

# The Irish Council for Civil Liberties

## Submission on the General Scheme of the Electoral Reform Bill (2020)

May 2021

Ronan Kennedy, Policy Officer (Democratic Freedoms)

## In this submission:

Introduction & Summary of Recommendations.....	3
Part One: Preliminary and General.....	6
Recommendations.....	14
Part Two: Establishment of Electoral Commission.....	16
Recommendations.....	18
Part Three: Franchise and Register of Electors.....	19
Recommendations.....	22
Part Four: Regulation of Online Political Advertising.....	23
Recommendations.....	26
Part Five: Facilitation of Electoral Events Where Covid-19 Restrictions are in Place.....	28
Recommendations.....	30
About ICCL.....	31

## Introduction & Summary of Recommendations

The Irish Council for Civil Liberties welcomes the opportunity to make a submission on this critically important Bill. There are a number of matters contained in this Bill that ICCL believe deserve careful consideration; including the definition of “political purposes” set out in Part One, the structure, powers and governance of the proposed Electoral Commission in Part Two, privacy concerns relating to proposals for the electoral register contained in Part Three, the scope of the proposals for political advertising in Part Four and the exercise of democratic rights in the context of national emergencies as per Part Five.

This submission is divided into five parts, each dealing with the individual sections of the Bill. It should be noted that the below section on Part One is a slightly abridged version of a previously submitted joint submission between the Coalition for Civil Society Freedom (CCSF), of which ICCL is a member and the office of Senator Lynn Ruane. ICCL has also made a previous individual submission on Part Four of the Bill (Political Advertising) which is included as a section here for ease of reference.

### Part One: Preliminary and General

ICCL submits that the development of the Electoral Reform Bill (2020) presents a clear opportunity to address and clarify the existing definition of ‘political purposes’ as contained in the 1997 Electoral Act (as amended). This definition should be clearly grounded in matters concerning electoral politics: parties, candidates, elections, and referendums. Such provisions should apply within clearly defined electoral periods as opposed to the situation as it exists now.

A legislative remedy to the matter already exists in the form of the Electoral (Civil Society Freedom) (Amendment) Bill 2019 which is currently before the Oireachtas and was drafted jointly between the Coalition for Civil Society Freedom and the Office of Senator Lynn Ruane.

The Electoral (Civil Society Freedom) (Amendment) Bill 2019 seeks to amend Section 22 of the Electoral Act 1997 (as amended) to provide for a new definition of ‘political purposes’. The new definition, which is set out below in paragraph 32, ensures that third parties will comply with donation disclosure requirements where the donation was received in relation to advocacy in a specific election or referendum and not for all advocacy which is currently the case;

ICCL submits that the wording of this legislative amendment should be incorporated into the Electoral Reform Bill (2020) as a workable and expedient solution to the serious and unintended consequences of the ambiguity of the 1997 Electoral Act (as amended) as outlined in this submission.

### Part Two: Establishment of Electoral Commission

ICCL Submits that the remit of the Electoral Commission is expanded beyond its current narrow focus to encompass a wider set of functions. These should include, inter-alia, countering mis/disinformation, candidacy support, the security of the electoral process and voter education. Furthermore, a clear timetable should be published to ensure that other functions are transferred without undue delay.

Furthermore, provisions related to the research functions of the Commission are re-examined in order to ensure academic independence. The Commission should be free to set and direct its own research agenda without the need for prior approval of the Oireachtas.

We recommend that the proposed governance structure of the Commission is re-examined in order to ensure that it aligns with international best practice for similar bodies, that it is not vulnerable to undue political influence, that its governance does not mirror existing democratic deficiencies in the Oireachtas and that operational costs are not provided by way of voted expenditure in order to ensure independence.

- a. The number of members of the Commission should be capped at 5
- b. That the requirement that the Chair should be nominated by the Chief Justice and should be of a legal background be removed and replaced by an alternative more open selection process.
- c. That the Clerk of Seanad Éireann should not assume the role of an *Ex Officio* member of the Electoral Commission until such time as the Seanad is elected through universal suffrage.

### Part Three: Franchise and Register of Electors

ICCL calls for the requirements for annual re-registration for those with no fixed abode to be re-examined to ensure that the democratic rights of those seeking to register are not unduly undermined by this provision. We would also recommend any review of this provision pays special attention to year-on-year re-registration in order to ascertain and address fall-off rates.

With respect to the provisions for the electoral register, ICCL strongly welcomes the abolition of the edited register. We reiterate our concerns with respect to the pooling and sharing of data and would welcome more detailed considerations of the data security risks that this provision will entail. The relationship between local authorities and the Electoral Commission will be of critical importance and should be placed on a statutory footing in order to ensure data security and privacy rights are vindicated. We also suggest that the Electoral Commission should publish regular reports on the registration efforts of local authorities in order to ensure proper public oversight.

ICCL strongly oppose any attempts to make the sharing of PPSN information being a mandatory requirement for those seeking to register to vote. Any such attempt would be profoundly undemocratic as the possession of a PPSN is not a mandatory requirement in order to exercise any constitutionally guaranteed democratic right. Furthermore, any such provision would unfairly disadvantage already marginalised communities who, while eligible to vote, may not possess a PPSN. While the use of PPSN as an identifier can be considered as one method of identity verification, it cannot be a compulsory method. Similarly, reasonable alternative registration methods should be accessible and practical for individuals who choose not to share their PPSN information.

While in principle ICCL welcomes the changes to the registration requirements for those who wish to register as postal voters and/or as anonymous on the electoral roll, the proposals are limited in scope. ICCL can see no practical reasons why any individual who wishes to register either as a postal voter or as an anonymous elector should be compelled to disclose sensitive personal or medical information in order to vindicate their basic democratic rights. It is our position that the options of postal voting and to appear as an anonymous elector should be available to all who request them, regardless of circumstance.

## Part Four: Regulation of Online Political Advertising

In bringing forward proposals to define “political advertising” under Head 120, it is imperative that the Bill addresses and clarifies the existing definition of “political purpose” under the 1997 Electoral Act. ICCL submits that a clear and consistent definition of “political purpose” and “political advertising” should be defined in the Bill. This should be clearly grounded in matters concerning electoral politics: parties, candidates, elections, and referendums. Such provisions should apply within clearly defined electoral periods. Such an approach is in line with the special democratic considerations associated with the integrity of democratic elections.

ICCL submits that this Bill presents a timely opportunity to simultaneously develop transparency guidelines on “Issue Based Advertisements” and which should be distinct in criteria from “Political Advertisements.”

While ICCL welcomes the focus on the need for transparency in the arena of political advertising, it is crucial that the measures are proportionate and align with existing data protection and privacy rights. Therefore, ICCL recommends that the Public Information Requirements as included under Heading 121 and related provisions are re-examined in order to ensure that these rights are respected and vindicated.

In addition, it is essential that transparency efforts should be linked to a greater understanding of digital rights more broadly. For this reason, we believe that any transparency notice should include links to further impartial resources as outlined above.

Furthermore, it is the view of ICCL that legislating for transparency with regard to so-called “micro-targeting” and “look-alike” targeting lists is inappropriate as these activities are incompatible with the GDPR.

## Part Five: Facilitation of Electoral Events Where Covid-19 Restrictions are in Place

That Part 5 of the General Scheme of the Bill be amended to include provision for the development of “all of government” strategies for the holding of electoral events in the context of national emergencies. This would include provisions for, inter-alia, the conducting of electoral events in the context of pandemics, natural disasters, terrorist outrages, cyber-attacks, extreme weather events, and so on.

The development of these strategies would be cognisant and build on the work of the 2019 National Risk Assessment report, published by the Department of An Taoiseach<sup>1</sup>. The revised Bill should also commit to carrying out a periodic review and update of these strategies.

That the development of these strategies should also prompt a wider review of the “*Strategic Emergency Management National Structures and Framework*”<sup>2</sup> document and the incorporation of electoral events into its planning matrix.

