

# Electoral Reform Bill 2022

Bill No. 37 of 2022

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## Abstract

The Bill, if enacted, will introduce significant electoral reforms through the establishment of an independent Electoral Commission, the modernisation of electoral register and the regulation online political advertising.



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## Glossary and abbreviations

Term	Meaning
Anonymous elector	A person who is entitled to be on the electoral register, whose personal safety might be at risk if their name and address were published, can apply to have their name omitted on the Register which is published or made available for inspection.
Buyer of online political advertisement”	A person who buys an online political advertisement, or a person on whose behalf an online political advertisement is bought.
Data Protection Impact Assessment (DPIA)	The process of identifying the risks arising out of the processing of personal data and of minimising these risks as far and as early as possible. DPIAs are tools for negating risk, and for demonstrating compliance with the GDPR
Designated registration area	The registration authority prescribed by the Minister to establish, manage, and maintain a ‘shared database’ for use by all registration authorities to maintain the electoral register.
Election period	The time between the making of a polling day order and polling day
Electoral Register	Register of electors for specific elections based on eligibility criteria for those elections, also the postal voters list and the special voters list
Gerrymandering	Manipulation of electoral boundaries to favour one party
Joint Oireachtas Committee	Joint Oireachtas Committee on Housing, Local Government and Heritage
Look-alike targeting	Use of data analysis of an existing audience to identify new people with similar characteristics or engaged in similar activities on an online platform
Micro-targeting	Use of data analysis to transmit a tailored online political advertisement to a specific person/group of people or to increase the circulation, reach or visibility of an online political advertisement
Minister	Minister for Housing, Local Government and Heritage
Online political advertisement	Any form of digital communication for political purposes purchased for placement, display, promotion or dissemination on an online platform during an electoral period
Pandemic	An outbreak of disease occurring worldwide, crossing international boundaries, and affecting a large number of people that the World Health Organisation has declared to be a pandemic.
Pending elector list	List of people, maintained by registration authorities, aged between 16 and 18, who apart from age meet the requirements for inclusion in the register of electors.
PLS	Pre-legislative scrutiny
PPSN	Personal Public Service (PPS) Number is a unique reference number issued for people to access social welfare benefits, public services. Section 262 of the <a href="#">Social Welfare Consolidation Act 2005</a>

Political purposes	<p>Activities to influence the outcome of an election or referendum by promotion or opposition of Members of the Oireachtas or Members of the European Union, candidates for Oireachtas and EP elections, political parties, political groups and their policies and interests. It also encompasses the activities of Third Parties.</p> <p>“political purposes” has the meaning assigned to it by section <a href="#">22(2)(aa) of the Electoral Act 1997</a>.</p>
Polling Day Order	An order made by the Minister appointing a day for the holding of a poll
Registration Area	Administrative area of a county council, a city council or a city and county council;”
Registration Authority	A county council, a city council or a city and county council;”
Shared database	The shared database will include the information in the electoral registers and the pending electoral registers for all registration authorities. It will identify particulars (full names, date of birth, address, nationality, PPS number (if any) and in the case of a deceased person the date of their death), as well as information and supporting documentation used to compile the registers and pending registers.
Transparency notice	Notice connected to each online political ad providing details of who bought the ad, amount paid, audience, how long it will run, link to the archive of online political ads on the online platform out who paid for the ad, amount paid,

## Summary

The Electoral Reform Bill 2022 was published on Wednesday 30 March 2022.

There are five Parts to the Bill. Part 2 deals with the establishment of the Electoral Commission, Part 3 deals with the modernisation of the Electoral Register and includes significant amendments to other legislation, Part 4 sets out the system for regulating online political advertising and Part 5 covers advance polling during a pandemic or Covid 19.

The Electoral Commission will be established with a membership of between 7 and 9 people. It will immediately be assigned the functions of the Registrar of Political Parties, Referendum Commission, Constituency Commission and local electoral area boundary committees, oversight of the Electoral Register, regulation of online political advertising, as well as research, advisory and voter education functions.

With the exception of an oversight role with respect to the compilation of the electoral register, the Electoral Commission will not have an oversight function for the organisation of elections and referendums; these functions remain with the local authorities. Nor will the Electoral Commission have any role in the regulation of political funding and election expenditure, the Standards in Public Office Commission retains these functions.

Establishing an electoral commission has been on the policy agenda since 2007 and there is broad support for its establishment as it is expected to act as a focal point for the management of elections/referendums, and it will research electoral policy and procedures and make recommendations for legislation and policy.

It has been established that the Electoral Register is inaccurate and incomplete. The Bill aims to address these challenges by providing for a rolling register, the use of Personal Public Service numbers (PPSN) to verify the identity of electors in the registration process, and for the creation of a national shared database of electoral register information which will provide a comprehensive system for registration authorities (local authorities) to maintain the electoral register for their registration areas. A rolling register can be updated throughout the year unlike the current system of publishing a draft register in November and a final register in February. New measures to facilitate the registration and voting by certain groups facing specific challenges, and the pre-registration of 16- and 17-year-olds, will reduce the burden of registering and voting for those people.

The Bill creates a new regulatory regime for online political advertising during election periods. An online political advertisement may not be circulated without a connected 'Transparency Notice' disclosing specified information including about the buyer and target audience, and the sale of online political advertising to foreign persons is prohibited. Buyers and sellers of online political advertising have obligations under the Bill. The Electoral Commission is the body responsible for monitoring compliance with the regulation and investigating suspected contravention of the regulations.

There has been extensive public consultation on the three major provisions of the Bill, establishing the Electoral Commission, Modernising the Electoral Register and Regulating Online Political Advertising, and material from these are drawn on throughout this Digest. The Joint Committee on Housing, Local Government and Heritage also carried out pre-legislative scrutiny of the General Scheme of the Bill.

## Introduction

The [Electoral Reform Bill 2022](#) [the Bill] was published by the Minister for Housing, Local Government and Heritage, Darragh O'Brien, and Minister of State for Heritage and Electoral Reform, Malcolm Noonan, on 30 March 2022.

Following an introduction and background to the Bill, this Digest is presented in four sections to reflect the four principal provisions of the Bill which are:

1. Establishes a statutory, independent Electoral Commission ([Section 1 of this Digest](#))
2. Modernises the electoral registration system ([Section 2 of this Digest](#));
3. Regulates online political advertising ([Section 3 of this Digest](#));
4. Provides for advance voting to facilitate elections during a pandemic, or Covid 19 ([Section 4 of this Digest](#)).

Launching the Bill, the Minister O'Brien linked a centenary of democracy, current world events and the government's commitment to renew and strengthen the Irish democratic infrastructure, stating that:

“As we approach our centenary as a democratic state, it feels wholly appropriate that we introduce reforms and improvements to strengthen the future of our democracy and democratic processes. Indeed, as we reflect on current world events, it is worth reminding ourselves that the democratic rights we enjoy are denied or threatened in many other countries. With this Bill, the government has committed to a renewal and a strengthening of our democratic infrastructure.”

Minister O'Brien added:

“Today marks a watershed moment as we bring about major modernisation of our electoral activity. The Electoral Commission – a new statutory, independent body – will provide key expertise and advice on important matters related to elections and referendums and play an important role in educating all citizens of their rights and roles with regard to our democracy.

“The introduction of controls around paid online political advertising is a pioneering move among our European counterparts and will be an important measure in ensuring transparency between political groups and prospective voters.”

Minister of State for Heritage and Electoral Reform Malcolm Noonan said:

“This Bill and the new and independent Electoral Commission that it provides for will have wide-ranging benefits for Ireland's democracy. These include making voter registration easier and more accessible while strengthening the integrity of the process; supporting young people, women, Travellers and Roma, people with a disability and migrants to get involved; spreading the word on voting, elections and the importance of people exercising their democratic rights; and enhancing the resilience of our democracy against modern challenges.”

In October 2020 the Government approved the establishment of a statutory independent Electoral Commission. The [General Scheme of the Electoral Reform Bill](#) was published by the Department of Housing, Local Government and Heritage on 8 January 2021. Pre-Legislative Scrutiny [PLS] was undertaken by the Joint Committee on Housing, Local Government and Heritage between January and July 2021 and the Committee's [report](#) with 42 recommendations was published in July 2021. See [Table 6](#) for the list of recommendations and the Departments response to each.

## Commencement

The Act shall come into operation on day/days appointed by order/orders of the Minister for Housing, Local Government and Heritage. The establishment day of the Electoral Commission will be established by Ministerial Order

This Digest has a general introduction and background to the Bill, after that the Digest treats each of the four principal provisions of the Bill separately.

## Legislative reviews

The Minister is required to review the operation of two sections of the Act, three years after they have come into operation, and to lay the reports before each House of the Oireachtas:

- Section 82 'General provisions relating to the registration of electors', and
- Section 91 'Anonymous electors'

## Government amendments – disinformation and electoral integrity

Launching the Bill Minister O'Brien said that he has asked the Attorney General to prepare proposals and options for inclusion in this Bill around the protection of the integrity of the electoral process against disinformation. He said that this could include the Electoral Commission being assigned an appropriate function in this regard, with any necessary amendments to the Bill being brought forward as the Bill progresses through the Oireachtas.



## Background to this Bill - Electoral reform

The establishment of an Electoral Commission and reform of the system for registering voters have been on the agenda of successive Irish governments since 2007.<sup>1</sup> The regulation of online political advertising has been on the policy agenda since 2017. The arrangements for elections and referendums with Covid-19 type restrictions in place are a result of the pandemic.

Several reviews of the Irish electoral system (PR-STV) between 1996 and 2013<sup>2</sup> have concluded that the electoral system itself should not be changed, but that reform of the administration and operation of the electoral system is required. The Joint Oireachtas Committee on the Constitution (2010) concluded there was not “a sufficiently compelling case” for changing the electoral system and went on to recommend the matter be considered by a citizens’ assembly. The Convention on the Constitution (2013) voted overwhelmingly (79%) against changing the electoral system and the government accepted the Conventions recommendation.<sup>3</sup> Both the Joint Committee on the Constitution and the Convention on the Constitution recommended the establishment of an electoral commission and improving the accuracy of the electoral register, among other electoral reform measures.

Key electoral reforms introduced in the same period include; restrictions on political donations, reporting on election expenses, gender quotas at Dáil elections, a six-month deadline for the holding of bye-elections, an independent Constituency Commission to determine constituency boundaries, an independent Referendum Commission to inform the public and encourage voting at referendums, the re-design of ballot papers, extended polling hours, experimentation with electronic voting in 2002, provisions to facilitate voting by prisoners, people with disabilities and those living in nursing homes.

In December 2019, the then Government approved the General Scheme (GS) of an Electoral Commission Bill, however the Dáil was dissolved before the GS was published.<sup>4</sup>

The current Government published the GS of the Electoral Reform Bill 2020 in January 2021. The Joint Committee on Housing Local Government and Heritage conducted pre-legislative scrutiny of the GS at seven meetings and published its report in July 2021.

The Government has now introduced a Bill to establish an Electoral Commission and provide for additional electoral reform: modernising the electoral registration process, the regulation of online political advertising in the run up to elections and provisions for electoral events with Covid-19 restrictions.

### Electoral Integrity

“For elections to be the legitimate instrument at the heart of the democratic process, they need to be carried out with integrity.

Elections with integrity are based on the democratic principles of universal suffrage and political equality and are professional, impartial, and transparent in preparation and administration throughout the electoral cycle.

Their outcome is not just legally beyond reproach but the process and its outcome are also perceived as legitimate by the electorate.” ([Kofi Annan Foundation, 2012](#))

Elections are central to democracy, an electoral system that is inclusive, transparent and accountable confers legitimacy on a new government because voters and other actors can accept the results of the election. It is important that any changes to the electoral administration processes retain both public confidence and electoral integrity and do not have a negative impact on political participation or trust in politics. International IDEA identified electoral management as being vital to electoral integrity given it occurs in a politically charged atmosphere.<sup>5</sup>

Public confidence in the Irish electoral process is considered to be very good.<sup>6</sup> Writing on electoral integrity in Ireland, Kavanagh states that “only a handful of prosecutions for breaches of electoral law are known to have taken place”, and she attributes this to a robust legal and administrative framework for ensuring electoral integrity within the political framework.<sup>7</sup> In the most recent [Electoral Integrity Worldwide Report 2019](#) Ireland was ranked 27<sup>th</sup> of 167 countries, with a ‘very high’ rate of electoral integrity. For this report experts are asked to assess the quality of national elections on eleven dimensions: electoral laws; electoral procedures; district boundaries; voter registration; party registration; media coverage; campaign finance; voting process; vote count; results; and electoral authorities.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) found a high level of confidence in the Irish electoral process and administration among stakeholders<sup>8</sup> during its Needs Assessment Mission (NAM) to Ireland from 22 to 24 January 2020.<sup>9</sup>

“All ODIHR NAM interlocutors expressed a high level of trust in the integrity of the electoral process, including voting and counting procedures on election day and the ability of the election administration to conduct professional and transparent elections. No new electoral issues that would benefit from an additional assessment by ODIHR have been identified. Some concerns were raised with regard to the absence of a centralised voter registration process, the underregulated field of social media and impact of that on the electoral campaign, and the need for a permanent electoral commission that would not only oversee the electoral preparations but would also offer guidance on the conduct of TV debates. These issues were, however, not identified by electoral stakeholders as significantly impacting the upcoming elections. In its conclusion the Mission noted that stakeholders raised issues with the voter registration process, underregulated social media and the need for a permanent electoral commission.”

There is broad support for the provisions of the Bill among political parties and civil society, although some stakeholders believe the Bill is not ambitious enough, particularly in relation to the functions assigned to the Electoral Commission (Section 1 of this Digest) and the regulation of online political advertising (Section 3). While there is general support for the use of Personal Public Service Numbers (PPSN) for the identification of electors, there are some concerns about the security of personal data and the disenfranchisement of people, particularly members of marginalised groups, who do not have a PPS number (Section 2).

## 1. Electoral Commission

This section of the Digest considers the reasons for establishing an Electoral Commission and outlines the current approach to electoral management in Ireland before outlining and discussing how the Bill provides for the establishment of an Electoral Commission.

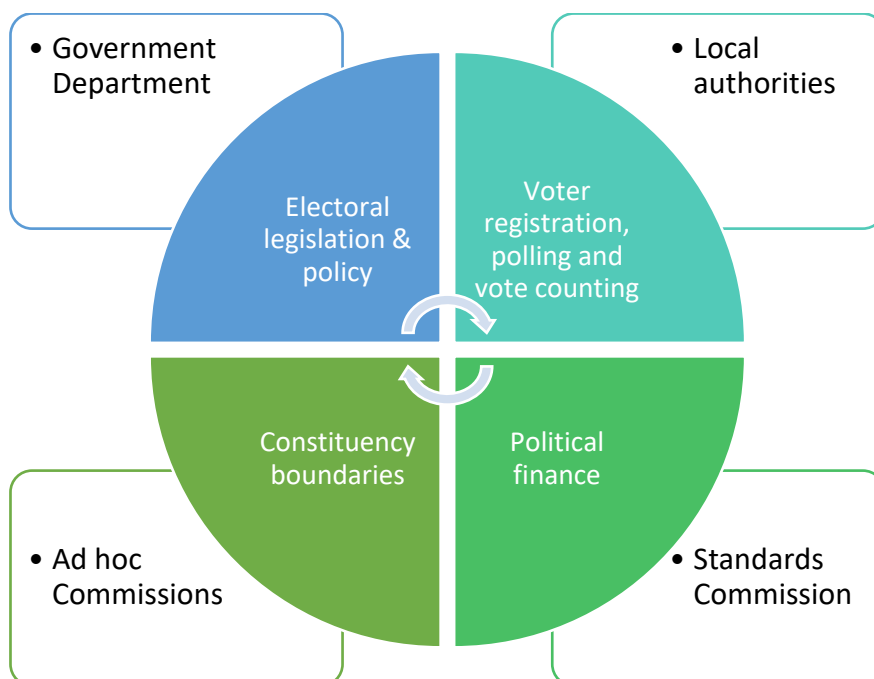
### 1.1 Why establish an Electoral Commission in Ireland?

