate distinction' between victims of sexual abuse who positively asserted their rights against the State before 1 July 2021 and those who did not. In the State's view, the former are covered by the *O'Keeffe v. Ireland* judgement whereas the latter are not.

40. With regard to [redacted] case, IHREC notes that in *Naughton* and *Kennedy*, the abuser in question was the same Christian Brother who abused [redacted]. Had [redacted] joined the State defendants to his proceedings against Brother Drummond and the Christian Brothers on foot of the PIAB authorisation he obtained, an application to set that joinder aside would in all likelihood have been made, and the authorities above would have been squarely against him.

41. On the basis of the review of the case law conducted above, IHREC concludes that proceedings against the State would always have been futile as a matter of domestic law. The conclusion that victims of historic abuse in Irish schools before 1991 do not have — and never have had — any stateable cause of action

against the State for its failure to protect them is regrettably unavoidable. In those circumstances, the requirement that to qualify for benefits under the Scheme, victims must have had proceedings in being — proceedings that on the State's own case, would be doomed to fail — before 1 July 2021 is indefensible.

42. In this context, it might be added that the decision in *Allen*, cited above, reflects that even where victims of historic sexual abuse at school have no effective judicial remedy under national law, redress under a Scheme such as that at issue here may constitute an effective remedy for the purposes of Article 13 ECHR. It follows that the exclusion of people like [redacted] is discriminatory, because it ensures that their only effective remedy lies in Strasbourg.

43. The second justification for the eligibility requirement of having to have issued proceedings against the State is that avoids exposing the State to an unlimited number of applications.

44. The suggestion that the potential number of applications could be unlimited is, with respect, difficult to understand. Under the terms of the Scheme, payments are for 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 anyone who claims to be part of the cohort will have to substantiate their claim in accordance with section 9 of the Scheme. It is clear then that the number of people affected is not in any sense unlimited. On the contrary, as time passes, the number decreases, a point made by the Special Rapporteur for Child Protection, Prof Conor O'Mahony, in his 2021 *Annual Report* (at p 36):

> *While the precise number of potential claims cannot be accurately predicted, it is clear that a considerable number (indeed, a large majority) of individuals who experienced sexual abuse in National Schools during a period in which the European Court of Human Rights (ECtHR) found that the State had failed to adequately protect children*

> *from sexual abuse in those schools have been unable to access a remedy for this violation. This falls short of the State's obligations under Article 13 of the ECHR. It also causes ongoing distress to the survivors (many of whom are of advanced age and cannot afford to wait for years for a remedy). One survivor recently told the Irish Examiner that he feels like "[t]hey are trying to sweep us under the carpet, and wait for us to die."*

45. Because the cohort of people affected by the *O'Keeffe v. Ireland* judgment is necessarily finite, sub-dividing that cohort into victims who sued the State and victims who did not is not rationally related its stated purpose. There is no danger of an unlimited number of applications. If a person can show that they were abused at school and, moreover, that the abuse could have been prevented (a requirement which IHREC has raised concerns about separately), then he or she is in the same position as Ms O'Keeffe whether or not he or she brought proceedings against the State. Such proceedings would not have succeeded, and, one way or the other, there would be no remedy for the violation of his or her rights under Article 3 ECHR. If the Scheme is actually designed to ensure that the State's obligations arising out of the judgment in *O'Keeffe v. Ireland* were met, all such victims should be eligible for redress. Here again, IHREC refers to the 2021 report of the Special Rapporteur on Child Protection:

> *Since the fault of the State that was identified by the ECtHR in O'Keeffe applied across the National School system, anyone who can demonstrate that they experienced sexual abuse in a system that failed to include effective safeguards against such abuse should be provided redress under the revised ex gratia scheme. Failure to do so will result in continuing violations of ECHR rights and potentially in repeat applications to the ECtHR.*

46. This is not a case in which it is necessary to produce evidence to rebut the presumption of constitutionality because (a) the presumption does not apply; and (b) there is no *prima facie* rational basis for the exclusion of victims like [redacted] from redress. In IHREC's submission, the explanations offered by

the Respondents are not reasonably capable, when objectively viewed, of justifying the differential treatment insofar as the exclusion from redress of victims who did not sue the State is concerned. For that reason, the Scheme is impermissibly discriminatory, and [redacted] is entitled to the relief he seeks on this basis.

E. CONCLUSION

47. For all of the reasons above, IHREC submits that the Scheme is not immune from challenge as an exercise of the Government's executive power, and that it is justiciable insofar as it is alleged to infringe [redacted] constitutional rights, including, in particular, his right to equality under Article 40.1.

48. IHREC further submits that [redacted] complaint against the Scheme on equality grounds is well-founded. The Scheme as established by the Government confers financial benefits on one class of sexual abuse victims while excluding others for reasons which are not *prima facie* rationally related to the purpose of the Scheme, which is to provide remedies to victims for violations of their Convention rights which are not recognised and cannot be remedied under national law.

Colin Smith BL
Michael Lynn SC
14 October 2022
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