<sup>1</sup> [National Risk Assessment 2019](#)

<sup>2</sup> [Strategic Emergency Management National Structures and Framework](#)

## Part One: Preliminary and General

### Head 2: Interpretation – The Definition of ‘Political Purposes’ as per the 1997 Electoral Act (As Amended)

2. It is the position of ICCL that the development of the Electoral Reform Bill presents an opportunity to replace the deeply problematic definition of ‘political purposes’ inserted in 2001 into section 22 of the Electoral Act 1997. While the purpose of the Electoral Act is to protect the integrity of elections and referendums, this definition appears to prohibit any person or organisation based in Ireland from accepting any international donations or grants or any substantial domestic donations or grants to assist them in influencing public policy. In addition, we are concerned by the impact of the onerous tracking and reporting requirements that attach to small domestic donations. The wording of the 1997 Electoral Act (as amended)<sup>3</sup> means that legitimate electoral donation restrictions apply also to a much wider range of civil society advocacy work all of the time, and not just when advocating an election or referendum result.
3. We believe that section 22 of the Electoral Act violates article 40.6.1° of the Irish Constitution as it pertains to freedom of association and assembly<sup>4</sup>, article 44.2.1° as it pertains to freedom of conscience<sup>5</sup> and article 40.6.1° as it pertains to freedom of expression<sup>6</sup>. Furthermore, ICCL contends that the Act as it stands violates European law and international human rights law. Rather than protecting democratic institutions and processes, these provisions stifle and limit public discourse and civic participation. We are gravely concerned that Ireland’s democratic values are compromised by the current wording of the 1997 Electoral Act.
4. The central issue of concern for ICCL with regard to this section of the General Scheme of the Bill in its current form is the failure to take the opportunity to amend the 1997 Electoral Act (as amended) with respect to the definition of ‘political purposes’ contained therein. In the Draft Heads of Bill, the definition of Political Purposes is set out under Head 2 as;

*“ha[ving] the meaning assigned to it by section 22(2)(aa) of the Electoral Act 1997 as amended by the Electoral (Amendment) Act 2001”*

5. The accompanying note on pp. 7 of the Draft Heads of Bill sets out the justification for and problems with the use of this definition;

*“The meaning of “political purposes” is similarly taken to be that set out in the Electoral Act 1997 to ensure a consistent approach is taken across the electoral codes. **It should be noted that this definition is the subject of concern for a number of civil society groups who contend that it is too broad and adversely affects the ability of third parties in funding [sic] raising in support of undertaking their ordinary day-to-day advocacy work.”**<sup>7</sup>*

<sup>3</sup> The 1997 Act was amended by the [Electoral \(Amendment\) Act, 2001](#) to incorporate the changes outlined. For the sake of clarity, we refer to the 1997 Act (as amended) throughout

<sup>4</sup> [Irish Constitution: Article 40.6.1°](#)

<sup>5</sup> [Irish Constitution: Article 44.2.1°](#)

<sup>6</sup> [Irish Constitution: Article 44.2.1°](#)

<sup>7</sup> General Scheme of the Electoral Reform Bill 2020 pp7

6. The Standards in Public Office Commission (SIPOC) has previously set out its concerns with regard to both the scope of and their ability to enforce the restrictions that the Act provides for. This was first highlighted in its 2003 annual report and numerous times subsequently. SIPOC's commentary is dealt with in more detail later in this submission.
7. Section 22 of the 1997 Act (as amended), defines 'political purposes' in such a broad manner that it is possible that it encapsulates almost all advocacy work that civil society organisations in Ireland conduct both inside **and** outside of electoral events. The 2001 amendment meant that restrictions were expanded to include any 'third party' as can be seen below;<sup>8</sup>
  - i. *(I) to promote or oppose, directly or indirectly, the interests of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament, or*  
  
*(II) to present, directly or indirectly, the policies or a particular policy of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament or a third party, or*  
  
*(III) to present, directly or indirectly, the comments of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament or a third party with regard to the policy or policies of another political party, political group, a member of either House of the Oireachtas, representative in the European Parliament, third party or candidate at an election or referendum or otherwise, or*  
  
*(IV) to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority;*
  - ii. *to promote or oppose, directly or indirectly, the election of a candidate at a Dáil, Seanad or European election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate with regard to the policy or policies of a political party or a political group or of another candidate at the election or otherwise;*
  - iii. ***otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition.***
8. The core issue with Section 22 of the Act as it stands is contained in paragraph I (IV) above. While aimed at addressing the risk of corruption or financial interference in Irish electoral politics, the above definition of 'political purposes' is so broad as to have the potential to impact on almost all advocacy work that CSOs in Ireland engage in both inside of and outside of electoral periods as it explicitly refers to ***"promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority"***.

<sup>8</sup> [2001 Electoral \(Amendment\) Act](#)

9. ICCL accepts that the law should guard against third parties being agents of political parties, however the law as written inhibits and restricts all work on public policy by any third party. This restriction is a clear violation of rights to freedom of expression and freedom of association that are protected by the Irish Constitution, European Law and international human rights standards.

### Restrictions on Donations as an Interference with Human Rights

10. The 2001 amendment to the act has meant that restrictions on donations, which previously only applied to political parties and electoral candidates, were applied to all contributions given “for political purposes” to any “third party”. A ‘third party’ in this sense then can be taken to mean any organisation that engages in work around public policy. These donation restrictions apply not only to direct financial contributions, but also to the supply of voluntary services, donations of property or goods, supply of services and so on.
11. It is important to understand that these provisions relate only to the making and receiving of donations, so impacts CSOs disproportionately. Other groups, for example business interests, are not similarly restricted in using other financial resources in order to influence public policy. This is particularly significant because while the conduct of elections or referendums centres on the primary actors in those events (parties, candidates and registered third parties); in general public policy discourse, there are a wide diversity of influences and actors, but section 22 of the 1997 Act (as amended) applies only to those who receive donations.
12. The Electoral Act prohibits ‘third parties’ from using any of the following sources of income for ‘political purposes’:
  - (1) donations from international sources,
  - (2) anonymous donations of more than €100,
  - (3) cash donations of more than €200, and
  - (4) donations of more than €2,500 from one source.
13. Within these limitations, donations of more than €200 may only be received from ‘corporate donors’ (including trusts) if the corporate donor is registered on SIPOC’s Register of Corporate Donors and provides a statutory declaration with its donation. If ‘third parties’ wish to use small domestic donations of more than €100 that are permissible for ‘political purposes’, they must;
  - (1) know the name and address of all donors,
  - (2) register with SIPOC and state the nature, purpose and estimated amount of donations and their proposed use for every year,
  - (3) open a separate bank account into which all donations for ‘political purposes’ are lodged and out of which only work for ‘political purposes’ can be funded, and
  - (4) notify SIPOC of all donations exceeding the statutory limits and send the prohibited excess to SIPOC within 14 days, following which SIPOC will share such details with both Houses of the Oireachtas.
14. In practice, the above definitions and donation restrictions mean that any civil society organisation which engages in work to “promote”, “oppose” or “comment” on public policy are at risk of prosecution if they use donations exceeding the above thresholds and/or any international donations as part of their campaigns. No restrictions apply to the financing of similar work by organisations who do not rely on donations. i.e. business. CSOs similarly face

enforcement action and possible criminal prosecution if they fail to comply with the complex and onerous documentation requirements attached to small domestic donations. The criminal offences proscribed in the Act are also very significant, amounting to possible fines of €25,394 on ‘third parties’ and corporate donors and up to three years imprisonment.