The purpose of electoral commissions is generally to guarantee that electoral administration is carried out in an independent manner – free from political interference. Michael Marsh (TCD) has argued that an advantage in the Irish context is that an Electoral Commission would be proactive in addressing existing problems with electoral administration and unlike any actor currently involved with electoral administration, electoral administration would be its priority.<sup>10</sup> Reform initiatives from an independent Electoral Commission would less likely be perceived as party-political. As such, an Electoral Commission would bring cohesion and co-ordination to the heretofore piecemeal approach to improving electoral administration and advance electoral reform.<sup>11</sup>

**Various reports (see Appendix 1) have identified the policy problems that can be addressed by the establishment of an Electoral Commission**, including: inaccuracies with the electoral register, administration of referendum campaigns, revision of constituency boundaries and proactive examination of policy issues in electoral administration including political engagement of young people, voter education, facilitating voting on election day, postal and other advance methods of voting, ballot re-design and the counting of surplus votes, the electoral system and its effects on representation, safe and secure use of technology in voting and the effect of gender quotas on representation.<sup>12</sup>

Currently, Ireland has a fragmented system of election management, see Figure 1. Policy and legislation are developed in the Franchise Section of the Department of Housing. Local authorities are responsible for the administration of elections, this includes: voter registration, nominations, polling and the counting of votes. Ad hoc committees, established at intervals in the electoral cycle (national and local), determine the boundaries of constituencies. A Constituency Commission is established after each census of population to make recommendations on Dáil and European Parliament constituencies. Local Area Boundary Committees are established to make recommendations ahead of any revision of local electoral boundaries.<sup>13</sup> Political finance is within the remit of the Standards in Public Office Commission (Standards Commission) which is a permanent, independent statutory body. In addition, a new Referendum Commission is established ahead of each referendum to provide information on the referendum question and to promote voting in the referendum. The Registrar of Political Parties is the Clerk of the Dáil.

Within this system there is no body tasked with undertaking research on electoral events and voter behaviour, voter education or encouraging people to vote, except for the Referendum Commission which is tasked with promoting voting at referendums.

**Figure 1. Components of the current Irish electoral management system**

**Source: Oireachtas Library & Research Service**

The functions of the various bodies currently involved in the administration and management of Irish elections, and any policy problems identified, are summarised below:

- Returning Officers/Local Authorities
- Constituency Commission and Boundary Committees for Local Electoral Areas
- Standards in Public Office Commission
- Registrar of Political Parties
- Referendum Commission

### Returning Officers/Local Authorities

The Returning Officers have responsibility for the administration of elections and referendums across the 39 constituencies. This includes the registration of voters, processing the nomination papers of candidates, printing ballot papers, organising the polling places and the count centre, counting votes and declaring the results of the election.

During the Joint Oireachtas Committee's consultation on the establishment of an electoral commission (2016), the majority of witnesses and submissions were of the opinion that operational responsibility for organising elections should remain with Returning Officers, with the planned Electoral Commission to have an oversight, performance management, coordinating and support role. It was noted that the Returning Officers are largely independent of the public sector and enjoy relatively high levels of trust.<sup>14</sup> On foot of this, the Joint Oireachtas Committee (2016) concluded that the operational responsibility for organising elections and referendums should remain with Returning Officers (as outlined in the Electoral Acts), with the electoral commission being assigned a central oversight, performance management, coordinating and support role. During PLS on the General Scheme of the Bill in 2021, political scientist Theresa Reidy described the current arrangements for polling and counting as one the strengths of the current system.<sup>15</sup>

**Voter registration, the most central and costly aspect of the administration of elections, also presents the biggest challenge.** There has been much debate about whether responsibility

for the electoral register should remain with the local authorities given the poor state of the current register or whether it be assigned to an electoral commission.<sup>16</sup> The Joint Oireachtas Committee (2008) recommended the establishment of a National Electoral Office to prepare and maintain the national electoral register, with the functions of the local authorities transferred to the National Electoral Office. Since then, stakeholders have preferred an oversight role for the electoral commission with the local authorities retaining responsibility for the maintenance and updating of the register. The [Report of the Joint Committee on the Consultation on the proposed Electoral Commission](#) (2016) indicated a preference that the electoral commission would have an oversight and policy role in reforming the electoral register, while the local authorities would maintain their operational function, at least in the medium term. During PLS (2021) the Department advised the Committee that there is public confidence in local authorities managing the register, that there are practical benefits of local knowledge and that local authorities can draw staff from other parts of the authority during times of peak engagement on the register. The Committee recommended an oversight role for the Electoral Commission in relation to the electoral register.

The specific issues with the accuracy and completeness of the Irish electoral register are treated in a later section – Modernisation of the Electoral Register (Section 2).

### Constituency Commission<sup>17</sup>

Under the Constitution, the Oireachtas is required to revise Dáil constituencies at least once every twelve years. The courts have interpreted this as an obligation to carry out this revision when a census return discloses major changes in the distribution of the population.<sup>18</sup> The Constitution also sets out the ratio of TDs to population, requires equality of representation and a minimum size of three seats for each constituency, see Box 1.

#### Box 1: Constitution of Ireland, Article 16 - THE NATIONAL PARLIAMENT

16. 2. 1° Dáil Éireann shall be composed of members who represent constituencies determined by law.
- 2° The number of members shall from time to time be fixed by law, but the total number of members of Dáil Éireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population.
- 3° The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.
- 4° The Oireachtas shall revise the constituencies at least once in every twelve years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Éireann sitting when such revision is made.
- 5° The members shall be elected on the system of proportional representation by means of the single transferable vote.
- 6° No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three.

Following each Census a new Constituency Commission is established to make recommendations for revisions to Dáil constituencies within the parameters of the Constitution and the terms of reference set out in the *Electoral Act 1997, section 6.2* as amended - See Box 2 . Those recommendations are then implemented through legislation, the Commission's role is advisory.

Figure 2 illustrates the process whereby Dáil constituencies are revised.

### Box 2. Terms of reference for the Constituency Commission

“...a Constituency Commission shall, in observing the relevant provisions of the Constitution in relation to Dáil constituencies, have regard to the following:

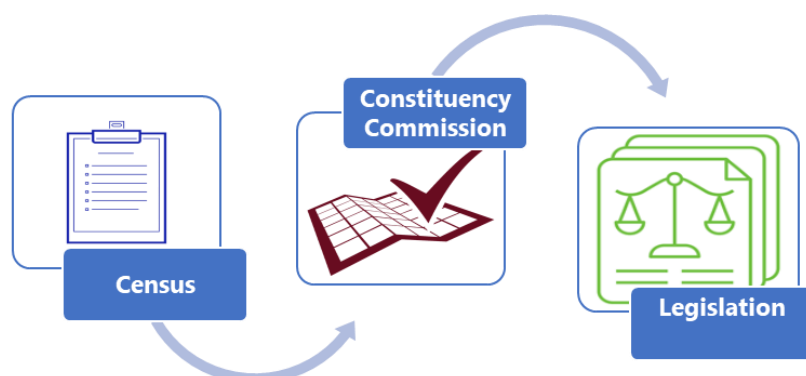
- (a) the total number of members of the Dáil, subject to Article 16.2.2° of the Constitution, shall be not less than 166 and not more than 172;
- (b) each constituency shall return 3, 4 or 5 members;
- (c) the breaching of county boundaries shall be avoided as far as practicable;<sup>19</sup>
- (d) each constituency shall be composed of contiguous areas;
- (e) there shall be regard to geographic considerations including significant physical features and the extent of and the density of population in each constituency; and
- (f) subject to the provisions of this section, the Commission shall endeavour to maintain continuity in relation to the arrangement of constituencies.”

**Source: Electoral Act 1997, section 6.2 as amended**

The number of TDs is currently 160. This was the maximum number of members provided for in the terms of reference of the Constituency Commission established after the 2016 Census, as per the *Electoral (Amendment) Act 2011*. That Commission’s recommendations were enacted by the *Electoral (Amendment) (Dáil Constituencies) Act 2017* which established the number of seats and the constituencies for the 2020 election.

The terms of reference set out in Box 2 were amended most recently by the *Electoral (Amendment) (Dáil Constituencies) Act 2017*, when the membership of the Dáil was increased in line with population projections to between 166 and 172. These will be the terms of reference for the Constituency Commission established after the 2022 Census.

**Figure 2: Process to revise constituencies and fix number of TDs.**



**Source: Oireachtas Library & Research Service**

Until 1979 governments introduced legislation to revise constituencies and this gave rise to allegations of gerrymandering.<sup>20</sup> In 1979 the first ad-hoc constituency boundary commission was set up to advise on constituency boundaries for the first direct elections to the European Parliament. From 1980-1995 there were five more ad hoc commissions established to advise on revisions of Dáil constituency boundaries. Apart from the 1988 report, all were enacted into law without modification.<sup>21</sup> The boundary revision process was put on a statutory basis with the provisions for an independent Constituency Commission set out in Part II of the *Electoral Act 1997* – political scientist John Coakley has described this as the ‘the final stage in the depoliticization of constituency boundary revision’.<sup>22</sup>



**The regular and unpredictable revision of constituencies remains controversial for sitting and potential TDs and it can also be confusing and alienating for voters. It is also a costly and time-consuming process.** An alternative approach to determining constituency boundaries has been put forward by Coakley and political geographer Adrian Kavanagh. They recommend a system of permanent constituencies, with the number of seats reallocated between constituencies after each census of population using a seat allocation formula to overcome the regular and significant boundary changes under the current system.<sup>23</sup> This is the approach found in several European countries with Proportional Representation electoral systems and multi-member constituencies, for example Switzerland, Spain, Belgium, Luxembourg, Portugal and Finland.<sup>24</sup>

### Local Area Boundary Committees

Section 23 of the *Local Government Act 2001* empowers the Minister for Housing, Planning and Local Government to define the local electoral areas and to amend those areas by order (statutory instrument). Before making an order, the Minister must establish a boundary committee to make a report recommending boundary changes within parameters set out by the Minister. The Minister must publish the report and have regard for its recommendations when making any order revising local electoral area boundaries. Boundary committees are independent and temporary bodies.<sup>25</sup> The most recent revision of local electoral areas was completed ahead of the local elections 2019. The boundary committees established in 2017 were required to have regard for the results of census 2016 and the commitment in the then programme for government to reduce the size of territorially large local electoral areas.<sup>26</sup>

Submissions to the Public Consultation on the RIA on the establishment of an electoral commission in 2018 were generally of the view that the functions of the Constituency Commission and the Local Electoral Area Boundary Committee should be transferred to the Electoral Commission. However, some submissions suggested that the Constituency Commission and Local Electoral Area Boundary Committee should remain either outside or partially outside an electoral commission. This was suggested to avoid the scenario whereby an electoral commission sets boundaries to suit its own administrative purposes as the organiser of all elections. Under this Bill, the proposed Electoral Commission will not be the organiser of all elections.<sup>27</sup>

### Standards in Public Office Commission (Standards Commission)

The Standards in Public Office Commission (Standards Commission) was established under the *Standards in Public Office Act 2001*, it replaced the Public Offices Commission established under the *Ethics in Public Office Act 1995*. The Standards Commission has supervisory roles under four Acts intended to avoid political corruption:

1. The *Ethics in Public Office Acts* requires the disclosure of interests and evidence of tax compliance from members of the Oireachtas and public servants.
2. The *Electoral Act 1997* regulates political finance, including political donations and election expenditure.
3. The *Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Act 2014* regulates expenditure of public funds to political parties and independents (parliamentary activities allowance).
4. The *Regulation of Lobbying Act 2015* regulates the lobbying of politicians and public servants.

Unlike other bodies in the management of Irish elections, the Standards Commission is a permanent, independent statutory body and while there have been calls for it to be better resourced to enforce compliance, there is little criticism of its performance of its duties. Both the Preliminary Study on the Establishment of an Electoral Commission (2008) and the Government Consultation paper (2015) envisaged the Standards Commission being central to the establishment of an electoral commission with either the electoral commission formed around the Standards Commission or the functions of the Standards Commission transferred to the new body.

In its submission to the public consultation **the Standards Commission outlined a series of challenges and structural issues that impact the Commission's work.**<sup>28</sup> It is expected that some of the issues associated with resources and independence would be addressed by the establishment of an electoral commission.

### Structural Issues for the Standards Commission

- Lack of independence from government in terms of budget, staff appointments, and reporting to the Oireachtas.
- A burdensome framework for reporting, seven separate statutory reports required under the Electoral Act.
- Four out of the six members of the Commission are ex-officio and have numerous statutory responsibilities in addition to their membership of the Commission, which impacts considerably on the time that can be dedicated to the work of the Commission.
- Secretariat staff also have responsibility for other operations within the Commission's remit, which means there is limited capacity for taking on work beyond processing electoral returns, such as inquiries into non-compliance.

The Standards Commission has made several recommendations to amend the political ethics & electoral finance regimes, these have been summarised with progress reports in the Commission's Annual Report 2020.<sup>29</sup>

### Referendum Commission

Referendum Commissions are temporary bodies, there is one established for each referendum to explain the subject matter of the proposals, to promote public awareness and encourage voting. Referendum Commissions have recommended that a permanent independent body be established to overcome the lack of time and resources to promote voter registration or voter turnout or to analyse the factors that influence them.<sup>30</sup> As with the Constituency Commission, most members of the Referendum Commission are ex-officio with additional statutory functions.

There are three referendums promised in the Programme for Government (2020):

1. Housing
2. Extending the franchise at presidential elections to Irish citizens living outside the State.
3. Article 41.2 of the Constitution (Women in the home)

In September 2019 a Referendum Commission was established in relation to the proposal for an amendment of the Constitution contained in the *Thirty-ninth Amendment of the Constitution (Presidential Elections) Bill 2019*. Court of Appeal Judge Mr David Barniville has been nominated as the Chairperson of the Commission.<sup>31</sup>

### Registrar of Political Parties

There is no legal requirement for political parties to be registered. However, parties must register (in addition to other qualifying criteria) to be in receipt of state funding and for their candidates to include any political party affiliation and party emblem on the ballot paper. Currently, the Registrar of Political Parties is the ex officio Clerk of the Dáil, with an appeal board to consider any disputes arising.

The registration of political parties was first introduced with the *Electoral Act 1963* for the purpose of including political affiliations on ballot papers. The *Electoral Act 1997* introduced state funding to 'qualified political parties' in the form of an annual payment for non-election related administration. Qualified parties must be registered to contest Dáil elections and have received 2% of the first preference votes at the previous general election. The 1997 Act also requires political parties to disclose donations and election expenses.



The *Electoral (Amendment) Act 2001* further revised the conditions of registration to allow the photographs of candidates and political party emblems on the ballot papers. Parliamentary parties are also required to be registered and have at least one member in the Dáil or Seanad, to receive the annual parliamentary activities allowance *Ministerial and Parliamentary Offices Act 1938*, as amended by the *Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Act 2014*.

## 1.2 Potential functions of an Electoral Commission

While there is a broad consensus among politicians, political scientists, and other stakeholders that an Electoral Commission should be established in Ireland, there is some disagreement about its functions including which of the above functions should be assigned to an electoral commission. These issues were addressed by the Joint Committee in 2016 and during the Pre-Legislative Scrutiny on the General Scheme of this Bill. We look at each in turn.

The establishment of an Electoral Commission has been on the policy agenda since 2007, and since then there have been a series of reports and consultations to inform the development of the legislation. There is a broad agreement that the functions of the Registrar of Political Parties, the Constituency Commission and Local Boundary Committees, the Standards Commission and the Referendum Commission should be transferred to a new Electoral Commission. There have been differences of opinion about the roles of the Electoral Commission and the local authorities in maintaining the electoral register and running electoral events. Given the poor state of the electoral register there is a body of opinion that would transfer maintenance of the register to the Electoral Commission. On the other hand, the local authorities are seen to do a good job and to have the confidence of the public, and in this scenario the Electoral Commission would provide guidance and oversight to the local authorities in respect of the register and electoral events.

Since 2008, advocates for the establishment of an Electoral Commission have recommended that the Commission would also have research, advisory and voter education functions. Currently, there is no body with this function, save the Referendum Commission and to some extent the Department. The Joint Oireachtas Committee (2016) recommended that the Commission be assigned a statutory duty to conduct independent research on electoral policy to inform Government, Parliament, and the Public. In addition, the Committee recommended that an electoral commission should develop and implement innovative ways to enhance voter education and engagement.

Over time additional functions have been recommended for the Electoral Commission, most recently the regulation of online political advertising. Table 1 lists the functions recommended in the key reports on its establishment since 2007.

