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Contact: Zoë Bryanston-Cross  
Tel: 03.90.21.59.62

Date: 30/01/2023

### DH-DD(2023)123

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1459<sup>th</sup> meeting (March 2023) (DH)

Communication from an NHRI (Irish Human Rights and Equality Commission) (19/01/2023) in the case of O'KEEFFE v. Ireland (Application No. 35810/09).

Information made available under 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.

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Réunion : 1459<sup>e</sup> réunion (mars 2023) (DH)

Communication d'une INDH (Irish Human Rights and Equality Commission) (19/01/2023) dans l'affaire O'KEEFFE c. Irlande (requête n° 35810/09) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

DGI

19 JAN. 2023

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

19 January 2023

Secretariat General  
Directorate General - Human Rights and Rule of Law  
Department for the Execution of Judgments of the European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex  
France

*By post and email: DGI-Execution@coe.int*

**Your ref: DH-DD(2020)1134**  
**Our ref: 11-264/0001**  
**Re: O'Keeffe v Ireland (Application no. 35810/09)**

Dear Colleague,

I write in respect of the execution of the judgment of the Grand Chamber in *O'Keeffe v Ireland* (Application no. 35810/09).

I enclose for the attention of the Committee of Ministers a communication made by the Irish Human Rights and Equality Commission, Ireland's National Human Rights Institution, pursuant to Rule 9(2) of the Rules for the supervision of the execution of judgments and of the terms of friendly settlements.

Should the Committee of Ministers have any queries regarding the enclosed communication, please do not hesitate to contact the writer.

Yours faithfully,

Éimear Fisher  
Director

Encl.

**Communication of the Irish Human Rights and Equality Commission with regard to the Information submitted by Ireland on 8 December 2020 on the execution of the judgment of the Grand Chamber in *O’Keeffe v. Ireland*.**

1. The Irish Human Rights and Equality Commission (‘IHREC’) is Ireland’s national human rights institution. On 8 December 2022, IHREC made 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 (the ‘ECtHR’) in *O’Keeffe v. Ireland*, no. 35810/09, ECHR 2014-I, under Article 46(2) of the European Convention on Human Rights.
2. The submission of 8 December 2022 related to the terms of the revised *ex gratia* redress scheme (the ‘revised Scheme’) established by the Government on 21 July 2021. There have been important further recent developments, which IHREC believes should be brought to the attention of the Committee of Ministers. In summary they are as follows:
  - a) Recent Litigation;
  - b) The publication of Report of the Special Rapporteur on Child Protection on the 15 December 2022; and
  - c) The State’s response to new cases of historic abuse in day schools.

*Recent litigation*

3. IHREC wishes to draw the Court’s attention to the case of *PD v. Minister for Education, Ireland and the Attorney General*, High Court Record No. 2020/684 JR, which was heard by the High Court (Ferry J) on 22 and 23 November 2022.
4. The case involved a challenge to the under-inclusivity of the revised Scheme. The Applicant, Mr D, was sexually abused by a teacher, a Christian Brother, in his primary school in the late 1960s and early 1970s. In 2011, he initiated civil proceedings claiming damages against his abuser and the Congregation of Christian Brothers. Mr D did not join the State as a defendant because, on the basis of domestic law, he had no cause of action against it.
5. In line with its terms Mr D was excluded from the revised Scheme because he did not issue legal proceedings against the State before 1 July 2021. He challenged that exclusion on the basis that it is unreasonable and discriminatory.
6. The State argued that, as a matter of domestic law, survivors of historic sex abuse are not entitled to damages for alleged breaches of the ECHR that occurred prior to 1973. It claimed that the provisions of the ECHR are not directly effective in domestic law and that they have effect only in accordance with the provisions of the European Convention on Human Rights Act 2003 Act. The State argued that, as a matter of domestic law, the provisions of the ECHR have no application to events that occurred prior to the implementation of the 2003 Act, in 2004. The case went to full hearing.
7. IHREC appeared as *amicus curiae* (‘friend of the court’) and argued that the revised Scheme as established by the Government does not provide equal access to redress for all victims of sexual abuse in day schools. It is IHREC’s position that it is unlawful to

discriminate between victims of violations of the ECHR in accessing the revised Scheme.

8. On 16 December 2022, the Court was informed that the proceedings had settled. Counsel for Mr D indicated to the Court that Mr D was '*delighted*' with the result.
9. IHREC welcomes the settlement of the litigation challenging the under-inclusivity of the revised Scheme.