15. The impact of these restrictions on civil society organisations is well documented and extensive<sup>9</sup> and only two years after the 2001 amendment was inserted into the 1997 Act, SIPOC raised serious concerns about the impact that it could have on organisations;

*“Because the definition of political purposes is so wide it may, unintentionally, cover, on an ongoing basis, any of the following:*

- *local bodies such as Tidy Towns Committees, Residents /Tenants Associations, Community Organisations, etc.,*
- *organisations such as Trocaire, Amnesty International, Threshold, the Society of St. Vincent de Paul, An Taisce, Credit Union Movement, Comhdháil Náisiúnta na Gaeilge, etc., representative associations such as ICTU, IBEC, ISME, IFA, USI, etc.,*
- *other interest groups such as those representing vintners, lawyers, hoteliers, teachers, accountants, builders, doctors, nurses, etc.*

*The list is far from exhaustive. It is highly likely that, in conducting their day to day business, any of the above could be involved in activity which would fall within the definition of political purposes in that they would be attempting to promote or procure a particular outcome in relation to a policy or policies of the Government or any public authority, including a local authority.”<sup>10</sup>*

16. The lack of clarity from central government on guidelines in which the above provisions should be enforced with regard to third parties has unfortunately meant that SIPOC’s 2003 warnings were accurate. Changes in the enforcement environment have led to a number of high profile organisations, including Education Equality, Amnesty International Ireland, ICCL and EQUATE to return funding, limit their activities, or shutter their organisation entirely.<sup>11</sup>

## The Case for Reform

17. It is the view of ICCL that the Electoral Act, in its current form, violates basic rights that are fundamental to the functioning of a healthy democracy and which are guaranteed by the Irish Constitution, European law and international human rights law. As it stands, the Electoral Act’s restrictions on CSO funding infringe on the rights to freedom of association and freedom of expression. The EU Fundamental Rights Agency (EU FRA) has noted the positive obligation on the state to ensure freedom of association which may include a duty to facilitate access to resources by CSOs that face difficulty in participating in public life.<sup>12</sup> In addition, the law as it stands may conflict with rights to equal treatment and non-discrimination and the right to the protection of personal data. The impact of similar laws that restrict the ability of CSOs to

<sup>9</sup> [The Coalition for Civil Society Freedom “Keeping The People’s Voice In Power”; Coalition Statement on the Electoral Act](#)

<sup>10</sup> SIPOC Annual Report 2003 pp35-36

<sup>11</sup> [ICCL Article: Education Equality on SIPOC threatening them with prosecution and no longer accepting donations over €100](#)

<sup>12</sup> [Challenges facing civil society organisations working on human rights in the EU](#)

fundraise have recently fallen foul of the European Commission and the European Court of Justice as is demonstrated by the below example of the situation in Hungary.

18. In the years since the 2001 amendment to the Act, the government has never articulated the purpose the amendment is seemingly pursuing with regard to CSO funding. It is the view of the ICCL that this is because it was never the intention of the Oireachtas or the Responsible Minister at the time for these restrictions to apply to the everyday advocacy work of Civil Society organisations. We concur with the view expressed by SIPOC in 2003 that the Oireachtas intended the restrictions to be confined to third parties' advocacy for a particular result during an election or referendum.<sup>13</sup>

19. We also draw attention to the submission provided by SIPOC on the public consultation for the establishment of an electoral commission in 2019 which recommended;

*“Consider[ing] whether definition of political purposes should be modified to include only campaigns relating to elections or referendums, rather than campaigns that seek to influence decisions or functions of public bodies”<sup>14</sup>*

20. In addition to commentary from SIPOC, Several excerpts from the Oireachtas debates preceding the enactment of the Electoral (Amendment) Act 2001 indicate that the Government intended the ‘third party’ donation limitations to apply to funding for advocacy within the electoral context, rather than generally. When the Government introduced the draft legislation in the Seanad in 2000, the legislation’s restrictions on ‘third party’ financial activity were by way of spending, rather than donation, limits. Then-Minister for the Environment and Local Government, Noel Dempsey TD, explained that ‘third party’ spending needed to be specifically restricted in order to ensure fairness to candidates running for election;

*“I want to sound a note of caution, which was sounded in 1997 also. There is a major problem in relation to third party expenditure. There are constitutional issues in relation to imposing limits on third party expenditure vis-à-vis the right of freedom of expression. **My own view, however, is that if a third party campaigns against a candidate, that candidate should have a reasonable opportunity to defend himself or herself within reasonable expenditure limits.**”<sup>15</sup>*

21. Subsequently at Seanad Committee Stage, the Government introduced the ‘third party’ donation restrictions. The responsible Minister for State, Robert Molloy TD’s explanation of the proposal clearly suggests that the Government intended to bring ‘third parties’ within the parameters of the existing rules relating to elections, rather than establishing a new system of regulating civil society funding, per se;

*“The definition of political purposes is also important to bring some certainty and parameters to the scope of the legislative measures. It is based on the definition of electoral expenses and includes campaigns conducted by third parties. The definition of third parties is also new and it relates to bringing campaign groups within the control on donation limits. It states that a third party is a person, other than a registered political party or a candidate at an election, who accepts a donation for a political purpose which*

<sup>13</sup> SIPOC Annual Report 2003

<sup>14</sup> [Proposal to Create an Electoral Commission Submission by the Standards in Public Office Commission March 2019](#)

<sup>15</sup> [Electoral \(Amendment\) Bill, 2000: Second Stage](#)

*exceeds £100 in a particular year. A person is already defined in the Act as including corporate and unincorporated bodies.”<sup>16</sup>*

22. It has been argued by some that the current restrictions that result as an unintended consequence of the 1997 Act (as amended) should remain in place as they protect the political system from being overly influenced by wealthy/foreign interests. ICCL shares the view that there is a legitimate need to protect the political process from overt external influence, however, deriving these protections from an unintended consequence of legislation is inappropriate. If the amended 1997 Act was enforced as written, it would ban CSOs from participating in public debate and position Ireland even further out of step with norms in other developed democracies.
23. We reject the notion that ending civil society participation in public debate is a necessary or proportionate means of achieving transparency or equality in debate or for the protection and preservation of democracy in Ireland. ICCL further rejects the idea that the sweeping restrictions that the amended 1997 Act imposes on CSOs are a necessary response to the threats that financial influence poses for the following reasons:
  - 1) Civil society is only one among a myriad of other forms of engagement with the political system and public debate in Ireland. It exists alongside other influences that the Government does not seek to regulate, and in fact supports; such as commercial interests and political parties. Civil society acts as a counterweight to these influences on the democratic system and acts as a method through which citizens can contribute to public debate, policy formation and so on in an accessible manner.
  - 2) Civil society advocacy is an essential tool for preventing interference with democratic rights, including from those who the 1997 Act (as amended) seems to restrict, i.e. overtly wealthy/foreign sources. A weak civil society creates the conditions for singular or nefarious forces to dominate public discourse rather than prevent them.
24. The amended 1997 Act’s wide-ranging and unintended limitations and restrictions governing funding and expenditure by CSOs are not a proportionate mechanism through which to foster a vibrant and thriving civic culture that supports our democracy. This is because:
  - 1) Other influences on the development of public policy and on the political system are not subject to similar draconian and unencoded oversight measures on funding.
  - 2) Regulations that are based on transparency and accountability are more effective tools for ensuring that members of the public are aware of the range of influences on public policy, and for guarding against interference with democracy. Currently, all CSOs that have at least one employee must register their interactions with public officials on the Lobbying Register, and funding to civil society organisations is monitored by the Charities Regulator and the Revenue Commissioners;
  - 3) Participation by civil society in public debate is crucial to ensuring that the electoral system – that is, the most sensitive element of our democracy – remains robust and secure. The Interdepartmental Group on the Security of Ireland’s Electoral Process

<sup>16</sup> [Electoral \(Amendment\) Bill, 2000: Committee Stage](#)

and Disinformation has explicitly recognised the need for civil society involvement in monitoring and responding to threats to the integrity of elections.<sup>17</sup>

25. By contrast, we believe, the Electoral Act’s restrictions on donations to ‘third parties’ for the purpose of election or referendum campaigning could be necessary and proportionate because the people elected and the result chosen in those contexts will have direct and immediate power to change the laws of the country, and those contexts are time- and subject-limited. This is a position echoed in a recent working paper published by the European Parliament’s Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation.<sup>18</sup>