**Table 1 Functions for the Electoral Commission set out in various reports**

Report	Electoral Commission functions recommended
<b>Agreed Programme for Government 2007</b>	<ul style="list-style-type: none"> <li>• Electoral administration and oversight,</li> <li>• Compilation of a new national rolling electoral register,</li> <li>• Standing Constituency Commission,</li> <li>• Electoral expenditure functions</li> </ul>
<b>Preliminary Study 2008</b>	<ul style="list-style-type: none"> <li>• Register of Political parties,</li> <li>• Compilation of the electoral register,</li> <li>• Constituency Commission functions,</li> <li>• Administration of elections (nominations to declarations),</li> <li>• Party and election funding,</li> <li>• Research,</li> <li>• Promote voter registration and turnout</li> </ul>
<b>Joint Committee on the Consultation on the proposed Electoral Commission 2016</b>	<ul style="list-style-type: none"> <li>• Register of political parties</li> <li>• Operational and policy role of Franchise Section of Dept</li> <li>• Regulation of political funding and election expenditure (Standards Commission)</li> <li>• Functions of the Referendum Commission</li> <li>• Functions of Constituency Commission and Local Boundary Committees</li> <li>• Oversight of preparation of Electoral Register in the medium term</li> <li>• Oversight of organisation of elections and referendums</li> </ul>
<b>Programme for Government 2020</b>	<ul style="list-style-type: none"> <li>• Oversight of elections and referendums,</li> <li>• Public information,</li> <li>• Update and maintain the electoral register,</li> <li>• Conduct elections,</li> <li>• Regulate online political advertising,</li> <li>• Examine use of postal voting,</li> <li>• Examine use of posters</li> </ul>
<b>General Scheme of the Electoral Reform Bill</b>	<p><b>Initial Functions (Gov agreed 20 Oct 2020)</b></p> <ul style="list-style-type: none"> <li>• Referendum functions</li> <li>• Registration of political parties' function</li> <li>• Dáil &amp; EP constituency review functions</li> <li>• Local Electoral Area Boundary Review Functions</li> <li>• Research, advisory and voter education function</li> </ul>

	<ul style="list-style-type: none"> <li>• Oversight of electoral register function (<i>not maintenance &amp; control</i>)</li> <li>• Regulation of Online Political Advertising Function</li> </ul> <p><b>Functions that could be added later</b></p> <ul style="list-style-type: none"> <li>• Oversight of electoral events</li> <li>• Regulation of political funding and electoral expenditure</li> </ul>
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**Source: Oireachtas Library & Research**

The Regulatory Impact Assessment (RIA) on the establishment of an Electoral Commission (2020) and the Joint Committee on the Consultation on the Proposed Electoral Commission (2016) considered the option of establishing the Electoral Commission on a statutory basis with limited functions initially, with further functions assigned later or establishing the Electoral Commission with all functions transferred from the outset. The RIA described phasing the establishment of the Electoral Commission to minimise any risk of compromising the high level of trust in the integrity of elections and referendums. Submissions to the Joint Committee recommended avoiding a ‘Big Bang’ approach while ensuring there was a timetable for the transfer of all functions to the Electoral Commission.

In their submissions to the Public Consultation on the Regulatory Impact Analysis on the establishment of an Electoral Commission in 2018 both the Referendum Commission and the Standards in Public Office Commission supported the establishment of an Electoral Commission to consolidate various electoral functions. Both bodies favoured establishing an Electoral Commission on a statutory basis and assigning a limited number of functions initially, with a view to assigning further functions over time. The Standards Commission identified the key challenges to the administration of elections as digital technology and the use of the internet as a communication and campaign tool, the increasing frequency of referendums and foreign involvement in political finance.

### 1.3 Composition options

There has also been some disagreement about the composition of the Electoral Commission. The independence of an electoral commission from the political system is a priority for electoral integrity reasons. Such **independence is ensured through the governance and resourcing structures put in place, and also the membership of the commission.**

Initially, the recommendations for the composition of an electoral commission reflected the membership of the bodies it was to replace, mainly ex officio roles.<sup>32</sup> Through the various consultations a strong argument against ex officio members has developed, with a preference for members dedicated to the role who have specific experience and expertise in elections and electoral administration. Table 2 illustrates how plans for the composition of the Electoral Commission have changed over time.

The Standards Commission recommended that the structure of the new commission should ensure that members are dedicated to the role on a full-time basis and not as an additional function to other statutory roles.<sup>33</sup>

The General Scheme set out a larger and more diverse membership, with up to 9 members, including two ex officio members and at least four members with expertise/experience in electoral matters in Ireland and abroad, administration of the electoral system and public administration including financial accountability. At PLS political scientists Teresa Reidy, Jane Suiter and David Farrell recommended a smaller board to avoid long, protracted discussions and impediments to

progress. They noted that internationally electoral commissions generally have smaller boards and are chaired by former political or senior civil servants. While electoral commissions have strong legal sections, few are chaired by judges.<sup>34</sup>

**Table 2. Composition options for an Electoral Commission**

General Scheme 2021	Joint Committee 2016	Preliminary Study 2008
<p><b>7-9 members</b></p> <p><b>Chair:</b> Judge</p> <p><b>2 ex office members:</b></p> <ul style="list-style-type: none"> <li>• Ombudsman</li> <li>• Clerk of Dail</li> </ul> <p><b>4-6 Ordinary members</b> To include experience and/or expertise in electoral matters, electoral systems internationally, administration of Irish electoral system and public administration.</p> <p>The Bill includes additional areas of experience/expertise – see below.</p>	<p><b>6 members</b></p> <p><b>Executive member:</b> Chief Electoral Officer (and provision for a Deputy)</p> <p><b>Non-executive members:</b></p> <ul style="list-style-type: none"> <li>• Judge/Former Judge of Supreme Court (Chair)</li> <li>• Clerk of Dail</li> <li>• Clerk of Seanad</li> <li>• Ombudsman</li> <li>• C&amp;AG</li> </ul> <p><b>Or</b> on bass of criteria set out in legislation which value impartiality and expertise/experience in electoral management Ireland/Abroad.</p>	<p><b>5 members</b></p> <p><b>Chair:</b> Judge/former judge of Supreme Court or High Court</p> <p><b>Ordinary members</b></p> <ul style="list-style-type: none"> <li>• C&amp;AG</li> <li>• Ombudsman</li> <li>• Clerk of Seanad</li> <li>• Clerk of Dáil</li> </ul>

Source: Oireachtas Library & Research

## 1.4 Provisions of the Bill

IDEA International describes three models of electoral management: first, the **Independent Model** where the electoral management body is institutionally independent of government, it may instead be accountable to the legislature, the judiciary or the head of state. Second, the **Government Model** where elections are organised and managed by government department and/or local authorities (current model in Ireland). The third is the **mixed model** where there are two distinct bodies, an independent electoral management body that develops policy, monitors and supervises the running of elections and an implementation body within a government department or local authorities that runs the elections.<sup>35</sup> – The mixed model is proposed for Ireland in the current Bill.

The Electoral Commission is to be funded from voted expenditure.

This section looks at the principal provisions of Part 2 of the Bill which provides for the establishment of a body to be known in Irish as An Coimisiún Tochcháin and, in English as the Electoral Commission. We focus on the following:

- Membership (Chapter 3, Section 8-12)
- Governance (Chapter 3, Sections 13-28)
- Functions (Sections 19-68)

### Membership

The Bill provides for the Electoral Commission to comprise between 7 and 9 members (s.8-12), as follows, and summarised at Figure 3:

The **Chairperson** will be either a former judge of the Supreme Court, the Court of Appeal or the High Court, or a judge of the Supreme Court, or a judge of the Court of Appeal, or a judge of the High Court. The Chairperson will be nominated by the Chief Justice and appointed by the President and their term of office will be for 7 years – they cannot be reappointed for a second term. The Commission can nominate a Deputy Chairperson.

**2 ex officio members**, the Ombudsman and the Clerk of the Dáil, or if there are vacancies in either office, the Director of the Office of the Ombudsman or the Clerk Assistant of the Dáil, respectively.

**4-6 ordinary members** are to be nominated by Government, approved by the Dáil and Seanad and appointed by the President. Ordinary members are to be identified and recommended to the Government by the Public Appointments Service (PAS) following a selection competition. PAS and the Minister are to set the requirements for appointment. Knowledge of and experience in the following areas are desirable for ordinary members:

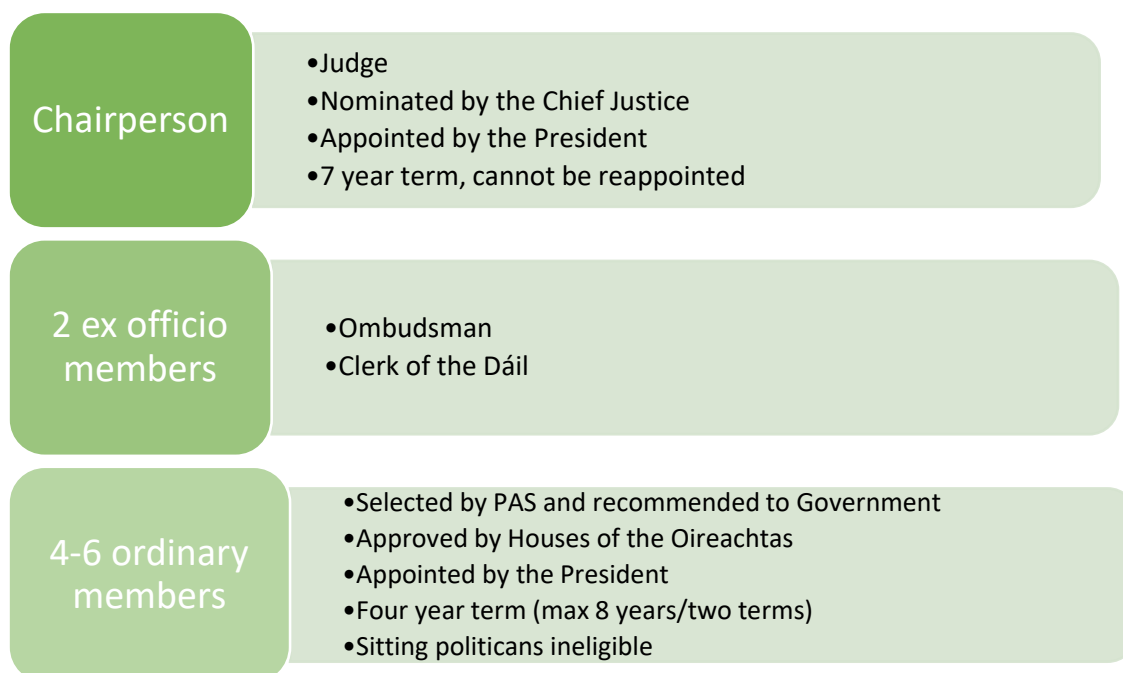
- electoral matters, including any experience or expertise gained as a former member of the Houses of the Oireachtas or a local authority;
- the administration of the Irish electoral system;
- administration of electoral systems outside the State;
- public administration and governance, at a senior level;
- expertise in financial matters; and
- advertising and publicity, particularly in relation to the digital aspects of a political campaign.

The term for ordinary members is four years, and they can serve a maximum of two terms (8 years). Re-appointment for a second term does not require a selection process or resolutions of the Houses of the Oireachtas. However, two of the ordinary members appointed to the newly established Commission will serve for a period of three years, and if re-appointed the second term will also be for three years. This is to allow for a degree of continuity on the Commission and the gradual replacement of members. The President, on the advice of the Government will decide which two ordinary members serve the shorter terms.

The Public Appointments Service is required to recommend an equal number of men and women for appointment as ordinary members, as such there would be a minimum of 29% of each gender on the Commission, which is lower than the Government's goal of 40% on State Boards.<sup>36</sup>

Members of the Oireachtas, European Parliament and local authorities are ineligible for appointment, as are people who have been convicted on indictment of an offence, convicted of an offence involving fraud or dishonesty or is disqualified under the *Companies Act 2014*. The Bill also sets out the grounds for the removal of ordinary members.

It is the Commission, with the consent of the Minister for Public Expenditure and Reform, that requests the appointment of the additional two ordinary members if they are considered necessary for the effective performance of its functions.

**Figure 3. Composition of the Electoral Commission (7-9 members)**

**Source: Oireachtas Library & Research Service**

The Commission will decide its own **procedures**, subject to a minimum of one meeting every three months, a quorum of at least four members for meetings and any votes are to be decided by a majority of those present and voting, with the chairperson having a casting vote if necessary (s.13).

The Electoral Commission is empowered to establish **committees** to advise and assist it and to delegate functions to any committees. Committees can include people who are not on the Commission or its staff, in this way the Commission can obtain additional expertise as required (s.14).

Commission **staff** will be civil servants, the Commission with the consent of the Minister for Public Expenditure and Reform will determine the grades and other terms and conditions (s.16). The Commission can appoint **consultants and advisers** paid from the funds of the Commission (s.15).

### Governance

There is to be a **Chief Executive** of the Electoral Commission to implement the policies of the Commission, manage and control staff, provide information required by the Commission and make proposals on any matter relating to the Commission's functions. The Chief Executive will be appointed by Government for a term of five years. He or she can be reappointed but cannot serve longer than 10 years/two terms. The first chief executive will be appointed directly by Government. The Public Appointments Service will hold a selection competition to identify and recommend future appointments. The Chief Executive is not a member of the Commission or a committee of the Commission, but can speak and give advice at meetings (s.20-22).

The Bill sets out accountability mechanisms for the oversight of the Electoral Commission by the Government and by the Houses of the Oireachtas.

The Chief Executive is the **Accounting Officer** for the Commission (s.25).

**Accounts** are to be prepared in the standard public service format, submitted to the Comptroller and Auditor General and the Comptroller and Auditor General's report on the accounts is to be laid before both Houses of the Oireachtas(s.17).



When requested to do so, the Chief Executive must **appear before the Committee on Public Accounts** (PAC), to give evidence, among other things, to the propriety of its transactions, its use of resources and any matter affecting the Commission referred to in a report of the Comptroller and Auditor General laid before Dáil Éireann (s.23). In addition to presenting before the PAC, the chief executive must also appear before Oireachtas Committees upon written request. However, he or she will not be required to give account for any matter “which is or has been or may be at a future date, the subject of proceedings before a court or tribunal in the State”. If the Chief Executive declines a request for this reason and the Committee does not withdraw its request the Chief Executive can apply to the High Court to determine the matter (s.24).

The Commission is required to publish an **annual report** on the performance of its functions to include details of research completed by the Commission, recommendations made to the Minister on electoral policy or procedures, its educational and information programmes to promote public awareness and participation in elections and referendums, and reports on electoral events, as well as progress on the implementation of its strategy statement (s.26).

The Commission is required to prepare three-year **strategy statements** to include its aims, objectives, outputs and strategies. Strategy Statements are to be submitted to the Joint Oireachtas Committee on Housing, Local Government and Heritage, laid before the Houses of the Oireachtas and published (s.27).

The Bill sets out a specific **role for the Joint Oireachtas Committee on Housing, Local Government and Heritage (JOC)** in relation to the Electoral Commission.

- Strategy Statements are to be submitted to the JOC.
- The Commission is to consult with the JOC (and the Minister and others considered appropriate) when preparing its research programme and provide six monthly updates on the programme to the JOC.
- Reports (and other information requested by the JOC) on Referendum functions are to be presented to the JOC.
- Constituency Review Reports are to be presented to the JOC.
- Removal of a Chief Executive is to be notified to the JOC, as well as the Minister.

**Electoral Commission documents to be laid before both Houses of the Oireachtas Members of the Oireachtas**

1. Annual Report
2. Comptroller & Auditor General's report on the financial accounts
3. Three-year Strategy Statement
4. Ministers draft request to the Commission setting out matters to be considered in a Local Electoral Area Boundary Review – to be approved by resolution of each House
5. Annual Research programmes setting out the subjects, methods, and estimated costs
6. Post electoral event reviews

## Functions

Chapter 4, Section 29 of the Bill sets out the main functions of the Electoral Commission, and Chapters 5-11 set out the details of these functions which are to:

1. Explain to the public the subject matter of referendums (Chapter 5)
2. Review constituencies for the election of members to the Dáil and the election of members to the European Parliament (Chapter 7)
3. Review local electoral area boundaries and report to the Minister in relation to those boundaries (Chapter 8)
4. Conduct research on electoral policy and procedure and make recommendations to the Minister (Chapter 9)
5. Provide information on electoral processes (including referendums) and encourage participation in the electoral and democratic processes of the State (s.66)
6. Prepare and maintain the Register of Political Parties (Chapter 6)
7. Oversee the electoral register (Chapter 10)
8. Regulate online political advertising (Part 4)

The functions assigned by the Bill might be examined in the context of the discussion on functions above. The Bill does not give the Electoral Commission any role in the oversight of elections and referendums; functions in this area remain with the local authorities. Nor will the Electoral Commission have any role in the regulation of political funding and election expenditure as these functions remain with the Standards in Public Office Commission. This represents a phased transfer of functions to the Commission rather than a 'big bang' approach. During PLS the Minister for State said that these and additional functions would be transferred to the Commission in future legislation (PLS 22 June 2021).

In our discussion of the functions of the Commission we focus first on the functions not previously carried out by any other body, the research, advisory and voter education functions, and second on the functions on being transferred to the Commission by the Bill, referendum functions, registration of political parties, constituency reviews and reviews of local electoral areas.

### Research, Advisory and Voter Education Functions (Chapter 9)

As noted above there is currently no body tasked with undertaking research on electoral events and voter behaviour, voter education or encouraging people to vote, except for the Referendum Commission which is tasked with promoting voting at referendums. The Bill sets out a specific research, advisory and education function for the Electoral Commission.

At the launch of the Bill Minister Noonan said that he would be tasking the commission to prioritise research on the Scottish experience of reducing the voting age to 17 and examining the size of constituencies and representational outcomes.<sup>37</sup>

### Research

The Commission is required to prepare an annual programme of research, setting out the subjects and how any research will be carried out as well as the estimated cost of the research. In preparing its programmes the Commission is to consult with the Joint Oireachtas Commission, the Minister, and any other person it considers appropriate. The programme is to be laid before the Houses of the Oireachtas and an update to be provided to the Joint Oireachtas Committee after six months.