#### *Report of the Special Rapporteur on Child Protection*

10. On 15 December 2022, the Government of Ireland approved publication of the 2021/2022 Report of the Special Rapporteur on Child Protection, Professor Conor O'Mahony of the School of Law at University College, Cork<sup>1</sup>. The Report is very critical of the revised Scheme, raising similar concerns to those expressed by IHREC in its submission dated 8 December 2022 and 1 December 2021.
11. The Special Rapporteur observes that the revised Scheme's requirement that applicants must have instituted court proceedings against the State prior to 1 July 2021 in order to qualify for an *ex gratia* payment is at variance with the *O'Keeffe* judgment. This requirement suggests that the entitlement to compensation derives from whether and when a person instituted legal proceedings, rather than from the rights violations experienced by children who were sexually abused in schools.
12. The Special Rapporteur states that this is clearly not the case. As the ECtHR noted in the *O'Keeffe* judgment, the Irish State's obligations towards children were not fulfilled when the State '*...[w]hich must be considered to have been aware of the sexual abuse of children by adults...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.*'
13. The Special Rapporteur emphasises that many victims had good reasons, deriving from the State's own conduct between 2009 and 2021, for not instituting court proceedings against the State, if they had not already done so. He observes that that it is well documented that the State sought to pursue litigants (including Louise O'Keeffe herself) for enormous legal costs in the aftermath of the Supreme Court decision in *O'Keeffe*. Professor O'Mahony goes on to say that this stance, no doubt, as intended, had a significant chilling effect on litigation. It is entirely unreasonable to require applicants to have exposed themselves to substantial costs orders by pursuing expensive court proceedings, which the domestic courts have repeatedly described as 'bound to fail.' He also notes that following the decision of the Government to review the earlier redress scheme, senior political leaders made statements assuring victims that the new scheme would provide appropriate redress. For example, he refers to the statement of the then Taoiseach, Leo Varadkar TD, in the Dáil on 9 July 2019:

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<sup>1</sup><https://www.gov.ie/en/publication/06d19-special-rapporteur-on-child-protection-15th-report/>

*‘The best apology we can make to Louise O’Keeffe and all other survivors is to say further action will be taken. The State failed them at the time and failed them again when it did not own up to its responsibility. We will not fail them a third time.’*

14. The Special Rapporteur also highlights a further weakness in the revised Scheme, namely the minimal provision made for covering applicants’ legal costs. The revised Scheme makes provision for covering ‘costs arising from work that was strictly necessary to prepare and submit an application to the Scheme’, up to a maximum of €4,000 plus VAT. The Special Rapporteur states that this minimal provision for legal costs ignores the fact that, since applicants are required by the revised Scheme to have instituted legal proceedings against the State as a precondition to qualifying for an *ex gratia* payment, they will have incurred very substantial legal costs—in some cases, running to tens of thousands of euros—that will not be covered by that scheme. This will significantly reduce the value of the €84,000 award that will be made to them.

#### *New Disclosures of Historic Child Sexual Abuse*

15. As noted in our communication dated 8 December 2022, further scandals of child sexual abuse in Irish schools continue to emerge. In December 2022, the Department of Education gave the following statement to the media:<sup>2</sup>

*“while the Department is not yet in a position to provide a definitive timeline, it is important that survivors know that there will be a serious response and Government is considering how this can best be achieved, having regard to the ongoing Garda investigation and the wishes of survivors”.*

16. The lack of coherence in the State’s approach to survivors of sexual abuse in schools makes it unlikely that the revised Scheme will provide an effective remedy to many survivors of historic abuse in Irish schools. As the *O’Keeffe v. Ireland* judgment makes clear, and as Irish case law thereafter has confirmed, these survivors have no domestic remedy against the State for its failure to protect them.
17. The narrowness of the eligibility criteria ensures that, as a measure to secure the implementation of the *O’Keeffe v. Ireland* judgment domestically by providing an effective remedy for survivors of sexual abuse in Irish schools, the revised Scheme cannot and will not succeed.

#### *Conclusion*

18. For all of these reasons, IHREC respectfully repeats its submission 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.

19 January 2023

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<sup>2</sup> <https://www.irishtimes.com/crime-law/2022/12/19/details-of-government-inquiry-into-school-abuse-allegations-delayed-until-new-year/>