### International Comparisons and the Case of Hungary

26. In 2017, the European Commission launched proceedings against Hungary after the country passed a law (*Law on the Transparency of Organisations Supported from Abroad*<sup>19</sup>) designed to discourage international funding for CSOs and NGOs working in the country. The Commission took the view that the law violated article 63<sup>20</sup> (prohibition of restrictions on the movement of capital between Member States and Member States and third countries) of the Treaty on the Functioning of The European Union (TFEU). In its ruling of 18 June 2020, the Court of Justice of The European Union found<sup>21</sup> the Hungarian law on NGOs to be in breach of EU rules on the free movement of capital and the fundamental rights to protection of personal data and freedom of association, protected by the EU Charter of Fundamental Rights. In its judgement, the Court highlighted;

*“the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society and includes the rights of civil society organisations to seek, secure and utilise resources. The Court concluded that the Hungarian legislation threatens the role of civil society as an independent actor in democratic societies, undermining their right to freedom of association, creating a climate of distrust towards them as well as limiting the privacy of donors.”<sup>22</sup>*

27. In 2018 the EU Fundamental Rights Agency listed the above Hungarian Law alongside the situation facing civil society organisations in Ireland as an example of increasing crackdowns on civil society activity in Europe. According to the report, the definition of ‘political purposes’ as included in the 1997 Electoral Act (as amended) was one of the key issues facing organisations in Ireland;

*“This broad definition can potentially cover the activities of a wide range of CSOs, including human rights NGOs, and in the past year, it appears that the regulatory body has applied the law in a more expansive way. In addition, investigations are often triggered by complaints to the regulatory body, so enforcement can inadvertently be selectively targeted”<sup>23</sup>*

<sup>17</sup> [First Report Of The Interdepartmental Group On Security Of Ireland’s Electoral Process And Disinformation](#)

<sup>18</sup> [Working Document on covert funding of political activities by foreign donors Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation](#)

<sup>19</sup> [Hungary’s new Law on the Transparency of Organizations Supported from Abroad A briefing paper by the European Centre for Not-for-Profit Law, published 15 June 2017](#)

<sup>20</sup> [Consolidated Version Of The Treaty On The Functioning Of The European Union](#)

<sup>21</sup> [Judgment of the Court \(Grand Chamber\) of 18 June 2020 European Commission v Hungary](#)

<sup>22</sup> [European Commission: February 2021 Infringements Package: Key Decisions](#)

<sup>23</sup> [Challenges facing civil society organisations working on human rights in the EU](#) pp22

28. The impact that this has had on organisations’ ability to fundraise in a time when government support has dwindled was also highlighted;

*“The blanket ban on foreign funding can have a particularly serious impact in Ireland, where most independent funding of human rights work comes from trusts and foundations based outside of Ireland.”<sup>24</sup>*

*“Although overall comparisons are not possible, available figures do show reductions in funding in some EU Member States. In Greece, Ireland and the United Kingdom, public funding has dropped significantly.”<sup>25</sup>*

29. ICCL accepts that while the situation in Ireland and Hungary are different, they are comparable. The Hungarian NGO law **explicitly sets out** to limit the ability of civil society to organise effectively as part of a broader attempt to erode democratic freedom and the rule of law, whereas the Irish Electoral Act 1997 (as amended) has the **unintended consequence** of restricting civil society fundraising and engagement.

30. In 2018, ICCL carried out a comparative study<sup>26</sup> of controls on CSO finance in other developed European democracies. The study highlighted the fact that when compared to The Netherlands, Finland and Germany, Ireland’s restrictions are far in excess of what would be considered proportionate in an established democracy.

Fig (i) Comparative Matrix: How Selected Countries Regulate “Political Activities” of CSOs<sup>27</sup>

	TAX RULES	ELECTORAL LAWS	FOREIGN FUNDING	REGULATORY APPROACH
<b>IRELAND</b>	Tax breaks for organisations with a charitable purposes – does not include human rights/public advocacy	Restriction in section 27 of the Electoral Act	Electoral Act limits foreign funding of CSOs deemed “third parties”	Charities Act
<b>NETHERLANDS</b>	CSOs get tax breaks if they are a charitable organisation abiding by the principle of “by us, for others”	No regulation of CSO activities through electoral laws	No legal restrictions, but some political moves to restrict funding to “salafist” organisations	“Hands off” approach, significant self-regulation
<b>GERMANY</b>	Tax breaks for CSOs with a charitable purpose: includes democracy promotion, civic education, but not human rights or “political” activities	No regulation of CSO activities through electoral laws	No legal restrictions	No dedicated law; main regulation through tax code and civil code
<b>FINLAND</b>	Tax exemption linked simply to “non-profit purpose” and promotion of “public good”	No regulation of CSO activities through electoral laws	No legal restrictions	Association Act

<sup>24</sup> [Challenges facing civil society organisations working on human rights in the EU](#) pp22

<sup>25</sup> [Challenges facing civil society organisations working on human rights in the EU](#) pp29

<sup>26</sup> [Regulating Political Activity Of Civil Society A Comparative Analysis Of Regulation Of Civil Society Organisations’ ‘Political Activity’ And International Funding – Ireland, Netherlands, Germany, Finland](#)

<sup>27</sup> [Regulating Political Activity Of Civil Society A Comparative Analysis Of Regulation Of Civil Society Organisations’ ‘Political Activity’ And International Funding – Ireland, Netherlands, Germany, Finland](#) pp17

## Recommendation: Updating the Definition of Political Purposes

31. ICCL submits that the development of the Electoral Reform Bill (2020) presents a clear opportunity to address and clarify the existing definition of ‘political purposes’ as contained in the 1997 Electoral Act (as amended) and outlined above. This definition should be clearly grounded in matters concerning electoral politics: parties, candidates, elections, and referendums. Such provisions should apply within clearly defined electoral periods as opposed to the situation as it exists now.
32. A legislative remedy to the matter already exists in the form of the Electoral (Civil Society Freedom) (Amendment) Bill 2019 which is currently before the Oireachtas and was drafted jointly between the Coalition for Civil Society Freedom and the Office of Senator Lynn Ruane. It should also be noted that In his response to the debate on the Electoral (Civil Society Freedom) (Amendment) Bill 2019 in October 2020, Minister of State Malcom Noonan TD set out how he intended to address the matters it raised in the course of the development of the Electoral Reform Bill (2020);

*“Ultimately, the political donations regime as provided for in the 1997 Act needs to apply in a manner that is proportionate, fair and balanced to all participants. Anything less than a thorough review could possibly result in more unintended consequences arising, over and above those that civil society has rightly argued have given rise to the current situation, with potential adverse implications for transparency in our electoral processes. Against this background, the Government is opposed to this Private Members' Bill. However, I wish to assure this House that the issues at the heart of the Bill can be considered further in the context of wider electoral reform proposals, which I intend to bring forward shortly.”<sup>28</sup>*

33. The Electoral (Civil Society Freedom) (Amendment) Bill 2019 seeks to amend Section 22 of the Electoral Act 1997 (as amended) to provide for a new definition of ‘political purposes’. The new definition, which is set out below, ensures that third parties will comply with donation disclosure requirements where the donation was received in relation to advocacy in a specific election or referendum and not for all advocacy which is currently the case;

### **Amendment of section 22 of Principal Act**

*2. Section 22 of the Principal Act is amended by the substitution of the following for the definition of “political purposes”:*

*“political purposes” means any of the following purposes, namely—*

- (i) (I) to promote or oppose, directly or indirectly, the interests of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament, or*
- (II) to present, directly or indirectly, the policies or a particular policy of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament, or*

<sup>28</sup> [Electoral \(Civil Society Freedom\)\(Amendment\) Bill 2019: Second Stage](#)

*(III) to present, directly or indirectly, the comments of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament with regard to the policy or policies of another political party, political group, a member of either House of the Oireachtas, representative in the European Parliament or candidate at an election or referendum or otherwise, or*

*(IV) to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome at a Dáil, Seanad, European or local election, or referendum, such campaign relating to an election for which the polling day has been set by Government or a referendum for which the Referendum Commission has been established,*

*(ii) to promote or oppose, directly or indirectly, the election of a candidate at a Dáil, Seanad or European election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate with regard to the policy or policies of a political party or a political group or of another candidate at the election or otherwise;*

*(iii) otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition;”.<sup>29</sup>*

34. ICCL submits that the wording of this legislative amendment should be incorporated into the Electoral Reform Bill (2020) as a workable and expedient solution to the serious and unintended consequences of the ambiguity of the 1997 Electoral Act (as amended) as outlined in this submission.