### **Advisory function**

The Commission can independently, and must when requested to do so by the Minister, make recommendations to the Government or the Minister on proposals for legislation or policy matters in relation to electoral policy or procedures. The Minister will lay any reports before the House of the Oireachtas.

### **Education function**

The Commission is required to develop educational and information programmes to promote public awareness of, and participation in elections and the democratic process more generally. It is also to encourage the public to vote at elections and referendums.

### **Post electoral reviews**

The Commission is required to publish a report on the administration of elections and referendums within six months of the event.

### **Referendums (Chapter 5)**

The Bill repeals the *Referendum Act 1998* which provided for the Minister to establish a Referendum Commission whenever a referendum was due to be held. Chapter 5 of the Bill assigns the Referendum Commission functions to the Electoral Commission.

- To prepare a general explanation of the subject matter of the proposal for the referendum
- To publish the explanations on TV, radio and other electronic media to reach the electorate, including those with sight and hearing disabilities
- To promote public awareness of the referendum and encourage the public to vote

Once the Minister has made the Polling Day Order the Commission is to publish referendum notices setting out the arrangements for organisations to apply to be approved bodies for the referendum. The Commission can approve bodies for the purposes of a referendum and the Bill sets out the process. Approved bodies can have representatives present when postal ballot papers are being sent out and opened, at polling stations and at the counting of the vote.

Within six months of a referendum the Commission is required to submit a report to the Joint Oireachtas Commission and provide a copy to the Minister.

### **Registrar of Political Parties (Chapter 6)**

The Chief Executive of the Electoral Commission is the Registrar of Political Parties (s40), and any appeals are to be determined by the Commission (s.50). The Bill sets out the requirements for the registration of parties and transfers the function from the Houses of the Oireachtas. The Register of Parties in force immediately before the commencement of s.41 of the Bill continues in effect.

### **Constituency Reviews**

The Commission is to automatically review Dáil and European Parliament constituencies on the publication of the preliminary results of the Census (s.55). This reflects the independence of the Commission, heretofore Constituency Commissions were established by Ministerial Order. Three months after the final result of the census of population has been published the Commission is to present its recommendations to the Joint Oireachtas Commission and lay the report before the Houses of the Oireachtas. Heretofore the reports were presented to the Ceann Comhairle.

The Minister will make a written direction to the Electoral Commission to review the European Parliament constituencies where there has been a change in the number of Members of the European Parliament to be returned from Ireland and the Commission would not be due to make a review of constituencies before the next European Parliament elections (s.55). The Commission's report in these circumstances is to be presented to the Joint Oireachtas Commission and laid before the Houses of the Oireachtas within two months (s.57).

The Electoral Commission will request and consider all public submissions as part of its review of constituencies (s.58)

A Census was taken on 3 April 2022, having been postponed for one year due to Covid 19. Based on the timeframes of the previous two Censuses the Preliminary Report should be published by the end of June 2022 and the Final Report in March 2023.<sup>38</sup>

If this Bill is enacted and the Electoral Commission established promptly, it is likely that reviewing the Dáil Constituencies in line with the 2022 Census will be its first major task.

Responding to a Parliamentary Question in March 2022, the Minister for State said there has been no decision regarding the revision of local electoral area boundaries ahead of the next elections in 2024.<sup>39</sup>

### **Local electoral area boundary reviews (s59-62)**

The Commission is assigned the role of reporting to the Minister on local electoral area boundaries in advance of any boundary changes. Before requesting the Commission to report on boundary changes the Minister must lay a draft request before the Houses of the Oireachtas and each House must approve the request.

The Central Statistics Office and Ordnance Survey Ireland will provide assistance to the Electoral Commission free of charge (s.28).

### **Electoral Register**

The Commission is assigned an oversight role for the electoral register. This function is treated fully in Section 2 of the Digest: Modernisation of the Electoral Register.

### **Regulation of online political advertising**

The Bill establishes the regulatory framework to ensure transparency in online political advertising. Section 3 of the Digest covers the new regulatory framework and the role of the Electoral Commission in terms of monitoring and encouraging compliance and carrying out investigations into suspected contravention of the regulations.

### **Cost of the Electoral Commission**

The 2018 RIA on the establishment of the Electoral Commission (December 2018) estimated the cost to the exchequer of establishing the Electoral Commission of between €3.3m and €3.5m in the first year depending on whether all functions were assigned initially or over time, and between €1.8m and €2m per annum thereafter.<sup>40</sup>

During PLS (2021) the Department stated that the first-year costs are estimated to be between €2.25 million and €2.7 million with annual costs thereafter in the region of €1.5 million to €1.7 million.<sup>41</sup>

## 2. Modernisation of the Electoral Register

The Electoral Register is an essential component of the voting process – without a trustworthy and reliable voter list, free and fair elections are not possible. ACE, the Electoral Knowledge Network, describes voter registration as ‘the most central and the most expensive aspect of the electoral process’, costing up to 50% of the overall cost of administering elections.<sup>42</sup>

ACE suggests a target for electoral registers to be 90% complete, 85% current and 97% accurate, this means the system should be expected to have 9 out of 10 eligible citizens on the list, current information on voters in 8.5 instances out of 10, and data entry errors in only 3 records out of 100.<sup>43</sup>

In this section we describe the problems with the electoral register and solutions identified to fix them (2.1), we set out how the electoral register is currently compiled (2.2), then we look at what the Bill proposes and discuss issues arising (2.3).

### 2.1 Problems with the Electoral Register and solutions identified

The Electoral Register includes the names of people entitled to vote at elections. Several problems have been identified with the current register in Ireland– inaccuracies and duplications in the register, a complex registration process, poor maintenance of the register, turnout being under-reported due to the inflated register, and voters are turned away from polling stations as they are not on the register. The Joint Committee (2010) found issues with the completeness and the accuracy of the register which arise “from the wide disparity in the compilation and management of the register and the application of electoral law among the 34 registration authorities nationwide”.<sup>44</sup>

It has been established that the electoral register is inflated, the number of names on the register exceeds the population eligible to vote, this is due to double counting (people registered at more than one address), counting the deceased and counting emigrants.<sup>45</sup> However, there has been no comprehensive research to ascertain the exact extent of the problem at a national level.

**Concern about the electoral registration process date back to the 1980s.** In 1986 the ESRI conducted a study of the accuracy of the register and estimated that 3% of those entitled to vote were not registered, and that 7% of the register was comprised of voters that should have been deleted from the register because they had died, registered elsewhere, or emigrated.<sup>46</sup> In 2001 O’Malley examined turnout figures for Irish elections and found that turnout is under-reported by 4-5% because of inaccuracies in the register.<sup>47</sup> In 2011, Flynn estimated that there were 200,000 more people on the electoral register compared to the number who would be eligible to vote based on Census 2011.<sup>48</sup> However, in some local authority areas the register under-represents the population eligible to vote. Kavanagh (2010) found that this mainly affects areas of rapid population growth and change, such as inner-city and suburban areas.<sup>49</sup>

The burden of registering can prevent some people from voting – this particularly affects young people and minority groups. There are also voters removed from the register in error due to the complex process of the annual canvas and the creation of the supplementary and final registers.

If the electorate does not reflect the general population, there is a risk that the political elite will pay greater attention to the policy needs of those who have voted rather than those who have abstained.<sup>50</sup>

In 2008, the Joint Oireachtas Committee on the Environment, Heritage and Local Government attributed the problems of accuracy, duplication, and omissions in the Electoral Register to the 34 registration authorities that are legally responsible for preparing and maintaining the registers. The Committee stated that:

“Updating the register and making preparations for elections is not a core function of local authorities, and is not something that is given priority every year. The level of priority afforded to this task varies from authority to authority. Despite some efforts of the Department in promoting uniformity of approach among these authorities, it became clear to Members that the serious errors prevailing with electoral data arise directly from the –

Varying degrees of priority afforded to maintaining that data,

Wide variety of practices among registration authorities, and

Insufficient field-workers and door-to-door visits to obtain the necessary information in some registration authorities.”<sup>51</sup>

It has been argued, on the other hand, that the problems of inaccuracy stem from the need to amend the legislation around registration, rather than from any under-performance by registration authorities and that legislative change is necessary for modernisation of the register.

In fact, as noted above there has been much debate about whether responsibility for the electoral register should remain with the local authorities given the poor state of the current register or whether it be assigned to an Electoral Commission. There is a growing consensus that the local authorities are best placed and resourced to maintain the register with an oversight and guidance role from the Electoral Commission to ensure consistent good practices across all local authorities. During PLS the Department advised the Committee that there is public confidence in local authorities managing the register, that there are practical benefits of local knowledge and that local authorities can draw staff from other parts of the authority during times of peak engagement on the register.

See Appendix 2 for a summary of the recommendations for reforming the electoral registration process made by the Joint Oireachtas Committee on the Environment, Heritage and Local Government in 2008 and other Committee and Departmental reports since.

Modernisation of the electoral register should serve two key purposes: improve the accuracy of the electoral register and make it easier for voters to register to vote.

## 2.2 Why is the Electoral Register inaccurate and incomplete and how can it be improved?

The process of establishing and maintaining the electoral registers is set out in the Box below.

### Box. 3 How the register of electors is compiled and maintained

Currently, the Register of Electors, is prepared and published by the Registration Authorities (i.e. county, city, and city and county councils) on an annual basis. Registration is at household level, all those over the age of 18 or reaching the age of 18 before the next February 15 in a household are to be included on the registration form. The person filling out the form makes a signed declaration that the information provided is correct. Forms are available from local authority offices, public libraries, Garda Stations and online for printing. It is not currently possible to register to vote online.

On November 1 the **Draft Register** is published. This is followed by a public information campaign to encourage voters to check that they are correctly registered before 25 November. This checking can be done at local authority offices, Garda stations and public libraries, or online. The **final Register of Electors** is published on 1 February and comes into force on 15th

February for elections and referendums held in the next year. Figure 1 illustrates the annual cycle.

**Figure 4. Electoral register - annual cycle**



**Source: Oireachtas Library & Research Service**

People included in the Draft Register on 1 November are not entitled to vote in any election or referendum that occurs before that register comes into effect on 15 February of the following year. Voters in this position must apply for inclusion on the **Supplementary Register** 15 days before polling day. Applications must be signed in the presence of a member of An Garda Síochána who is satisfied with the identity of the person.

There is also a **postal voters list** and a **special voters list** to facilitate voters who cannot vote in person at their local polling station due to very specific circumstances.<sup>52</sup> Voters must apply for inclusion on these lists ahead of the 25 November deadline. Voters who are eligible for, but not already included in, the postal or special voters list, can apply for inclusion in the relevant supplement to these lists published prior to each election and referendum.

Since 2004, registration authorities are required to publish two versions of the register – the **full register** and the **edited register**. The full register lists everyone who is entitled to vote and can only be used for an electoral, or other statutory purposes. The edited register contains the names and addresses of people whose details can be used for direct marketing by commercial or other organisations. Electors can opt out of the edited register

Five features in the current system for compiling the electoral register have been identified as causing the inaccuracies and incompleteness of the register:<sup>53</sup>

1. Use of household as opposed to an individual registration system. Particularly in shared accommodation rather than family households.
2. Absence of a systematic facility to check the validity of names on the register and to cross check records. This results in people being registered at more than one address.
3. No central body to coordinate cross-checking between different registration authorities and ensure high standards across all authorities

4. Lack of a systematic facility to remove people from the register, apart from deceased persons.
5. Failure to adequately fund local authorities which see registration duties as an additional, rather than a core function. At the PLS an official from the Department described some of the challenges with field work in relation to the register and noted that some local authorities use field workers (for house-to-house enquiries) more than others.<sup>54</sup>

Electoral integrity is compromised by an over-inflated register as it opens up the opportunity for fraudulent use of ballots, flouting the one person one vote principle. An over-inflated register also results in reported turnout figures that are lower than the actual turnout.

Voting is not a high priority for all citizens and the complexity of the registration process can put some potential voters off. Quinlan (2015) found that registration procedures have a greater impact on the likelihood of voting than either election timing and (weekend or time of year) and the number of hours the polls are open.<sup>55</sup>

Key recommendations to reform the process for voter registration identified include:

1. **Central oversight of the registration process** to ensure consistency across the local authorities that have responsibility for compiling and maintaining the register. Some commentators have suggested that the Electoral Commission should be the body to compile and maintain the electoral register as they would devote resources, engage expert advice, greater stake in ensuring the maintenance of registers.
2. **A single rolling register** would improve the efficiency of the process as it would replace the publication of Draft and Final Registers on an annual basis and Supplementary Registers in advance of elections and referendums by the local authorities.
3. **Individual rather than household registration.** Individual registration is recommended to improve the accuracy of the register. However, several respondents to the Public Consultation on the Modernisation of the Electoral Register (2019) were concerned that a move to individual registration would negatively impact the completeness of the register, and specifically among certain demographics, young, mobile people and those in need of assistance to register.<sup>56</sup>
4. **Use of PPS numbers to identify voters.** While the use of PPS numbers to identify voters is recognised as being efficient, the need to be fully compliant with data protection legislation is also recognised by stakeholders. During PLS, Mr Dale Sunderland, Deputy Commissioner at the Data Protection Commission identified two key issues pertaining to the use of PPS numbers:
  - i. Use of PPSN must be a justifiable solution to identified issues with the electoral register and should not have a disproportionate impact on individuals data protection.
  - ii. Does the legal basis for the PPSN, set out in the Social Welfare Acts, support the issuance of PPSNs to individuals for the sole purpose of registering as electors?<sup>57</sup>

Sunderland recommended a Data Protection Impact Assessment (DPIA) to explore data protection risks and suitable safeguards with using PPS numbers to identify electors, and he recommended that the DPIA should be published for reasons of transparency. He also recommended another DPIA in relation to processing the data of people under 18, for the purposes of pre-registration of voters and targeted electoral awareness material.



Public awareness is critical to the success of modernising the electoral register, informing the public about the changes and what they need to do to ensure they are registered, and also ensuring there is public confidence in the security of their sensitive personal data.

## 2.3 Provisions of the Bill

Part 3 of the Bill deals with the Franchise and Registration of Electors, amending the *Electoral Act 1992*, *Electoral Act 1997*, *Electoral (Amendment) Act 2006* and other Acts. Section 104 amends the Rules on maintaining the register set out in the Second Schedule of the *Electoral Act 1997* to take account of the changes in the legislation

The principal provisions in this area are:

- Role of electoral commission and registration authorities
- the introduction of a rolling register to replace annual updates to the electoral register,
- individual registration to replace household registration of voters,
- the use of Personal Public Service Numbers (PPSN) to verify the identity of voters on the register,
- measures to facilitate certain categories of voter to be registered and exercise their franchise, and the pre-registration of 16- and 17-year-olds.

### Oversight of registration by the Electoral Commission and role of Registration Authorities

The Bill, (Chapter 10) gives the Electoral Commission responsibility for the oversight of the electoral register, including researching the accuracy and completeness of the register, activities and processes for maintaining the register and setting standards for the registration authorities in relation to the electoral register. The Commission can also make recommendations to the Minister on legislative changes in relation to the register and registration process to maintain or enhance the integrity of the register and process for registration.

The registration authorities continue to be the local authorities, they are responsible for the maintenance and publication of the electoral register. Section 95 amends the functions of the registration authorities, as such it specifies that maintaining the electoral register includes entering the names of people entitled to be registered as electors, removal of the names of those not entitled to be registered, updating and correcting details “to ensure a complete and accurate register of elections”. Section 96 requires the registration authorities to report annually to the Electoral Commission outlining the measures taken in the preceding year to ‘ensure the maintenance of a complete and accurate register of electors for its registration area’.

### Shared database and data sharing for maintenance of the electoral register

Sections 85-87 deal with the creation of a shared database and data sharing for the maintenance of the electoral register.

The processing of personal data is only lawful where it has a ‘legal basis’. Article 6 of the [General Data Protection Regulation](#)<sup>58</sup> (GDPR) sets out what these legal bases are. These can be summarised as consent, contract, legal obligation, vital interests, public task, or legitimate interests. The Data Protection Commission has developed a helpful guidance note on the legal bases for processing personal data<sup>59</sup>. The proposed Designated Registration Authority would likely fall under the ‘public task’ basis as the Data Protection Commission note it is the basis most relevant to public authorities. The guidance note emphasises:

There does **not need to be a specific legal power** to process personal data attributed to that controller, but their underlying task, function or power must have a **clear basis in EU or Irish law, including common law**.<sup>60</sup>

Recital 41 of the GDPR provides that the law which underpins the task, function or powers should be clear and precise and its application should be foreseeable to those affected by it, in accordance with the case-law of the Court of Justice of the European Union and the European Court of Human Rights.<sup>61</sup> Public authorities must also ensure that the data processing is necessary, proportionate and limited to what is necessary to achieve the stated purpose. The Data Protection Commission in their submission at PLS recommended that a DPIA should be completed prior to the implementation of the proposed Designated Registration Authority, given the scale of the database, to identify risks and appropriate safeguards.<sup>62</sup>

Section 85 permits the Minister to make, by regulations, a Designated Registration Authority to ‘establish, manage and maintain a shared database for the purposes of enabling the efficient performance by registration authorities of their functions.’ The shared database will include the information in the electoral register, the pending electoral register, identifying particulars (full names, date of birth, address, nationality, PPS number (if any) and in the case of a deceased person the date of their death), as well as information and supporting documentation used to compile the register and pending register, for all registration authorities. All registration authorities are to use the shared database when preparing the register. The shared database is not a national electoral register. The Designated Registration Authority is required to make annual reports to the Electoral Commission.

Section 86 restates that the electoral register can only be used for electoral and other statutory purposes.

Section 87 of the Bill provides for, and sets out the conditions for data-sharing between registration authorities, between the Minister for Social Protection and registration authorities, and between other Ministers and public bodies and registration authorities, for the purpose of updating, maintaining and ensuring the accuracy of the register of electors

Registration authorities can share information to

- check for duplicate entries of electors,
- verify the accuracy of the register of electors,
- examine whether information supplied in a form submitted to the registration authority in relation to the register of electors is accurate,
- update and maintain the register of electors,
- and, the general reason, in pursuance of any other of its functions under this Part.

The Minister for Social Protection can confirm a person’s identifying particulars – name, date of birth, address, nationality, PPSN (if any), submitted to or held by registration authorities solely for the purpose of updating, maintaining and ensuring the accuracy of the register of electors.

The Minister can, by order, provide for periodic data-sharing exercises between a registration authority and other government departments or public bodies, again solely for the purpose of updating, maintaining and ensuring the accuracy of the register of electors. The order must specify the information to be shared, information that the Minister considers to be ‘necessary and proportionate to be shared’, the process to be followed when sharing the information including safeguards for the fundamental rights and freedoms of data subjects, and which public bodies are required to share the information.

A registration authority can request information from the General Registrar/ an t-Ard-Chlárathoir about the deaths of people in the registration authority concerned.

The Bill repeals the provision for an edited electoral register that could be purchased and used for direct marketing purposes (s.86). A note in the General Scheme described how the edited register had fallen into disuse, with less than 10% of registered electors included in edited register for



2019/20, and there were only 27 requests across all registration areas for edited registers between 2015 and 2018.

### Individual registration

Section 90 of the Bill provides for the individual registration of electors and the updating of information on electors by application to the registration authorities. This section also sets out an appeal mechanism if a registration authority refuses an application for inclusion in the register. The specific details are set out in the Rules in the Second Schedule. A new rule added to the Second Schedule, Rule 28, provides for an online application process for inclusion on the electoral register.

Rule 29 of Part V of the Second Schedule sets out that any new application for inclusion in the register is to include the following information, and a signed declaration that the information is true:

- Full name (including all former names, if applicable)
- Date of Birth
- Address and Eircode
- Nationality
- Personal Public Service Number (if any).

The registration authority must verify the identity of the applicant by electronic or other means before they are added to the register. If it is not possible for the registration authority to confirm the identity of an applicant, the applicant must resubmit their application, this time signed in the presence of a member of the Garda Síochána or a member of the civilian staff of the Garda Síochána, from the applicant's local station, or an official at the registration authority (s.29(5)). There are arrangements set out for applicants who through illness or disability cannot attend an office to verify their identity to have a medical practitioner certify that their inability to comply with that requirement (s.29(6)). It would appear that the medical practitioners' certification is accepted in lieu of the verification requirement.

If the registration authority refuses a resubmitted application the applicant can appeal the decision to the county registrar in accordance with Rule 39 of the Second Schedule.

The revised Rule 5 sets out the inquiries that registration authorities can make to maintain and update the register. The registration authorities can require people to provide their PPSN (if they have one), their address and Eircode, and their date of birth. Where someone cannot provide the specific documentary proof, for example a birth certification or evidence they are entitled to register as an elector, they can make a statutory declaration, and the registration authority is required to pay any fees associated with the declaration.

While there is broad support for the use of PPS numbers to verify the identity of electors<sup>63</sup>, it is also one of the more controversial aspects of the Bill as it involves the sharing of personal data, and not all eligible electors have a PPS number. Those without PPS numbers, or who do not include a PPS number on their application, may be required to re-submit an application for inclusion in the electoral register signed in the presence of a member of the Garda Síochána or a member of the civilian staff of the Garda Síochána, from the applicants' local station, or an official at the registration authority.

The Irish Council for Civil Liberties (ICCL) in their submission to the PLS said it would be undemocratic to make the sharing of PPS information mandatory for those registering to vote. The ICCL accepted the use of PPS numbers as one method of identity verification but sought a reasonable alternative method for those who do not wish to share their PPS number. The ICCL also expressed concern for the protection of members of marginalised communities, who, while eligible to vote may not have a PPS number.<sup>64</sup>

As noted above, Mr Dale Sunderland, Deputy Commissioner at the Data Protection Commission recommended a Data Protection Impact Assessment (DPIA) to explore data protection risks and suitable safeguards with using PPS numbers to identify electors, and he recommended that the DPIA should be published for reasons of transparency. During the PLS hearing on 22 June 2021 the Department said that the DPIA was at an advanced stage and that the Department would engage formally with the Data Protection Commission on the legislation.<sup>65</sup>

### Corrections and the removal of names from the electoral register

As outlined above (2.2), the current register is known to be inflated by the inclusion of the names of electors who have died or emigrated, and duplicate entries for electors who have moved within or between registration areas. The Bill provides for the registration authorities to remove duplicate names from the register through a new Rule 10 in the Second Schedule of the Electoral Act 1997. Rule 10 sets out the requirement for three documented attempts to contact the person affected to notify them of the intention to remove their name and provide relevant information on how they can update their details, and on the third attempt a notice informing them of the date their name will be removed and how they can appeal the decision to remove their name.

The Bill also provides for registration authorities to receive information about the deaths of people from An tÁrd-Chláraitheoir (The General Registrar) in order to remove the names of people who have died from the register (s. 87).

In addition to electors requesting that their own information on the electoral register is amended/updated, the Bill permits third parties to request a correction or the addition or removal of a name on the electoral register. New Rule 7 and the Bill sets out the procedures to be followed by the registration authority to verify the details of such requests.

### Rolling Register

While there is no specific reference to or definition of a 'rolling register' in the Bill, section 84 amends the section 13 of the *Electoral Act 1992* and provides for a continuous register by removing the requirement for the annual preparation and publication of a register. Section 84 further provides that the register in force before commencement of this section of the Electoral Reform Act 2022. Electors can be added to the register until 14 days before any polling day at an election or referendum. The register is published on or after the fourteenth day before polling day. The list of names added to the register from the making of the polling day order is also to be published on the fourteenth day before polling day.

The Bill amends the Electoral Acts to remove the references to qualifying dates, the Draft register and supplements to the register as they are no longer relevant with the move to a Rolling Register.

The register includes the postal voters list and the special voters list, and the anonymous electors – the registration authorities are to decide how anonymous voters will be referenced on the register (s. 104).

People are eligible for inclusion on their eighteenth birthday, assuming other conditions for eligibility are met, see Box 4. Where an elector has pre-registered (see below) their name can be added to the register of electors in advance of their 18<sup>th</sup> birthday if an order appointing the polling date for an election has been made and their birthday occurs after the last day for applications for entry on the register and before or on the polling day.

In addition to publishing the register, the registration authorities are required to send an **electronic copy** of the register to the Minister, and to each member of the European Parliament, the Dáil and local authority for a constituency or local electoral area to which the register relates. Members of the Seanad are to receive electronic copies of the register for the constituency in which they live.

## Facilitation of electors who are homeless, suffering from mental illness, or at personal risk if their names are published

The Bill makes special provision for electors who are homeless, voters suffering from mental illness cannot attend a polling station and people who would be at risk if their name was published on the electoral register.

### Homeless electors

Section 82 of the Bill sets out a process for homeless people, people not ordinarily resident at any premises, to apply for inclusion on the electoral register by making a declaration of circumstances and providing an address for correspondence. The registration at an address provided in such a declaration must be renewed on an annual basis.

### **The Bill provides for a review of the operation of this section after three years**

### Disabled voters

The Bill removes the requirement for a disability or illness to be 'physical' before an elector can be included on the postal voters list (s.88) or the special voters list (s.92). This is taken to be the reference to "bringing better and more flexible options for people who – because of mental health difficulties – are not able to attend polling stations to vote." in the press release at the launch of the Bill.

### Anonymous electors

Section 91 of the Bill allows people whose personal safety would be at risk if their name or address were listed on the electoral register, for example survivors of domestic abuse, to register to vote without their details being made public. A written application to the Registration Authority is required with evidence of the risk to their personal safety in the form of an order under the *Domestic Violence Act 2018*, under the section 10(3) of the *Non-Fatal Offences against the Person Act 1997*, section 46 of the *Criminal Law (Sexual Offences) Act 2017* or the declaration by a qualified person, a Garda Superintendent or higher rank or a registered medical practitioner, a stating that in their opinion the personal safety of the person or someone in their household would be at risk if their name and address were published in the electoral register. The registration authority decides on the application and notifies the applicant of its decision. Where an application is refused there is provision for an appeal to the County Registrar.

### **The Bill provides for a review of the operation of this section after three years.**

Similar legislation was introduced in the UK in 2006. Following a review in 2017, additional court orders and qualifying persons were permitted as evidence of the risk to the personal safety of people. In December 2019 there were 3,300 anonymous voters registered in England and Wales, and 200 in Scotland.<sup>66</sup> Anonymous voters are a tiny proportion of the total number of people registered for parliamentary elections in the UK in 2019 was over 47 million.

### Pre-registration of 16- and 17-year-olds - Pending elector list

Section 93 of the Bill provides for the pre-registration of 16- and 17-year-olds. People who are between 16 and 18 can apply for inclusion in the 'pending elector list' once they satisfy all the other criteria for registration. Box 4 sets out the criteria for the registration of voters for the different types of election.

**Box 4. Eligibility to register for elections**

- Presidential electors – Age 18, Irish Citizen, Resident in Ireland
- Dáil electors – Age 18, Irish Citizen, British Citizen, Resident in Ireland
- European electors – Age 18, Irish Citizen, Citizen of the EU Member State, Resident in Ireland
- Local government electors – Age 18, Resident in Ireland

The pending electors list is not to be included in the register of electors, nor it is to be published or available for inspection.

On the date the applicant turns 18 their name is to be entered on register of electors. Their name can be added to the register of electors in advance of their 18<sup>th</sup> birthday if an order appointing the polling date for an election has been made and their birthday occurs after the last day for applications for entry on the register and before or on the polling day. Once their name has been entered on the register of electors it is to be removed from the pending elector list.

Pre-registration of voters is intended to increase the turnout of young people in elections and their participation in the political process more generally. Most 16- and 17-year-olds are still at school and within the reach of a targeted education programme designed to encourage registration. Electoral events during these years may prompt those too young to vote to engage with the political process by pre-registering to vote, ensuring they are automatically added to the electoral register when they turn 18. By 18 they may have finished school and started work or college and the burden of registering may prevent them from doing so. There is research from the US that pre-registration increases voter turnout by as much as 8% when compared to a control group that was not pre-registered to vote.<sup>67</sup>

**Offences**

The Bill creates or restates offences where an applicant fails to provide information in their possession or provides false information in relation to applications for inclusion on the electoral register, the postal voters list, the special voters list, the pending electors list and an application to be registered as an anonymous elector pending elector list, as well as third party claims to update the register (s.103).

It also restates that the electoral register can only be used for electoral or statutory functions (s. 86).

**Implications and implementation of measures to modernise the Electoral Register**

On February 15 2022, the local authorities published the Electoral Register for the period 2022-2023. If the Bill is enacted this Register will remain in force and henceforth be updated on a rolling basis. The next Register will be published fourteen days before the polling day for the next election/referendum.

It is expected that the Minister will make orders in relation to a series of new application forms to facilitate registration and updates, including on-line forms, for general applications for inclusion on the electoral register, postal voters, special voters, homeless, anonymous, pre-registration of 16- and 17-year-olds.

At PLS, an official from the Department of Housing described a two-step process to updating the current electoral register rather than starting a new register. Step one is making it easier for people to update their details, and step two is a major public awareness campaign to encourage people to check and update their details.

Measures to facilitate voters in challenging circumstances, people suffering mental illness, homeless people and people who may be at risk if their details are published on the register, should result in a more complete register of electors. The pre-registration of young voters should, to a certain extent, alleviate the burden of registration at the age of 18.

A more accurate and complete register will result in more accurate turnout data at electoral events.

## 3.Regulation of online political advertising between elections

Part 4 (sections 117-139) of the Bill sets out a regulatory regime for online political advertising.

### 3.1 Why regulate online political advertising – what is the policy issue?

Electoral competition is a central feature of a democratic society. The regulation of political advertising aims to create a fair and transparent environment in which electoral competition occurs (discussed in detail in L&RS Note, 2021, 2-5).

The [Broadcasting Act 2009](#) and the [Electoral Act 1997](#) (as amended) set a context for electoral competition which aims to preserve the integrity of the process by creating a level playing field, limiting the influence of money on political competition and reducing the incentives for corrupt relationships in politics. They do so by banning certain practices and bringing transparency to others: The former bans political advertising on broadcast media and the latter bans large donations from private interests or any donation from foreign entities to actors engaging in political competition. Both bring transparency - requiring those engaging in competition to disclose their sources of money (e.g. for corporate donations over €200) and to disclose who is paying for their political advertising (for print advertising during electoral campaigns). Yet online political advertising, which now constitutes an increasingly important part of electoral competition,<sup>68</sup> is unregulated. The proposal to regulate online political advertising should be seen in the context of these laws.

There are several reasons to regulate online political advertising, some of which concern bringing it into line with other political advertising, others related to the specific, different challenges posed by political advertising which is online.

**First**, it is at odds with the regulation of political advertising and political finance (described at length in [L&RS Note, 2021](#)) a fact which reduces the effectiveness of the existing regime.<sup>69</sup>

**Second**, while there is a complete ban on political advertising on traditional broadcast media, online political advertising is not even subject to the transparency requirements applied by print media to political advertising (with the exception of the voluntary Code of Practice agreed by the European Commission and signed by several online platforms – discussed below). As such, citizens are unable to evaluate (with certainty) political advertising online as there is no consistent information on who paid for them and journalists. Furthermore, fact checkers or other organisations cannot offer citizens comprehensive analysis of campaign messages and activities as **much activity is undetectable and untraceable.**<sup>70</sup>

Online advertising is distinguishable from traditional advertising in a number of respects which present challenges to effective regulation.

- A popular selling-point for online political advertising is **micro-targeting**. Unlike traditional political advertising, where anyone who reads the publication in which an advertisement is placed can see it, an online political advertisement is generally micro-targeted at carefully selected (often described as persuadable) audiences identified using the user data the online platform has amassed and analysed. And the user who receives an online political advertisement tends to be unaware of why he or she received it, unaware of who else did, and may be unaware of other advertisements issued by the same party or candidate which



may give a different message. While micro-targeting can also happen in the offline world (as noted by the Data Protection Commissioner in her submission to the Public Consultation in 2018), online advertisements can be micro-targeted in more ways, have a larger potential reach and are less subject to public scrutiny. With no regulator responsible for ensuring that content in political advertising is truthful and very little public scrutiny, online political advertising may facilitate the spread of mis- or dis-information. Effective regulation aims to reduce the extent to which online political advertising facilitates the spread of disinformation.

- A practice which further contributes to opacity is the blurring in the distinction between content which is clearly an advertisement, and political content which is promoted for a fee but appears like a post or an article and is included in newsfeed content. For example, a person pays an online platform to help them build up a following (a target audience of potentially persuadable voters) and subsequently unpaid political content is pushed out to this audience during a campaign. The process of paying to build up a target audience and a following is a service offered by many online platforms. This practice poses problems for representative democracy similar to those posed by unattributed and micro-targeted political advertising except that it is even more opaque, i.e. users may genuinely be unaware that they are receiving the content as a result of a transaction which identified them as a likely or persuadable voter.
- Where an organisation uses a **pre-programmed robot/automated account** to amplify a political message, masquerading as a real person and sending it to users with particular characteristics on the basis of an algorithm, this poses further challenges in that it elevates the apparent importance of the content. This is the deliberate manipulation of social media via bots - a type of software capable of autonomously performing actions such as tweeting, re-tweeting, liking or directing messaging to other accounts or other fake media accounts, to amplify messages.<sup>71</sup>
- Further, there is the challenge to the regulation of online content presented by the **global nature of the internet** and the online platforms. In Ireland, it is illegal for a party or a candidate to accept a 'foreign donation' meaning a donation from a person or a body residing outside of the State (unless that person is an Irish citizen, a company with an office registered in the State or a European political party). However, online political advertising may be generated by persons or groups abroad. The extent to which legislation can prohibit political advertising generated from abroad and targeted at Irish citizens for the purposes of influencing the outcome of an election or referendum, is central to addressing this policy problem.