<sup>29</sup> [Electoral \(Civil Society Freedom\) \(Amendment\) Bill 2019](#)

## Part Two: Establishment of Electoral Commission

### Proposed Commission Functions

35. ICCL strongly welcomes the provisions contained within the General Scheme of the Bill to establish an Electoral Commission. This is a development that ICCL have sought for a number of years.<sup>30</sup> We temper this welcome however by expressing some disappointment with regard to the limited scope of powers for the Commission as laid out in this draft. The General Scheme of the Bill seems to prescribe the role of the Commission as one of amalgamating existing electoral functions into a single institution as set out on pg.57<sup>31</sup>. The number of further functions “to be **considered** for transfer at a later stage”<sup>32</sup> includes the oversight of electoral events, and the regulation of political funding and electoral expenditure. The timescale for the transfer of these functions is not set out in the Bill in its current form. It is the view of ICCL that there is no reason why a timetable for the transfer of these functions to the Electoral Commission cannot be published as part of the development of this legislation. This timetable should be as short as possible in order to allow the Electoral Commission to begin its work, but flexible enough to allow for the smooth functioning of any unforeseen electoral events.
36. The overt prescription of functions as set out under Head 28 seems to allow very little room for the Commission to evolve, expand or adapt its remit of activities. As Highlighted by Dr Jane Suiter in her presentation to the Committee on February 2<sup>nd</sup>, “Crucially, the Commission is not given a specific function of maintaining the integrity of electoral processes.”<sup>33</sup> There is no recognition of the interrelated and current threats of disinformation or electoral interference, nor is there a role for the Commission to support candidacy as is seen in New Zealand<sup>34</sup>.
37. One of the most glaring omissions from Head 28 is the restricting of “The explanation of, and encouragement of the electorate to vote”<sup>35</sup> function only to referenda. ICCL strongly encourages the committee to include a recommendation to expand this function to all electoral events. Furthermore, the Commission should be explicitly tasked with the function to carry out holistic referenda/election audits as is the case in other advanced democracies and studies on public attitudes towards voting and the electoral process, as seen in the UK<sup>36</sup>.
38. Head 77 on the Research Function of the Commission is disappointing both in its brevity and lack of ambition. The designation of the research function to solely the topics of electoral policy and procedure and means to increase voter participation does not allow sufficient scope for the Commission to undertake research and/or pilot projects on other topics it may deem necessary. The onerous nature of obtaining Oireachtas approval for research as outlined under head 78 is not consistent with the principle of independence of the Commission or its effectiveness and should be re-examined.

<sup>30</sup> [ICCL Submission to the Public Consultation on the Establishment of an Electoral Commission](#)

<sup>31</sup> General Scheme of the Electoral Reform Bill 2020

<sup>32</sup> General Scheme of the Electoral Reform Bill 2020 PP58

<sup>33</sup> [Consultation on the General Scheme of the Electoral Reform Bill 2020 Opening Statement on behalf of Theresa Reidy \(UCC\), Jane Suiter \(DCU\), and David Farrell \(UCD\) 2 February 2021](#)

<sup>34</sup> [New Zealand Electoral Commission: About the Electoral Commission](#)

<sup>35</sup> General Scheme of the Electoral Reform Bill 2020 PP57

<sup>36</sup> [UK Electoral Commission: Public Attitudes](#)

## Proposed Commission Governance Structure

39. ICCL would also express some concerns with regard to provisions relating to governance of the Commission as currently envisioned. Head 5<sup>37</sup> of the Bill sets out the Membership Composition of the Commission. Best comparative practice internationally, such as the New Zealand Electoral Commission (three members)<sup>38</sup> or the Electoral Commission of South Africa (five members)<sup>39</sup> would normally suggest that the Commission itself should be comprised of a smaller number than the 7-9 persons as set out in the General Scheme of the Bill. ICCL would suggest a membership of 5 as a seemingly optimum number in order to ensure effective governance.
40. As per Head 5(2)<sup>40</sup>, it is unclear to ICCL as to why it is necessary that an individual with a judicial background is essential for the execution of the role of the Chair of the Electoral Commission. Further consideration should be given to alternative options in this regard, for example an open competition or the establishment of a special appointment process chaired by the Chief Justice. We welcome the provision for a public selection process for the Selected Members as outlined under Head 5(3), but would again call into question the need for this to consist of “between 4 and 6” individuals when comparable international best practice would suggest a smaller number in order to ensure efficiency and functionality.
41. ICCL would also draw attention to the provision as stipulated under Head 5(2), with regard to *Ex Officio* members, that one of these posts should alternately be filled by either the Clerk of Dáil Éireann or the Clerk of Seanad Éireann. It is the view of ICCL that this post should not be filled by the Clerk of Seanad Éireann as it is not currently an institution which is elected through universal suffrage.
42. The overly prescriptive nature of the relationship between the Commission and the Oireachtas is a matter of concern. It is the view of ICCL that the independence of the Commission may be compromised by the fact that its operational costs are to be provided by way of voted expenditure. This could lead to undue political considerations influencing budgetary allocations. In order to ensure complete independence, ICCL would recommend that costs are allocated from non-voted expenditure.

<sup>37</sup> General Scheme of the Electoral Reform Bill 2020 pp14

<sup>38</sup> [New Zealand Electoral Commission: Electoral Commission Board](#)

<sup>39</sup> [Electoral Commission of South Africa: Organisational Structure](#)

<sup>40</sup> General Scheme of the Electoral Reform Bill 2020 pp14

## Recommendations

43. That the remit of the Electoral Commission is expanded beyond its current narrow focus to encompass a wider set of functions. These should include, inter-alia, countering mis/disinformation, candidacy support, the security of the electoral process and voter education. Furthermore, a clear timetable should be published to ensure that other functions are transferred without undue delay.
44. That provisions related to the research functions of the Commission are re-examined in order to ensure academic independence. The Commission should be free to set and direct its own research agenda without the need for prior approval of the Oireachtas.
45. That the proposed governance structure of the Commission is re-examined in order to ensure that it aligns with international best practice for similar bodies, that it is not vulnerable to undue political influence, that its governance does not mirror existing democratic deficiencies in the Oireachtas and that operational costs are not provided by way of voted expenditure in order to ensure independence.
  - a. The number of members of the Commission should be capped at 5
  - b. That the requirement that the Chair should be nominated by the Chief Justice and should be of a legal background be removed and replaced by an alternative more open selection process.
  - c. That the Clerk of Seanad Éireann should not assume the role of an *Ex Officio* member of the Electoral Commission until such time as the Seanad is elected through universal suffrage.

## Part Three: Franchise and Register of Electors

### Registration of Electors

46. The provisions contained under Head 86 (7)(a) simplifying the process for those with no fixed address being able to register are welcome. It is imperative that efforts should be made to facilitate marginalised populations to exercise their democratic rights. We would however have concerns that the proposed annual renewal process is onerous. ICCL welcomes the promised review of this provision to ensure effectiveness and would suggest that particular attention is paid to the number of those who re-register year on year if the existing provision is retained. Special efforts must be made by the Electoral Commission to publicise this provision in partnership with relevant organisations working with homeless individuals and families.
47. With regard to Head 88 and Head 89 concerning the Register of Electors and the Edited Register of Electors, we welcome the provision for a rolling electoral register and the ending of the edited register. The “opt-in” workaround for the edited register from 2018 had very low uptake and presented serious privacy and ethical concerns with regard to the use of the electoral register for marketing and business purposes. As set out under Head 92,;

*“The information in the register of electors maintained under section 13 shall only be used for an electoral or other statutory purpose”<sup>41</sup>*

It is the view of ICCL that in order to fully vindicate and realise the democratic rights guaranteed under the constitution and international human rights law it is imperative that there is no provision for the use of electoral data for commercial purposes.