A key test of the Government's proposed Bill is if it can address these challenges which unrestricted online political advertising creates for democracy.

## 3.2 How do the Bill's proposals address these challenges?

### What are the policy options?

To mitigate the potential risks to electoral integrity posed by un-regulated online political advertising (described above) policy makers face options. As with political finance regimes, the options centre on a few core instruments, and some may be used together:

- a) **Place a ban/prohibition on online political advertising** - a full ban would mirror the ban on political advertising in broadcast media.
- b) **Place a partial prohibition or ban on certain types of political advertising online** - prohibit certain types of online political advertisement e.g. ads that are paid for by a sponsor residing outside of the State; ads that are micro-targeted; online political advertising outside of 'the electoral period.'
- c) **Introduce caps or some type of limit on online political advertising** - limit/place ceilings on expenditure on online political advertising by political actors.
- d) **Introduce measures to bring full or partial transparency to online political advertising** - set out information which must be disclosed when publishing and promoting an online advertisement and measures which ensure that the public can easily access this information; these requirements may be permanent or during election periods.

If the decision at point (a) is made to restrict - rather than to ban - online political advertising, policy-makers are likely to select one or a combination of options at points (b)-(d) above. As such, caps or limits on certain types of online political advertising may be in place alongside policy instruments designed to bring transparency to online political advertising.

### Government's policy: proposals as set out in Bill

Looking at the policy options above, the Bill proposes to regulate, rather than to place an outright ban on online political advertising in line with the ban on broadcast media. The imposition of a ban does not appear to have been considered as a policy option (Box 5).<sup>72</sup>

The Bill introduces transparency requirements for online political advertising (d), while banning online political advertising by foreign buyers (b). This ban is in line with the political finance regulations which ban donations from foreign sources. The Bill does not include option (c) as it does not place limits on expenditure on online advertising although expenditure limits set out in the *Electoral Act 1997* place limits on general expenditure on campaigns. However, such limits only apply during the formal election periods.

#### Box 5. Policy of placing a ban on political advertising

Political advertising is banned on broadcast media in many states including France, Denmark, the UK and Ireland (except for free political broadcasts during the election period) and is in general more heavily regulated on broadcast than on print media.<sup>73</sup>

Explaining the heavier regulation, is the broader reach, greater persuasive power and public nature of broadcast media.<sup>74</sup> However, as the **reach of digital media is becoming increasingly broad, the question as to why online political advertising is not aligned with broadcast media arises.**

**The broad reach of digital and social media** is evident from survey data published Reuters/You Gov Irish Digital Media Reports (BAI and FuJo, DCU, 2020<sup>75</sup> and 2021<sup>76</sup>).

The survey found that in Ireland the main sources of news are about half digital (digital and social media) and half traditional (although the proportion citing television as their preferred source of news increased between 2020-2021).



- Television remains the most popular source for news – preferred by 41% (an 8% increase from 2020 and a 5% increase from 2019 when it was preferred by 36%).
- The next most popular source of news is online at 29% in 2020 and 2021. This figure excludes social media and blogs which were preferred source for 16% in 2021 (down 4 percentage points from 2020). This means that 45% of those surveyed receive their news in digital format and in doing so are most likely exposed to online political advertising.
- Social media platforms are important sources of news for younger age groups: they were the main source of news for 43% of the 18 to 24 age group and 20% of the 24-35 age group in 2020. Notably this decreased in 2021 and social media platforms were the preferred source of news for 31% of the 18-24 and 27% (down 5%) for the 25-34 age group.

There are arguments for and against the banning of online political advertising.

**On the one hand**, there is the risk that banning political advertising online would push political and issue-based actors to rely on more opaque forms of promotion online to communicate their political message (e.g. the distribution of promotional content which is not an Ad using the targeting services of an online platform). Further, such a prohibition would require examination for its compatibility with freedom of expression under the Constitution.

**On the other hand**, digital media has an increasingly broad appeal which may rival that of broadcast media (see above), there is already a ban on political advertising on broadcast media which has been held up as constitutional in the courts (see L&RS Note, 2021), and there appears to be some public support for prohibiting online political advertising. The Irish Digital News Report (2020) found 52% of surveyed adults were against allowing political advertising on social media, with 35% in favour, while 47% favoured allowing it on traditional broadcast media.<sup>77</sup>

The imposition of such bans is technically possible. Facebook in Ireland banned political advertising from foreign buyers two weeks before the referendum on the Repeal of the Eight Amendment in an effort to enhance electoral integrity amidst growing concern about the potential influence of unattributed, foreign-placed ads.<sup>78</sup> Google followed suit and banned all political advertising during the referendum campaign on 9 May 2018, including on YouTube (which it owns).<sup>79</sup> Twitter unilaterally decided in October 2019 to ban political advertising in general.<sup>80</sup>

**In France** online political advertising is forbidden during election periods which lasts for six months. Article 52 of the Electoral code, bans any political advertising through the press or by any audiovisual communication media (including social networks) during the 6 months preceding the first day of the month of the elections.<sup>81</sup>

Following a summary of the Bill's provisions on online political advertising, we discuss the extent to which the Government's proposals are likely to achieve the policy objectives set out above under three headings. Key issues **for Members' consideration** during the legislative process are highlighted throughout.

## Provisions of the Bill (Part 4)

**Section 118** sets out to whom and under what circumstances the provisions in Part 4 will apply: to the *purchase (directly for oneself or indirectly on behalf of another) of an online political advertisement (defined in s117) for placement, display, promotion, or dissemination during an electoral period (defined in s117).*

**Section 119** defines the key policy instrument – the Transparency Notice – with which the Bill proposes to regulate online political advertising (the definition of which is discussed below); it sets out the information which must be provided in the transparency notice when an online political advertisement is published/promoted/distributed/disseminated and the format in which this information must be provided. It obliges online platforms to notify the Electoral Commission when a Transparency Notice is displayed and to establish (and maintain in real-time) a publicly accessible archive/library of online political advertisements and the associated Transparency Notices (s119 (4, 5, 6)). Under s119 (8) failure of the online platform to comply with s119 is an offence.<sup>82</sup>

Ensuring the true identity of the buyer for the transparency notice is critically important to the functioning of the proposed legislation and **s121-123** aim to achieve this. **Section 121** obliges online platforms to verify the identity of the buyer prior to purchase and specifies the measures to be applied (type of identification documents and including a signed statutory declaration) including setting out that the platform must take reasonable steps to verify that a person who is acting for another person is genuinely doing so. It is an offence for the online platform to place, display, promote or disseminate an advertisement where a buyer does not provide the documentation required under s121 (**s120(3) and s121(4)**). s121(6) provides that where the buyer is purchasing numerous online political advertisements during the same election period it is sufficient for sellers to apply identification and verification procedures once.

The Bill creates reciprocal obligations and offences on the sellers and buyers of online political advertising. **Section 122** obliges buyers to provide the information specified under s119, 120, 121 and 123 which online platforms must obtain to comply with the legislation. It is an offence by the buyer to provide false or misleading information in this respect i.e. information ‘that the buyer knows or ought reasonably to know’ is false or misleading (s122(6)) In the case that a person is acting on behalf of a buyer it is the buyer who is liable (s122(7)).

**Section 123** places a statutory ban on online political advertising *during election periods* where a buyer resides outside the State in many circumstances<sup>83</sup> and makes it an offence for online platforms to place, display, promote or disseminate such an online political advertisement. (s123(6)). Online platforms use the verification measures set out at s121 to determine that the buyer resides in the State and, if he or she resides outside the State, that they are permitted to place an advertisement.

Online platforms (seller) and buyers are obliged under s133 to retain records, information and documentation which was required for the sale or purchase of online political advertising under s119-123 of the legislation (Table 3) for 30 months. This obligation is for the purpose of demonstrating compliance with the relevant provision of the Act and must be made available on request for monitoring and compliance purposes (discussed below).

**Table 3: Requirements to retain records, information, and documentation**

<b>Seller must retain information provided under the following sub-sections</b>	<b>Buyers must retain information provided under the following sub-sections</b>
S119 (2) and (5)	s119(2)
S120 (1) and (2)	s120 (1, 2)
S121 (1, 2, 3 5 , 7)	s122 (2,3, 5, 7)
S123 (1, 4a)	s123 (1)

**Source: L&RS analysis of the Bill**

The monitoring and enforcement regime which is overseen by the Electoral Commission is set out in Sections 125-136 and offences and penalties (on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both or on conviction on indictment to a fine or imprisonment for up to five years or both) are set out in s137. Section 137 also provides for a defence of due diligence, the prosecution of summary offences by the Commission<sup>84</sup>, liability for offences committed by a body corporate and liability for costs and expenses arising out of the investigation, detection and prosecution of offences.

**Table 4: Summary of the purpose of each Section in the Part 4 of Bill**

s117	Interpretation e.g. defines online political advertising, online platform, election period, micro-targeting, look-alike audience, buyer, seller
s118	Clearly sets out when and to what Part 4 applies to
s119	Sets out that a Transparency Notice must be published with an online political ad and sets out precisely the information that must be in it including format
s120 – 121	Sets out obligations on online platforms accepting online political advertisements and that it is an offence to proceed without undertaking actions set out in s121 and s123 to gather information and verify identity
s123	Prohibits sale of online political advertising to foreign persons (as defined in the Bill)
s122	Places obligations on buyers to provide information required and creates offence for false or mis-leading information
s124	Exceptions in cases of certain buyers (for public information requirements)
s125-136	Sets out monitoring and enforcement regime (described below)
s137	Offences under the Act

### 3.3 Analysis of proposed provisions in light of the policy goals

The Government's proposals aim to address the risks which unregulated online advertising pose by bringing full transparency to the online political advertising campaign and by ensuring that online political advertising is not purchased from abroad (except where permitted).

The **definition of online political advertising** in the Bill, which will determine the breath of the advertisements to which the provisions will apply, the details of the information which must be disclosed in transparency notices as well as the **effectiveness of the enforcement regime**, will be critical to the success of the legislation.

Below we evaluate the proposals in the Bill against three core criteria:

1. Definition assigned to ‘online political advertising’: what online advertisement will be subject to regulation and when?
2. What are the Transparency regulations – what must be disclosed and how?
3. Ensuring compliance – monitoring regime and creation of offences

In each sub-section we focus on a number of key questions and issues which Members may wish to consider.

### 3.3.1 Definition of ‘online political advertising:’ what advertisement will be subject to regulation and when?

Of central importance to the overall implications of the Bill is whether the definition of ‘**online political advertising**’ (**below**) is sufficiently broad to bring the transparency to online political advertising campaigns required to ensure electoral integrity.

**Online political advertising means** ‘any form of communication in a digital format commissioned for political purposes<sup>85</sup> purchased for placement, display, promotion or dissemination on an online platform<sup>86</sup> *during an electoral period*\* and for which a payment or payment in kind is made to the online platform. Notices placed or displayed by specified persons in connection with performing statutory duties around elections are excluded from this definition by s124 (e.g. notices by the Minister, the Electoral Commission, officials organising elections).

\*beginning on the day of the making of a polling day order and ending on polling day. (s117)

Two aspects of the definition are very significant: what type of communication is an online advertisement and what makes it political? Both are considered below where we ask a series of questions about the scope of the definition.

#### ***Does an online advertisement include paid-for content that does not resemble an Ad?***

Under the Bill, “a communication” is an online advertisement if it is ‘any form of digital communication in a digital format’ that is commissioned and paid for with money or in kind. This definition is broad and would appear to include political content which appears more like a post or an article than an advertisement once it has been paid for. **Members may wish to clarify that this definition covers paid-for political communications which are not always clearly identifiable as advertisements (described above as political content promoted for a fee, paid for social media newsfeed content).** The Joint Committee in its Report on the General Scheme (2021) recommended (recommendation 41) that the Department facilitate an exploration *into the utilisation of social media content* in electoral and political interference in the form of public consultation and expert opinion.

#### ***Is the definition of political too broad and limiting for civil society organisations?***

Regarding ‘political’ there were two dimensions to what made an online advertisement political in the General Scheme – the first pertained to the purpose of the online advertisement and the second to the identity of the person or entity purchasing the ad.

The Bill instead focuses the definition of political solely on the purpose of the online advertisement (i.e. on 'the what' rather than on 'the who' which is similar to the approach taken to a 'relevant communication' in the [Regulation of Lobbying Act 2015](#)). Under the Bill, an online advertisement is political if it is:

commissioned 'for a political purpose' which has 'the meaning assigned to it by s22(2) of the *Electoral Act 1997*: a political purpose is one '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.'

This definition of political purpose is quite broad and will mean that issue-based advertising i.e. advertising which aims to promote a policy outcome will be covered by the requirements.

There was some discussion during the Committee's hearings on the General Scheme about whether the definition should be tighter in order to exclude issue-based advertising.

**On the one hand**, some witnesses<sup>87</sup> cautioned that a broad definition would place undue restrictions on wider civil society activity engaging in advocacy which aims to influence political decision and policy making.<sup>88</sup> These reflect arguments presented in a debate on the political finance regime and the appropriateness of applying the caps on donations in the Electoral Acts to third parties.<sup>89</sup> The [Electoral Amendment \(Civil Society Freedom\) Bill 2019](#)<sup>90</sup> [PMB], proposes to exempt third parties from these provisions so that they could raise funds freely (without the cap on the amount and the disclosure requirements) to finance issue-based campaigns. The Joint Committee recommended that the definition of 'political purpose' in this Bill be replaced with the narrower definition in the 2019 Private Members' Bill in order to exempt issue-based online political advertising where it is not connected to a particular contestant in the electoral contest. However, it also recommended that the Department bring forward proposals on transparency for online issue-based advertising (Recommendations 1 and 2).

**On the other hand, there are reasons to retain the definition of online political advertisement** in the Bill. Firstly, if the transparency requirements applied only to online advertisements placed by specified persons competing in the election (or third parties connected to them), there may be greater scope to avoid them through loosely-linked third parties. Narrow definitions in political finance regimes can open up opportunities for those who seek a disproportionate influence over the policy and electoral process (in a way that avoids caps and disclosure) to channel money indirectly through unregulated entities.<sup>91</sup>

The broad definition in the Bill reduces any incentive for political actors to encourage online political advertising by groups to which they are loosely connected in order to avoid transparency as all advertisements with a political purpose are subject to disclosure requirements. That the Bill applies both to the direct and indirect (on behalf of another) purchase of online political advertising (s118) also aims to prevent this scenario.

Secondly, **the provisions in this Bill only apply to online political advertisements during the 'election periods.'** Civil society organisations are free to place online political advertisements at other times without transparency requirements. And as the proposed provisions do not impose a ban, rather disclosure, they should not negatively affect freedom of expression and freedom to advocate.

***Who decides if an online advertisement is political?***

A recent study of the regulation of political content online in Germany and the USA concluded that success depends on how clearly rules are defined to online platforms and how strictly they are enforced.<sup>92</sup>

While the definition of an online political advertisement is set out in the Bill and is quite comprehensive, the question remains as to who interprets it and what happens if online platforms interpret the rules differently? This is very important as the Bill proposes that if an online platform places, displays, promotes or disseminates an online political advertisement without a Transparency Notice (as prescribed in s119), it is guilty of an offence.

While under the Bill online platforms will decide what is and what is not a political advertisement (in accordance with the definition in the Bill), ultimately the responsibility for interpreting and clearly defining what is, and what is not, an online political advertisement lies with the Electoral Commission as the body responsible for enforcing this part of the Bill. There is some judicial oversight provided for in s130 (as noted above) which provides for an appeal to the District Court in respect of a compliance notice issued by the Commission. A possible ground of appeal is that the Commission, in making its decision, committed a serious and significant error of law or fact, (or a series of minor errors which when taken together amount to the same). It is possible that an error in interpreting the definition of an online political advertisement may come under this category or ground of appeal.

***Why do transparency requirements apply during the electoral period only?***

Under s117 (definition of online political advertising) and s118 (application) it is clear that the transparency regime provided for in this Bill will apply only during election periods (defined above).

**Members may wish to consider the rationale for only requiring transparency around online political advertising during the period running up to an electoral contest, and whether the legislation would better meet its policy goals were the requirements to apply at all times.**

As discussed elsewhere (see L&RS Note, 2021) the effectiveness of the cap on electoral expenditure set out in the *Electoral Act 1997* is limited by its application to the official campaign period only, an argument highlighted on several occasions by the Standards in Public Office Commission.<sup>93</sup> It is possible to circumvent the requirements by frontloading expenditure prior to the commencement of the campaign. In the same way, limiting the application of the to online political advertising commissioned to run during the election period may limit its effectiveness by encouraging buyers to frontload some of their placement, display or promotion of online political advertising to periods immediately preceding the formal election period (thereby avoiding disclosure requirements). BAI has also drawn attention to the limitations of confining controls to the election period; it has argued that this is 'not likely to be wholly sufficient to protect citizens from the risks arising from online political advertising' and suggesting they be applied on an ongoing basis.<sup>94</sup>

In its submission to the Government's consultation (2018), the Institute for Future Media and Journalism (FuJo) noted that in some recent referendums over half of voters deferred their decision until during the electoral campaign.<sup>95</sup> They suggest that most political actors will therefore wish to run the bulk of their online advertising during the campaign period. However, it should be noted that other voters make decisions about voting intentions mid-term, or at least are influenced by events mid-term when making a voting decision and are motivated by many different reasons



from party attachment, to policy issues, to the performance of a local politician.<sup>96</sup> The electorate is volatile<sup>97</sup> and ongoing advertising and 'brand awareness' is likely to affect voters' decisions. **Under the Bill, unattributed online political advertising with none of the information specified for Transparency Notices and perhaps including online political advertising purchased from abroad - can be targeted at citizens between elections.** In spite of the intention to bring transparency to the online campaign, there may be little or no possibility for citizens to gain an understanding of how online political advertising mid-term or just prior to a formal campaign is affecting electoral competition (unless through an online platform's compliance with the voluntary Code of Practice initiated by the European Commission).

If, on the other hand, the requirements were applied during all periods, the incentive to front-load online political advertising prior to the commencement of an official electoral or referendum campaign to avoid transparency requirements would not exist. There would be transparency on online political advertising for citizens, without interfering with freedom of expression as the proposed provisions *do not place any restrictions* on the content of online political advertising.

Applying the regulations on an ongoing basis would place greater burdens on stakeholders – the online platforms and the purchasers of online political advertisements. However, these may not be insurmountable as it will be necessary for stakeholders to create systems and structures to comply with the legislation during electoral periods in the first place.

The Joint Committee in its Report on the General Scheme recommended that the Bill provide for **consistency in approach in the regulation of political advertising both on and offline, and both inside and outside of election periods (Recommendation 40)**. The Bill does not ensure consistency as requirements apply to broadcasting media at all times and not just during election periods.

***Do the transparency requirements apply if an online political advertisement is commissioned and placed prior to the commencement of the electoral period?***

A related theme is the possibility that buyers could avoid transparency requirements during electoral campaigns by purchasing online political advertising prior to its commencement. Under the General Scheme the transparency requirements applied to an online political advertisement 'placed, displayed or promoted' during the electoral period; this left open the possibility that an advertisement commissioned prior to the election period but circulating during the election period could be exempt from the regulations. However, under the Bill the regulations apply to advertisements 'placed, displayed, promoted **or disseminated**' during the electoral period. This suggests that all online political advertising circulating during a campaign is subject to the transparency requirements.<sup>98</sup>

### **3.3.2 Transparency requirements – what must be disclosed?**

Equally significant to the Bill's proposals on which online advertisement will be subject to regulation are the actual requirements themselves and whether they are sufficiently robust to achieve the policy goal.

The purpose of disclosure requirements is that they **provide information and context for voters who receive online political advertisements**. Research on disclosure laws in the USA highlight two impediments to their achievement of policy goals. One, the cognitive limitations of the information recipients i.e. voters have limited time and capacity to digest and to consider the implications of vast amounts of disclosure information. Two, loose enforcement regimes with small

punishments for breaches reduces compliance.<sup>99</sup> **This suggests** that disclosure requirements are more successful where information overload is prevented i.e. where the information is easily accessible and digestible; disclosure should ensure that voters, journalists, NGOs, fact checkers and society in general can with ease generate a picture of the political advertising online environment – who is paying for it, who is being targeted, how much money is being spent and by whom.<sup>100</sup> The extent to which the Bill's provisions will achieve these goals is considered below.

***Is the information required comprehensive enough to achieve the above goal?***

Section 119 sets out that an online political advertisement must be labelled Political Advert and must connect the user easily (via a button, icon, tab, hyperlink or other connection) to a clearly displayed Transparency Notice. The list of information which must be displayed in a Transparency Notice is comprehensive and includes not only the identity of who paid for the advertisement, the cost and the expected size of the audience, but also information on why the user is receiving it (Box 6). If fully complied with for each online political advertisement, it would provide transparency and context to online political advertisements for citizens and journalists, fact checkers and data analysts (who may help to analyse it).

**Box 6. The Transparency Notice must include:**

- Name, postal address, telephone number, email address and, where applicable the website address of the buyer (which means the address of the person who paid or will pay for the advertisement in the event that a third party purchased it)
- Whether micro-targeting was applied (and the description of the criteria and source of information used as basis for micro-targeting) to the Ads placement, display, promotion or dissemination
- Whether the target audience of the Ad was generated on the basis of 'look-alike' targeting and, if so, a description of the characteristics including a link to the online platform's policy on look-alike targeting if it has one
- Total amount paid or due to be paid
- Number of days it will run for and the date on which is placed, displayed, promoted or disseminated and will cease to appear
- Estimated size of audience trying to reach and views
- Link to an online archive or library of the online platform's online political advertisements which also must be established under s119 (5)
- Contact details for online platform (who may be notified if the Transparency Notice does not comply with the regulations).

**Source: L&RS analysis of the Bill**

The provision requiring transparency around whether and how **micro-targeting, including through the generation of look-alike audiences**, has been applied to target a political advertisement will be important if transparency is to be comprehensive and if users are to easily understand why they are receiving an advertisement (and why other people are not).

Research on the application of the *EU Code of Practice on Tackling Online Disinformation*<sup>101</sup> by online platforms<sup>102</sup> during the 2019 European election campaign in Ireland found that, in spite of the Code's requirement that signatories disclose micro-targeting information, the information provided was patchy; signatories only provided data on age, geography and gender, in spite of the fact that it is possible to micro-target ads in far more ways (e.g. according to political views). Micro-

targeting of data by region disclosed by Facebook during the UK 2019 General Election was confined to England, Scotland, Wales and Northern Ireland.<sup>103</sup>

By stipulating that **all criteria for micro-targeting be specified**, the legislation aims to ensure that online platforms supply consistent and more comprehensive information than in the example above. The Bill (s119 (2)b and c) requires “confirmation of whether micro-targeting was applied...” and ‘a description of the criteria or information, and the source of the information, used as the basis for any such micro-targeting’ and information about the platform’s policy on micro-targeting. It also requires confirmation of whether targeting is directed at persons included on the basis of look-alike targeting and if so information on how that audience was identified. The point of these is to help users understand why they are being targeted in the hope to re-balance the information imbalance between holders of big data and ordinary people. **Section 119 (b) and (c) are very important in this respect (Table 5 below compares the level of detail required by the General Scheme (2021) and the Bill.**

**Table 5. How the GS and the Bill treat ‘micro-targeting’ and the ‘look-alike audience’**

	General Scheme	Bill
Micro-targeting	Confirmation of whether micro-targeting was applied in the placement, display and promotion of the online political advertisement and, where applicable, a description of the criteria used for any such micro-targeting	Confirmation of whether micro-targeting <sup>104</sup> was applied in the placement, display, promotion or dissemination of the online political advertisement and, if so, a description of the criteria or information, and the source of the information used as the basis for any such micro-targeting and providing a link or connection to the online platform’s policy, if any, on micro-targeting.
Look-alike audience	Confirmation of whether the target audience contains a look-alike targeting list and, where applicable a description of the characteristics of the target audience	Confirmation of whether the particular audience at whom the buyer intends the advertisement to be directed includes persons included on the basis of the application of look-alike targeting <sup>105</sup> and, if so, a description of the characteristics of, or the activities engaged in by, the particular audience and the source of the information used to identify that particular audience and providing a link or connection to the online platform’s policy, on look-alike targeting

**Source: L&RS analysis of the Bill**

It will be important that the Electoral Commission monitor future developments, including legislation in other EU Member State, which may create opportunities to target online political advertisement which are not covered by the Bill in order to prevent the emergence of loopholes (for example see legislation in Germany below).

### Box. 7. Regulation of online political advertising by telemedia intermediaries in German law

The Germany Media State Treaty (MStV) (2020) introduces new rules regarding transparency and discrimination for telemedia intermediaries which it identifies as “any telemedia that aggregates, selects, and presents third-party journalistic/editorial offers, without presenting them as a complete offer”.

Under the transparency provisions, intermediaries will be required to provide information (in easy-to-understand language) about how their algorithms (which micro-target information) operate, including:

- The criteria that determine how content is accessed and found.
- The central criteria that determine how content is aggregated, selected, presented and weighed.
- Any changes to their criteria must be made publicly available immediately.

Media Intermediaries that act as social networks will also be required to identify and label “social bots.”<sup>106</sup>

**Source: Nelson and Jaunson (March 2020)**

The regulation of targeting via social bots (discussed in 3.1 above) is not explicitly covered in the Bill in spite of the fact that it was included in the *Online Advertising and Social Media Transparency Bill (PMB)* and discussed by the Joint Committee at PLS on the GS of the Electoral Reform Bill. The Joint Committee recommended (39) that

“the use of artificial intelligence or internet bots by political parties, politicians and election candidates to power politically motivated social media accounts be made an offence under the proposed legislation. In addition to the above, that the use of anonymous online accounts or data brokers by political parties, politicians and election candidates in an attempt to influence political discourse, democracy or democratic decisions be made an offence under the proposed legislation.”

#### ***Will the archive function to bring transparency during election campaigns?***

The **archive of online political advertising** which is a requirement under the Bill is a very significant part of bringing transparency. Its purpose is to enable society, including journalists, academic researchers and fact checkers, to gain a good understanding of the complexity of online political advertising and its role in an election campaign or its influence on politics in general. If this information is not presented in a searchable, user friendly way, it can be useless in achieving the policy goal of transparency. As suggested in the Report by the Joint Committee (2021, Recommendation 36) the Bill requires that the archive of online political advertising **is generated real-time** and is not after advertisements expire which is generally after the election period. Provision is included to ensure that the archive is maintained by a successor organisation, or transferred to the Electoral Commission, in the event that an online platform’s constitution changes (e.g, through acquisition, merger, disbandment – s121(5) c and 121(7)). This enables journalists, fact-checkers, academics, citizens and the Electoral Commission to monitor online political advertising during the critical period – during the election campaign. If implemented as intended in the Bill, this will facilitate real-time research during an election campaign.

The significance of regulating how the information is provided in archives was highlighted by the authors of research on the EU Code on Disinformation (referred to above). FuJo found that the archive of online political advertisements provided by all three platforms examined (Twitter, Facebook, Google) was incomplete, difficult to search and that it was questionable whether the archives served their purpose - to have real-time information available about the nature, cost and extent of micro-targeting behind political and issue-based advertising.<sup>107</sup>

### 3.3.3 Monitoring and Enforcement Regime

The Bill sets out that the regulated entities comprise both the sellers *and* the buyers of online political advertising. It creates offences for contraventions of the Bill by both parties to the transaction, the proposals create reciprocal offences. This may prove to be an effective way to ensure compliance. Offences are set out at s137 and discussed above briefly.

How is compliance monitored and determined?

The functions of the Electoral Commission for the purposes of this Part (regulating online political advertising) are set out in s125. **Section 127** empowers the Electoral Commission to monitor (or make arrangements to carry out monitoring including by contract s127(2)) of the placement, display, promotion or dissemination of online political advertisements.

The Electoral Commission can proactively monitor compliance (and may receive information from external persons which could prompt it to make enquiries). If, on the basis of its monitoring or on the basis of information brought to it by an external person, the Commission has reasonable grounds to believe that the regulations are being contravened it may, (a) under **s126**, conduct an investigation (i.e. an investigation is triggered by the Electoral Commission) or (b) under **s131** the chief executive may under certain circumstances<sup>108</sup> issue a Direction to the online platform or the buyer which takes effect immediately. **s131(2)** sets out what may be provided for in a direction. Where a Direction is issued, an online platform may appeal to the Board of the Electoral Commission under s132.

In the case of an investigation, the Electoral Commission may appoint an 'authorised officer' (s126) with relatively extensive powers (set out at **s134**) to conduct investigations into suspected contraventions of the legislation. The Electoral Commission may apply to the High Court for an Order if a person from whom it requires information to conduct an investigation will not provide information.

The investigation process set out in **s128 and s129** is depicted in Figure 5 below. In the event that the Commission finds that there has been a contravention, it has four tiered options including to issue a Compliance Notice and to bring about a prosecution. The recipient may appeal the Compliance Notice to the District Court under **s130**.

**Figure 5. Process of investigations by the Electoral Commission s128-129**

Source: L&RS Analysis of the Bill



## 4. Pandemic elections

The Covid-19 pandemic presented severe challenges to the management and scheduling of elections across the world. While natural disasters and other emergency situations pose similar challenges, typically they have a more localised impact on elections. There are two options when it comes to addressing the challenges Covid-19 poses to holding elections: postponement or the introduction of special voting arrangements to mitigate the threat of spreading the virus. There is no provision in Irish law for an election to be postponed due to the declaration of a state of emergency, or similar, as exists in some other countries.

James and Alihodzic identified five key challenges to holding elections and maintaining electoral integrity during natural disasters, including the Covid-19 pandemic.<sup>109</sup> These are:

1. Threats to the opportunities for deliberation
2. Equality of contestation
3. Equality of participation
4. Robust electoral management delivery
5. Institutional certainty

The Bill addresses only equality of participation by providing for an additional polling day and allowing electors on the special voters list to have a postal vote if voting is not possible from their nursing home or hospital.

Part V of the Bill provides for the Minister, with the consent of the Electoral Commission, to make an order for an advance polling day at an election, or referendum, in one or more constituencies, “where it is necessary to do so having regard to the immediate, exceptional and serious risk posed to human life and public health by a pandemic or by Covid-19”.

The advance polling day is in effect a second polling day. The poll will remain open for at least 12 hours, between 7am and 10:30pm.

The detail of any advance polling day under the Act is to be published in *Iris Oifigiúil*, and the returning officer in the affected constituency is required to publicise the detail.

Section 101 of the Bill provides for a person on the special voters list to be issued with a postal vote in the event that “the place where the special voter is ordinarily resident is not accessible to the special presiding officer and as a consequence the special voter would be unable to vote at the poll at the election”.

In the context of a pandemic or Covid 19 additional non-legislative arrangements would also be required to ensure the health and safety of staff working at polling stations and at counts. These arrangements are the responsibility of Returning Officers. Returning Officers are required to choose an appropriate count centre and making arrangements for staff, furniture and equipment, see for example s.113 of the *Electoral Act 1992*.

Special arrangements were introduced for counting the votes in the Seanad General Election 2020. The count centre was located in the Printworks rather than Leinster House to facilitate social distancing of count staff and observers. Attendance was restricted to the minimum permitted by law – candidates and their agents. No journalists attended. The count was live streamed on the Oireachtas social media platforms, the detailed results of every count and video clips of the Returning Officer’s announcements were also put out on the Oireachtas social media platforms. The counts for the National University of Ireland (NUI) and Dublin University (TCD) were also held in larger venues and livestreamed on the university websites.<sup>110</sup>

## Previous legislation related to the current Bill

There are three Private Members Bills relevant to the establishment of an electoral commission and one to the regulation of online political advertising.

- [Electoral Commission Bill 2012](#), PMB sponsored by Deputy Ciaran Lynch that lapsed with dissolution of the Dáil in 2016.
- [Electoral Commission Bill 2008](#), PMB sponsored by Deputy Ciaran Lynch that lapsed with dissolution of the Dáil in 2011.
- [Electoral Registration Commissioner Bill 2005](#), PMB sponsored by Deputy Eamon Gilmore that was defeated at second stage.
- [Online Advertising and Social Media Transparency Bill 2017 \[PMB\]](#) sponsored by Deputy James Lawless

## Public consultations related to the current Bill

There have been at least three public consultations relevant to this bill:

1. The Department of Housing, Planning and Local Government held a Public Consultation on the [Regulatory Impact Assessment \(RIA\) on the establishment of an Electoral Commission](#) in December 2018 which set out a number of options for establishing an electoral commission, including functions that might be assigned to it.
2. In 2019, the Department of Housing, Planning and Local Government published the results of a public consultation on the [Modernisation of the Electoral Register in Ireland –Report of Public Consultation](#)
3. In 2017 there was a public consultation on the regulation of transparency of online political advertising. [gov.ie - Submissions - public consultation on regulation of transparency of online political advertising \(www.gov.ie\)](#)

## Pre-legislative scrutiny of the General Scheme of the Bill

A [General Scheme](#) was published by the Department of Housing, Local Government and Heritage on 8 January 2021. Pre-Legislative Scrutiny [PLS] was undertaken by the Joint Committee on Housing, Local Government and Heritage between January and July 2021 and the Committee published its [report](#) with 42 recommendations. In the forward to the report the Cathaoirleach stated:

“The Committee broadly welcomes the provisions concerning the establishment of the Electoral Commission, the modernisation of the register, and the provisions for holding electoral events during COVID-19 restrictions, but there was much discussion and concern that the proposed legislation does not go far enough in addressing other aspects of the modern electoral environment, particularly around the influence of the online social media environment and thus the role of social media organisations”.