### Oversight and Reporting

48. With respect to Head 107, 20(A)1 on Oversight and Reporting, provision should be included to ensure that these reports are made available on the Commission website or similar within a defined number of months of receipt by the Minister, to allow for public oversight of local authority efforts with regard to updating and maintaining an accurate register.

### Data Protection and Data Sharing

49. Head 90 of the General Scheme of the Bill refers to the creation of a shared central database for the electoral register. While there are clear benefits of this provision with regard to efficiency and data management, this cannot be at the expense of data security and privacy rights. It is the view of ICCL that this provision deserves further scrutiny insofar as it has the potential to create data privacy and security issues. It is essential that any relationship between the Electoral Commission and the individual registration authorities be clearly demarcated with regard to data security and processing. As per the note on pg. 145 of the General Scheme of the Bill, this relationship is yet to be defined.
50. Related to the above, ICCL are concerned that the scope of the data sharing as envisioned under Head 93 section 13E (4), is not sufficiently clear. In order to ensure the protection<sup>42</sup> of sensitive personal data, this provision requires further clarification including an explanation

<sup>41</sup> General Scheme of the Electoral Reform Bill 2020 PP147

<sup>42</sup> As per the meaning assigned by GDPR

of which categories of data can be shared, for what explicit purpose and, per subsection (5), the specific lawful basis for each processing purpose. In particular, ICCL Have grave concerns with regard to any use/sharing of PPSN data for the aforementioned purposes as it is likely disproportionate to the level of certainty required for the processing purpose.

51. The Department of Social Protection sets out the PPSN as;

*“a unique reference number that helps you access social welfare benefits, public services and information in Ireland.”<sup>43</sup>*

This definition is based on that as outlined under head 262 (1) of the Social Welfare Consolidation Act (2005);<sup>44</sup>

*“personal public service number” means a number allocated and issued in accordance with subsection (2);*

*“primary account number”, in relation to a public service card or a card issued under section 264, means a number consisting of—*

*(a) an issuer number, issued under licence from the International Standards Organisation,*

*(b) a personal public service number, and*

*(c) a card number allocated, in the case of a public service card, by the Minister or, in any other case, by the person who issued the card;*

*“public service identity”, in relation to a person, means the information specified in subsection (3) and the person’s personal public service number; “specified body” shall be read in accordance with Schedule 5; “spouse” means—*

*(a) each of a married couple, or*

*(b) a man and woman who are not married to each other but are cohabiting as husband and wife;*

*“transaction” means—*

*(a) an application,*

*(b) a claim,*

*(c) a communication,*

*(d) a payment, or*

*(e) a supply of a service,*

*(f) relating to a public function of a specified body which relates to a natural person.*

<sup>43</sup> [Department of Social Protection: Get a Personal Public Service \(PPS\) Number](#)

<sup>44</sup> [Social Welfare Consolidation Act \(2005\)](#)

52. The right of eligible persons to participate in the democratic process through casting ballots in elections and referenda is one of the most basic fundamental democratic freedoms. In the Irish context, these rights are set out in article 16<sup>45</sup> of the Constitution. Limitations on the exercise of this right cannot reasonably be captured by the definition provided above which sets limits on the use of the PPSN.
53. Eligibility to vote does not require a PPSN and therefore to **require** a PPSN in order to register to exercise this right is fundamentally undemocratic. While it is not unreasonable for the registration process to offer individuals the **opportunity** to use their PPSN to confirm their identity/address, the willingness to share PPSN data cannot be a **compulsory** requirement. ICCL are strongly opposed to any attempts which serve to conflate existing and limited PPSN functions with that of a National ID or similar. This opposition to the functionality creep of the PPSN has previously been raised by ICCL, for example with relation to concerns surrounding the interaction between PPSN and the Public Service Card.<sup>46</sup> Furthermore, with respect to Head 104 on the Pending Elector List, while we strongly welcome the pre-registration of 16- and 17-year-olds as a positive development, we are again opposed to the mandatory use of PPSN as an identifier for the reasons outlined previously.
54. There are a number of further issues related to privacy and what ICCL believes to be excessive barriers to the exercise of democratic rights. For example, with respect to Head 94 (Entry of Names in Postal Voters Lists), it is the position of ICCL that individuals should not be forced to prove and/or disclose illness/disability for any period of time in order to be able to access postal voting. Forcing individuals to disclose such sensitive personal data in order to vindicate their constitutionally guaranteed democratic rights is not proportional to the need to justify a postal ballot. ICCL recommends that this requirement is removed and postal voting be made available to any individual who requests it. It is difficult to understand why an expanded postal vote provision is not included in this General Scheme and ICCL submits that the examination of postal voting and other such measures should be one of the primary areas of consideration for the Electoral Commission.
55. ICCL gives a qualified welcome to the provision for Anonymous Electors as contained in head 101. While this is a very worthwhile provision, it seems to suffer many of the same shortfalls as the postal vote provisions above. The requirement to “prove” the danger of inclusion on the register poses is excessive, difficult to justify and not proportionate to potential it has to prevent and discourage individuals from exercising their democratic rights. Secondly, while the attempt to remove the necessity of a barring order or similar is a positive step, it introduces a discretionary nature to the assessment of applications which is very unwelcome. ICCL supports the ability of any individual to appear as anonymous on the register if they so choose, regardless of their personal circumstances and without having to provide proof or similar justification.

<sup>45</sup> [Irish Constitution: Article 16](#)

<sup>46</sup> [The Irish PSC: Enforced digital identities for social protection services and beyond](#)

## Recommendations

56. ICCL calls for the requirements for annual re-registration for those with no fixed abode to be re-examined to ensure that the democratic rights of those seeking to register are not unduly undermined by this provision. We would also recommend any review of this provision pays special attention to year-on-year re-registration in order to ascertain and address fall-off rates.
57. With respect to the provisions for the electoral register, ICCL strongly welcomes the abolition of the edited register. We reiterate our concerns with respect to the pooling and sharing of data and would welcome more detailed considerations of the data security risks that this provision will entail. The relationship between local authorities and the Electoral Commission will be of critical importance and should be placed on a statutory footing in order to ensure data security and privacy rights are vindicated. We also suggest that the Electoral Commission should publish regular reports on the registration efforts of local authorities in order to ensure proper public oversight.
58. ICCL strongly oppose any attempts to make the sharing of PPSN information being a mandatory requirement for those seeking to register to vote. Any such attempt would be profoundly undemocratic as the possession of a PPSN is not a mandatory requirement in order to exercise any constitutionally guaranteed democratic right. Furthermore, any such provision would unfairly disadvantage already marginalised communities who, while eligible to vote, may not possess a PPSN. While the use of PPSN as an identifier can be considered as one method of identity verification, it cannot be a compulsory method. Similarly, reasonable alternative registration methods should be accessible and practical for individuals who choose not to share their PPSN information.
59. While in principle ICCL welcomes the changes to the registration requirements for those who wish to register as postal voters and/or as anonymous on the electoral roll, the proposals are limited in scope. ICCL can see no practical reasons why any individual who wishes to register either as a postal voter or as an anonymous elector should be compelled to disclose sensitive personal or medical information in order to vindicate their basic democratic rights. It is our position that the options of postal voting and to appear as an anonymous elector should be available to all who request them, regardless of circumstance.

## Part Four: Regulation of Online Political Advertising

### Head 120; Buyers of Online Political Advertisements

60. The core of ICCL’s commentary on Head 120 is a development of our submission on the Regulation of Online Political Advertising in Ireland<sup>47</sup> in advance of the Open Policy Forum on the issue in November 2018 as initiated by the Interdepartmental Group on the Security of Ireland’s Electoral Process and Disinformation. This section should also be understood in the context of the matters raised and addressed in the Electoral (Civil Society Freedom) (Amendment) Bill 2019 which is before the Oireachtas and seeks to amend the Electoral Act 1997 to end the chilling effect the 2001 amendment has had on civil society organisations.
61. Since 2001, the Electoral Act 1997 (As Amended) has applied donation restrictions previously reserved for political parties and those running for election to all donations made to “third parties” for “political purposes”. A “third party” is *anyone* other than an election candidate or political party. The amended 1997 Act’s broad definition of “political purposes” is having a negative impact on the work of CSOs in Ireland outside of election and referendum periods, has severely constrained funding efforts and led to a number of organisations being forced to shutter their activities. The Standards in Public Office Commission (SIPOC) has begun to enforce the Act’s funding restrictions in relation to the work of CSOs generally, i.e. even if not within an election or referendum period. The relevance of the 1997 Electoral Act and the 2001 amendment to the General Scheme of this Bill is set out below.

#### Definition of Political Purposes for the Purposes of Advertisement

62. The General Scheme of this Bill proposes to define “political advertisement” as “*any form of communication in a digital format commissioned for **political purposes** for placement, display or promotion on an online platform **during an electoral period** and for which a payment is made to the online platform.*”<sup>48</sup> Under Heading 120 (1)(f), this proposed regulation would apply to third parties as defined by the amended 1997 Act. This proposal presents a potential conflict between different definitions of “political” within the wider Electoral Code. At one level, the proposal that rules of “political advertising” should apply only within defined “electoral periods” offers welcome certainty and clarity to the law. At the same time, the potential interaction between the proposed definition of “political advertisement” with the existing definition of “political purposes” as it applies to ‘third parties’ in the amended 1997 Act may cause further confusion in an already problematic area of law as previously addressed.

#### Existing Law on “Political Purposes”

63. “Political purposes” as they relate to political donations are defined in section 22(2)(aa) of the 1997 Act (as amended). The wording of this section is included in paragraph 6 of this document.
64. It is important to understand that these provisions relate only to the making and receiving of donations. While aimed at addressing the risk of corruption or financial interference in Irish electoral politics, the above definition of “political purposes” is so broad as to have the

<sup>47</sup> [Public Consultation on Regulation of Online Political Advertising in Ireland Submission by the Irish Council for Civil Liberties](#)

<sup>48</sup> General Scheme of the Electoral Reform Bill 2020 Part 4, Heading 120 (1) pp234

potential to impact on almost all advocacy work that CSOs in Ireland engage in both inside of **and** outside of electoral periods as it explicitly refers to **“promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority”**. The restrictions on donations under section 22 include a prohibition on receiving **any** donation that is not originating from Ireland or from an Irish citizen resident abroad, and also places limitations on the size of a donation that can be received from those sources.

65. In this sense then, while the plan to limit the scope of the proposed regulations contained in Head 120 on political advertisements to only electoral periods is more limited, the proposal may also further entrench the definitions contained in the amended 1997 Act into law. This would have the effect of transposing the seemingly unintended limitations on fundraising into the arena of advertising for CSOs and other “third party” organisations.

66. The difficulty with the existing provision is acknowledged in the General Scheme of the Bill;

*“The meaning of “political purposes” is similarly taken to be that set out in the Electoral Act 1997 to ensure a consistent approach is taken across the electoral codes. It should be noted that this definition is the subject of concern for a number of civil society groups who contend that it is too broad and adversely affects the ability of third parties in funding[sic] raising in support of undertaking their ordinary day-to-day advocacy work.”<sup>49</sup>*

67. In his response to the debate on the Electoral (Civil Society Freedom) (Amendment) Bill 2019 in October 2020<sup>50</sup>, the Minister set out how he intended to address this matter in the course of the development of this Bill<sup>51</sup>. ICCL remains hopeful that a revised definition of “Political Purposes” to update those contained in the amended 1997 Act can be included in the final version of this Bill.

## Issue Based Advertisements

68. ICCL does not exclude the possibility that transparency regulations with regard to advertising might be deemed to also appropriately apply to a wider category of ‘issues based advertising’ concerning matters of social or economic policy outside of electoral periods. Regulations such as these are already the case within the existing practice of some social media companies, for example in Facebook<sup>52</sup>, Twitter<sup>53</sup> and Instagram<sup>54</sup>, while TikTok bans political and issue-based advertising completely<sup>55</sup>.

69. However, we believe it is imperative that any such rules around ‘issues based advertising’ should be clearly distinguishable from rules pertaining to ‘political advertising’. This Bill presents an opportunity to disentangle explicitly political advertising and ‘issue-based advertising’ and to develop separate guidelines for transparency on the latter. This is particularly prescient when we consider the role played by the internet in the public’s access to news and information both inside and outside of electoral periods. Different considerations of freedom of expression and freedom of association apply in the context of individuals and

<sup>49</sup> General Scheme of the Electoral Reform Bill 2020 Head 121, pp5

<sup>50</sup> [Electoral \(Civil Society Freedom\)\(Amendment\) Bill 2019](#)

<sup>51</sup> [Electoral \(Civil Society Freedom\)\(Amendment\) Bill 2019: Second Stage, Seanad Éireann debate - Thursday, 22 Oct 2020](#)

<sup>52</sup> [Facebook; About Ads About Social Issues, Elections or Politics](#)

<sup>53</sup> [Twitter: Cause-based advertising policy](#)

<sup>54</sup> [Information on Social Issue Ads on Instagram](#)

<sup>55</sup> [TikTok: “Understanding our policies around paid ads”](#)

civil society organisations seeking to express views on matters of public interest. Thusly different criteria with regard to the transparency of these advertisements should apply.

## Head 121: Public Information Requirements for Online Political Advertisements

70. There are a number of issues with regard to Head 121 of the General Scheme of the Bill which ICCL believe deserve further consideration. These mostly refer to the need to balance privacy rights with the objective of protecting electoral integrity. Any use of personal data to ensure advertising transparency is bound to and must be balanced with the principles relating to the processing of personal data as outlined in Article 5 of GDPR.<sup>56</sup> ICCL also notes the EU's forthcoming Digital Services Act which may necessitate the revisiting of this proposed legislation in the near future.

### Public Information Requirements

71. Head 121(2)(a) of the General Scheme of the Bill refers to the Public Information Requirements for Online Political Advertisements. The requirements for information to be included in the "Transparency Notice" should be interrogated further. The General Scheme of the Bill sets out that the transparency notice should contain;

*"the name, postal address, email address and, where applicable, the website address of the buyer who paid for the online political advertisement;"*<sup>57</sup>

The related obligations on the buyers to provide this is set out under Head 127 and stipulates that an offence will be committed by the buyer if this information is not provided<sup>58</sup>. The penalties for this offence are described under Heading 130.<sup>59</sup>

72. ICCL would have serious concerns with regard to the scope of personal data that individuals would be forced to disclose in order to place these advertisements, in particular when the advertisement is placed by an individual as opposed to an organisation. It is important to be mindful of potential negative effects this provision could have on vulnerable groups in society e.g. forcing members of discriminated against minorities to publicly declare their support for an organisation or cause. If the hosting platform does not receive all of the information as stipulated in the General Scheme of the Bill, they are precluded from running the advertisement(s) in question. This provision is set out in Head 122 (2);

*"An online platform which is unable to obtain such information and documentation as a result of any failure on the part of the buyer, shall not provide the service sought by the buyer for so long as the failure continues."*<sup>60</sup>

This provision may have a serious chilling effect on the enjoyment of democratic rights to freely participate in the democratic process and violate the right to privacy.

<sup>56</sup> [GDPR Article 5](#)

<sup>57</sup> General Scheme of the Electoral Reform Bill 2020 Head 121(2)(a), pp236

<sup>58</sup> General Scheme of the Electoral Reform Bill 2020 Head 127, pp252

<sup>59</sup> General Scheme of the Electoral Reform Bill 2020 Head 130, pp261

<sup>60</sup> General Scheme of the Electoral Reform Bill 2020 Head 122(2), pp239

## Online Digital Archive

73. The data protection and privacy concerns are compounded by the provisions in the Bill which relate to the creation of a “digital archive” for the preservation of these advertisements for a period of seven years as provided for under heading 121(4) and 121(6)(c). Heading 121(6)(b) stipulates that the company hosting the advertisement should;

*“ensure public access to that online archive or library is maintained in the public interest and for the purpose of research relating to the holding of elections and referendums and on matters connected therewith”<sup>61</sup>*

74. The accessibility of this archive and the details provided in the privacy notice for a lengthy period such as this should be scrutinised in terms of proportionality in the need to ensure the transparency of funding. This need has to be weighed against the rights of individual privacy and freedom of political expression. It should be noted however, from a transparency perspective it would be advisable that any online archive is made available in real-time as opposed to when the electoral event has concluded.

## “Micro Targeting” and “Look-Alike” Targeting

75. Heading 121(2)(b) and 121(2)(c) set out the transparency provisions that political advertisements must contain with regard to so-called “micro-targeting” and ‘look-alike” targeting lists. However, many (perhaps all) such technologies are incompatible with the GDPR because they process personal data, including “special category” data, unlawfully. ICCL has submitted detailed evidence on this point to the DPC.
76. Furthermore, it is the view of ICCL that Heading-121(2)(a) should include provision for, inter alia, a prominent link to the Electoral Commission website, or another independent resource, with a notice informing individuals that “*further information on your rights with regards to political advertising can be seen here*” or similar. While websites hosting these advertisements have an important role to play in ensuring transparency, it is critical that individuals are signposted to impartial information regarding their digital rights.

<sup>61</sup> General Scheme of the Electoral Reform Bill 2020 Head 121(6)(b), pp237

## Recommendations

77. In bringing forward proposals to define “political advertising” under Head 120, it is imperative that the Bill addresses and clarifies the existing definition of “political purpose” under the 1997 Electoral Act. ICCL submits that a clear and consistent definition of “political purpose” and “political advertising” should be defined in the Bill. This should be clearly grounded in matters concerning electoral politics: parties, candidates, elections, and referendums. Such provisions should apply within clearly defined electoral periods. Such an approach is in line with the special democratic considerations associated with the integrity of democratic elections.
78. ICCL submits that this Bill presents a timely opportunity to simultaneously develop transparency guidelines on “Issue Based Advertisements”, as outlined above and which should be distinct in criteria from “Political Advertisements.”
79. While ICCL welcomes the focus on the need for transparency in the arena of political advertising, it is crucial that the measures are proportionate and align with existing data protection and privacy rights. Therefore, ICCL recommends that the Public Information Requirements as included under Heading 121 and related provisions are re-examined in order to ensure that these rights are respected and vindicated.
80. In addition, it is essential that transparency efforts should be linked to a greater understanding of digital rights more broadly. For this reason, we believe that any transparency notice should include links to further impartial resources as outlined above.
81. Furthermore, it is the view of ICCL that legislating for transparency with regard to so-called “micro-targeting” and ‘look-alike” targeting lists is inappropriate as these activities are incompatible with the GDPR.

## Part Five: Facilitation of Electoral Events Where Covid-19 Restrictions are in Place

### Democratic Rights and the Rule of Law in times of National Emergency

82. ICCL welcomes this important provision with regard to the exercising of democratic and electoral rights in the context of Covid-19 restrictions. It is however, somewhat puzzling that the measures in question *solely* refer to the management of electoral events specifically in this narrow context. This Bill presents the opportunity to legislate for electoral events in the context of emergencies more broadly and to help ensure that no national emergency of any kind (natural disaster, extreme weather, public health etc.) should present an insurmountable obstacle to the vindication of democratic rights .
83. It is the view of ICCL that one of the key lessons that must be drawn from the global experience of Covid-19 is that accountability, openness, oversight and transparency with regard to decision-making are essential in maintaining the legitimacy and authority of democratic institutions. The importance of these democratic principles and the rule of law more generally become *more, not less* important at a time of national crisis. This is a matter that we have highlighted our repeated concerns with to the Government over the course of the last year.<sup>62</sup>
84. Recent research published by IHREC in conjunction with Trinity College Dublin has highlighted the importance of the rule of law for the functioning of democracy and also how the onset and response by government to the pandemic has highlighted a;
- “significant defect in Ireland’s COVID-19 response, breaching international law norms relating to the rule of law.”<sup>63</sup>*
85. National emergencies such as Covid-19, should not be seen as an excuse for opaqueness when important decisions with regard to individual liberties and human rights are being made. At a time when community and national solidarity are essential in meeting great challenges, and when governments may seek to and be required to exercise unusual and exceptional powers, the onus on governments, parliaments and other policy-making structures to be open and clear about their decisions and processes is increased.
86. An essential element of the rule of law is that government is bound by the law and by established rules and processes. ICCL draws attention to the lack of adherence by government in their response to Covid-19 to the *“Strategic Emergency Management National Structures and Framework”<sup>64</sup>* document which was published by the Department of Defence in July 2017. This document recommended an “all of government” approach to national emergency management and makes provision for decision-making and oversight structures in the event of a pandemic. The principles that there should be a multi-disciplinary approach to emergency situations seems to be largely sound. However, we note that the 2017 Framework is also incomplete. For the purposes of this Bill, for example, the document does not contain provision for conducting electoral events during national emergencies.

<sup>62</sup> [ICCL Commentary on Covid-19 Emergency Powers Legislation](#)

<sup>63</sup> [Ireland’s Emergency Powers During the Covid-19 Pandemic](#) pp62

<sup>64</sup> [Strategic Emergency Management National Structures and Framework](#)

87. It is the view of ICCL that the current Part 5 of this General Scheme presents an opportunity to address this lacuna. With this in mind, it is the recommendation of ICCL that Part 5 should be amended and expanded to include provision for the management of electoral events in the context of national emergencies more broadly. Enhancing Part 5 in this manner would go some way to putting the exercise of critical democratic rights in the time of emergency on a statutory footing.
88. According to a March 2021 report by the International Institute for Democracy and Electoral Assistance (IDEA), while elections were held in 108 countries or territories in 2020, they were postponed in 36 as a result of Covid-19, or where Covid-19 was cited as a reason for postponing.<sup>65</sup> Creating a robust legislative guarantee for the smooth functioning of the democratic process insofar as is possible in the context of a national emergency can act as a catalyst for a review of government decision-making, transparency and oversight during the Covid-19 emergency more broadly and in order to ensure that lessons are learned in this regard for future emergencies.

<sup>65</sup> [IDEA: Global Overview of Covid-19 Impact on Elections](#)

## Recommendations

89. That Part 5 of the General Scheme of the Bill be amended to include provision for the development of “all of government” strategies for the holding of electoral events in the context of national emergencies. This would include provisions for, inter-alia, the conducting of electoral events in the context of pandemics, natural disasters, terrorist outrages, cyber-attacks, extreme weather events, and so on.
90. The development of these strategies would be cognisant and build on the work of the 2019 National Risk Assessment report, published by the Department of An Taoiseach<sup>66</sup>. The revised Bill should also commit to carrying out a periodic review and update of these strategies.
91. That the development of these strategies should also prompt a wider review of the “*Strategic Emergency Management National Structures and Framework*”<sup>67</sup> document and the incorporation of electoral events into its planning matrix.

<sup>66</sup> [National Risk Assessment 2019](#)

<sup>67</sup> [Strategic Emergency Management National Structures and Framework](#)

# About ICCL

**The Irish Council for Civil Liberties (ICCL)** is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.