Five key issues arose during PLS:

1. Definitions of “online political advertisement” and “political purposes”.
2. Composition, resources, and additional functions for the Electoral Commission to those set out in the General Scheme.

3. The role of Local Authorities in the maintenance of the electoral register.
4. Data protection issues associated with using PPS numbers for the registration of voters, including the need for carrying out and publishing Data Protection Impact Assessments (DPIA) to ensure compliance with GDPR, and also ensuring the Bill is in compliance with the Digital Services Act.
5. Need for consistency in the approach to the regulation of political advertising both on and offline, and inside and outside election periods. The regime for regulating online political advertisements to be transparent, manageable and realistic in its implementation.

Table 6 sets out the 42 recommendations of the Committee at PLS and the response of the Department to those recommendations. Thirty-six recommendations are described as either being 'reflected in the preparation and drafting of the Bill's provisions' or 'being considered at Committee Stage'.

**Table 6. JOC 42 recommendations in PLS Report and response of the Department to those recommendations**

	Recommendation	Disclosure
1	The Committee recommends that the definition of 'online political advertising', and related definition of 'political purposes', as included in the Bill be amended to incorporate the definition of 'political purpose' as contained in the Electoral (Civil Society Freedom) (Amendment) Bill (2019) so as to assist in addressing and managing during the electoral cycle any unintended consequences that might negatively impact on the work of Civil Society Organisations.	Not incorporated in Bill
2	The Committee recommends that the Bill provide for the definition of 'issue-based advertisements' in addition to, but distinct from the current definition of 'political advertisements' and that the Department provide for the regulation and the development of transparency guidelines for such 'issue-based' advertisements.	Not incorporated in Bill
3	The Committee recommends that the Department review the proposed composition of the Electoral Commission with consideration to be given to international best practice.	Reflected in the preparation and drafting of the Bill's provisions
4	The Committee recommends that the proposed Electoral Commission include a Member with expertise or experience in <ol style="list-style-type: none"> <li>(a) IT systems, cybersecurity, data and digital security or a related background,</li> <li>(b) and include a former political representative with experience at both local and national level.</li> </ol>	<ol style="list-style-type: none"> <li>(a) Being considered as Committee Stage amendment</li> <li>(b) Reflected in the preparation and drafting of the Bill's provisions</li> </ol>
5	The Committee recommends that the proposed Electoral Commission be mandated to include, liaise with, or establish a sub-committee with representatives from those communities historically under-represented in electoral matters including but not limited to women, black people	Reflected in the preparation and drafting of the Bill's provisions

	and people of colour, new communities, LGBTQI+ people, members of the Traveller and Roma communities, migrants, young people, people with disabilities and people from disadvantaged socio-economic backgrounds.	
6	The Committee recommends that the Electoral Commission be funded through non-Voted Expenditure to maintain its independence and autonomy, with an increased budget to be made available on election years.	Not incorporated in Bill
7	The Committee recommends that the Electoral Commission be adequately funded, resourced, and staffed to ensure it can carry out and progress its functions effectively in line with best international practice for a comparative electoral process.	Reflected in the preparation and drafting of the Bill's provisions
8	The Committee recommends that local authorities be adequately funded, resourced, and staffed to allow them to carry out the additional requirements resulting from the proposed legislation.	Reflected in the preparation and drafting of the Bill's provisions
9	The Committee recommends that the proposed Bill provide for the promotion of voter registration and electoral participation, particularly for under-represented groups, as an explicit function of the Electoral Commission.	Reflected in the preparation and drafting of the Bill's provisions
10	The Committee recommends that the proposed Bill provide for the audit and evaluation of electoral events as an explicit function of the Electoral Commission.	Reflected in the preparation and drafting of the Bill's provisions
11	The Committee recommends that the proposed Bill provide for the maintenance of electoral integrity and the protection against election interference, as an explicit function of the Electoral Commission.	Bring considered as Committee Stage amendment
12	The Committee recommends that the proposed Bill provide for the provision of public awareness campaigns for all electoral events, in line with the referendum functions as provided for in the proposed Bill, and to provide for a public campaign explaining the single transferable vote system.	Reflected in the preparation and drafting of the Bill's provisions
13	The Committee recommends that the proposed Bill empower the Electoral Commission to work with and support actions by NGOs concerned with promoting public participation in electoral processes.	Reflected in the preparation and drafting of the Bill's provisions
14	The Committee recommend that the proposed Bill mandate the Electoral Commission to encourage and promote gender balance in all elements of the electoral process.	Reflected in the preparation and drafting of the Bill's provisions
15	The Committee recommends that the proposed Bill mandate the Electoral Commission to develop guidelines and standards governing political discourse during referendum and electoral events.	Not incorporated in Bill

16	The Committee recommends that the proposed Bill provide for the sanctioning of political parties or candidates who engage in discriminatory actions or rhetoric.	Not incorporated in Bill
17	The Committee recommends that the Department engage with the National Disability Authority to explore how the proposed legislation might be improved so as to better serve the needs of people with disabilities.	Reflected in the preparation and drafting of the Bill's provisions
18	The Committee recommends that the Electoral Commission be mandated to develop guidelines to ensure that all electoral and political information produced by parties is accessible for persons with disabilities.	Reflected in the preparation and drafting of the Bill's provisions
19	The Committee recommends that the proposed Bill provide for the promotion, inclusion, facilitation, and participation of persons with disabilities in the electoral and political process as an explicit function of the Electoral Commission.	Reflected in the preparation and drafting of the Bill's provisions
20	The Committee recommends that the Department clarify in the Bill the method by which the modernised electoral register will interact with those registers maintained by local authorities.	Reflected in the preparation and drafting of the Bill's provisions
21	The Committee recommends that the Electoral Commission's role in the oversight of the Electoral Register be strengthened and expanded, with a mandate to reform and improve the standards of electoral registers maintained by local authorities.	Reflected in the preparation and drafting of the Bill's provisions
22	The Committee recommends that the Electoral Commission be given primary responsibility for registering, maintaining and controlling the data on the electoral register, with local authorities to act as agents and/or processors of the Electoral Commission with sufficient resources to do so.	Not incorporated in Bill
23	The Committee recommends that the Bill provide for a simplification of the process of re-registration arising from voter mobility/relocation and/or to provide for postal voting where such a move is temporary.	Reflected in the preparation and drafting of the Bill's provisions
24	The Committee recommends that three documented attempts be made within a 6-month period after the new rolling register comes into force, to contact persons before they are removed from the register.	Reflected in the preparation and drafting of the Bill's provisions
25	The Committee recommends the integration of the register of deaths with the centralised register to ensure that when a person passes away that they are automatically removed from the register to prevent deceased persons from receiving polling cards or being called for jury duty.	Reflected in the preparation and drafting of the Bill's provisions
26	The Committee recommends that the Department considers whether clarification is required regarding the parameters for the use of the electoral register outside of electoral periods.	Reflected in the preparation and drafting of the Bill's provisions

27	The Committee recommends that the Bill provide for the regulation of the creation by others of third party databases which cross reference data contained in the electoral and the marked register.	Reflected in the preparation and drafting of the Bill's provisions
28	The Committee recommends that the Bill provide for the regulation of access to the electoral register by political parties and individuals, as well as providing clear guidance on the use of the electoral register by political parties and individuals, including data protection requirements.	Reflected in the preparation and drafting of the Bill's provisions
29	The Committee recommends that the Electoral Commission, in conjunction with the DPC, conduct a Data Protection Impact Assessment on whether or not the cross-referencing of the register of electors and multiple marked registers is permissible. If found to be permissible, the majority of the Committee recommend that the electoral commission provide a register of voters who have voted in the previous three elections, set out by local electoral areas within constituencies, to all registered political parties and that the Commission use this information to increase democratic participation.	Not incorporated in Bill
30	The Committee recommends that, in advance of the Bill being published the Department publish any Data Protection Impact Assessments undertaken in the course of developing the digital electoral register and make any ancillary documentation publicly available.	Reflected in the preparation and drafting of the Bill's provisions
31	(a) The majority of the Committee strongly recommends the use of the PPSN to verify a person's identity on the register. This should be done in full compliance with GDPR requirements, and that justification for doing so be made publicly available in advance of the Bill being published. (b) Support should be provided to assist a person who has a legal right to vote in the state to obtain a PPSN as part of the registration process.	(a) Reflected in the preparation and drafting of the Bill's provisions (b) Not incorporated in Bill
32	The Committee recommends that any proposed data sharing arrangements undergo a Data Protection Impact Assessment to ensure full compliance with GDPR, and that Public Service Identity data, if used, for verification purposes be used exclusively for that purpose.	Reflected in the preparation and drafting of the Bill's provisions
33	The Committee recommends that the Department carry out a DPIA specifically concerned at the cohort of persons under the age of eighteen whose data will be processed under the proposed legislation and address any safeguarding requirements that may arise.	Reflected in the preparation and drafting of the Bill's provisions



34	The Committee recommends that the Department ensure that the provisions of the Bill align with the Digital Services Act.	Reflected in the preparation and drafting of the Bill's provisions
35	The Committee recommends that prior to the bill being finalised, detailed Data Protection Impact Assessments be conducted on all elements of the Bill which involve the processing of personal data, and that these DPIAs be made publicly available.	Reflected in the preparation and drafting of the Bill's provisions
36	The Committee recommends that the proposed Bill be amended so as to require online platforms to publish political advertisements and associated transparency notices in an archive or database in real-time on an ongoing basis and not solely following the expiration of the advertising campaign.	Reflected in the preparation and drafting of the Bill's provisions
37	The Committee recommends that the Department engage with online platforms to further develop and clarify transparency requirements around online political advertising that allow for sufficient and robust public transparency while accommodating their manageable and realistic implementation.	Reflected in the preparation and drafting of the Bill's provisions
38	The Committee recommends that the Department engage with online platforms to develop effective and agreed requirements for such platforms to accurately identify and verify the information of buyers of advertisements, such that those in breach of the provisions would be subject to sanctions and/or liable to prosecution.	Reflected in the preparation and drafting of the Bill's provisions
39	The Committee recommends that the use of artificial intelligence or internet bots by political parties, politicians and election candidates to power politically motivated social media accounts be made an offence under the proposed legislation. In addition to the above, that the use of anonymous online accounts or data brokers by political parties, politicians and election candidates in an attempt to influence political discourse, democracy or democratic decisions be made an offence under the proposed legislation.	Being considered as Committee Stage amendment
40	The Committee recommends that the proposed Bill provide for consistency in approach in the regulation of political advertising both on and offline, and both inside and outside of election periods.	Reflected in the preparation and drafting of the Bill's provisions
41	The Committee recommends that the Department facilitate an exploration into the utilisation of social media content in electoral and political interference in the form of public consultation and expert opinion.	Being considered as Committee Stage amendment
42	The Committee recommends that an interdepartmental committee be established that engages with the Media Commission and the	Reflected in the preparation and drafting of the Bill's provisions

	Electoral Commission in order to ensure oversight of “community guidelines” with a view to their codification in future legislation.	
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**Source: Department of Housing**

## Appendix 1. Key Reports on the establishment of an Electoral Commission 2007-2021

The **Programme for Government 2007** committed to establish an Electoral Commission and the Department of the Environment and Local Government began the process by commissioning a report from the Geary Institute in UCD on the issues involved in establishing an Irish Electoral Commission. Geary Institute for Department of Housing (2008) **Preliminary Study on the Establishment of an Electoral Commission**. This study recommended the establishment of an Electoral Commission with responsibility for the Register of Political parties, compilation of the electoral register, Constituency Commission functions, administration of elections (nominations to declarations), party and election funding, research and the promotion of voter registration and turnout.

In **2008** the **Joint Oireachtas Committee on the Environment, Heritage and Local Government** **First Report: the Future of the Electoral Register in Ireland and related matters** examined electoral registration in Ireland and recommended the creation of a National Electoral Office to run elections and prepare and maintain the register of electors.

In **2010**, the **Joint Oireachtas Committee on the Constitution's** *Review of the electoral system for the election of members to Dáil Éireann* supported the establishment of an Electoral Commission and recommended that it be placed on a constitutional footing to enhance its legitimacy and to guarantee its independence. That Committee also made recommendations on the registration of voters.

The **Fourth Report of the Constitutional Convention** (2013) addressed the Dáil electoral system and among other things recommended the establishment of an Electoral Commission but did not elaborate on functions it should have.

In **2015** the Government published a **Consultation Paper on the Establishment of an Electoral Commission in Ireland** (Department of Environment, Community and Local Government, 2015) which was the starting point for an in-depth study of the topic by the Joint Committee on Environment, Culture and the Gaeltacht. The **Report of the Joint Committee on the Consultation on the proposed Electoral Commission (January 2016)**, which followed submissions and hearings, makes recommendations on:

- how to establish an electoral commission;
- the functions which should be assigned to it;
- mechanisms to ensure its independence and accountability; and
- composition of the electoral commission.

Following its consideration of the Joint Committee's Report (2016), the Department of Housing, Planning and Local Government published a **Regulatory Impact Assessment (RIA) on the establishment of an Electoral Commission in December 2018** which set out a number of options for establishing an electoral commission, including functions that might be assigned to it. A **Public Consultation on the Regulatory Impact Analysis** on the establishment of an Electoral Commission received 23 submissions.

In December **2019** the then Government approved the **General Scheme (GS) of an Electoral Commission Bill**, however the Dáil was dissolved before the GS was published.

The **General Scheme of the Electoral Reform Bill** was published in January 2021 and the Joint Committee on Housing, Local Government and Heritage conducted **Pre-Legislative Scrutiny** on the GS between January and July 2021. The Committee's **report** was published in July 2021.

## Appendix 2. Key Reports on modernisation of the Electoral Register

In 2008 the **Joint Oireachtas Committee on the Environment, Heritage and Local Government** [First Report: the Future of the Electoral Register in Ireland and related matters](#) examined electoral registration in Ireland and recommended:

- Establishment of a National Electoral Officer with a mandate to prepare and maintain the National Register of Electors and to oversee the operation of elections and that local authority functions for elections be transferred to that office;
- Use of identifiers such as PPS numbers, dates of birth and signatures to ensure the accuracy of the register. Privacy should be guaranteed by prohibiting the publication of PPS numbers on the register (i.e. only to be used to check identity).

In 2010, the **Joint Oireachtas Committee on the Constitution's** *Review of the electoral system for the election of members to Dáil Éireann* supported the establishment of an Electoral Commission and recommended that it be placed on a constitutional footing to enhance its legitimacy and to guarantee its independence. That Committee also made several recommendations on the registration of voters, including:

- That a new voter registration system be established and maintained under the authority of the new Electoral Commission.
- That the voter registration process in Northern Ireland be used as a model of best practice in designing and implementing the new voter registration system.
- That the new voter registration system be based upon the allocation of Personal Public Service (PPS) numbers.
- That the new voter registration system allow input at local level to verify the accuracy, comprehensiveness and timeliness of registration information.

The [Report of the Joint Committee on the Consultation on the proposed Electoral Commission](#) (January 2016) set out the following approach to solve the problems with the accuracy and completeness of the electoral register:

- A rolling register to replace the annual canvas and supplementary register
- Individual rather than household registration
- A central electronic register to replace the 31 separate registers (did not specify whether to create a new register or to clean up and combine the existing registers)
- Use of PPSN (Personal Public Service Numbers) to address problems of inaccuracy and incompleteness in a manner compliant with the Data Protection legislation
- Investigate online registration.

The Joint Committee indicated a preference that the Electoral Commission would have an oversight and policy role in reforming the electoral register, while the local authorities maintained their operational function at least in the medium term. (pp13-14)

In 2019, the Department of Housing, Planning and Local Government (2019) published the results of a public consultation on the [Modernisation of the Electoral Register in Ireland –Report of Public](#)

[Consultation](#).<sup>1</sup> The Public Consultation followed engagement with the Local Authority Franchise Staff. Respondents to the Public Consultation were positively disposed to the proposals, especially the simplified forms and registration processes, rolling registration and a single database. There were concerns expressed around the implementation of the reforms, specifically identity verification, data protection and privacy.

The 2019 Consultation also included four additional proposals: a system of anonymous registration, registration for those who are homeless, early registration for 16-18 year olds and the removal of the provision for an edited register. These proposals also received support in the public consultation process.

## References

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1 New Programme for Government 2007

2 Constitution Review Group (1996) Report, All Party Oireachtas Committee on the Constitution (2002) Seventh Progress Report, Parliament, Joint Committee on the Constitution (2010) Fourth Report: Article 16 of the Constitution Review of the Electoral System for the election of members to Dáil Éireann, and the Convention on the Constitution (2013) Fourth Report, Dáil Electoral System

3 David Farrell & Richard Sinnott (2018) 'The Electoral System' in John Coakley & Michael Gallagher (eds) Politics in the Republic of Ireland, pp103-

<sup>4</sup> [Government Press Release 30 December 2019](#)

5 IDEA International (2014) [Electoral Management and Design](#) p.1

6 Fiona Buckley & Theresa Reidy (2015) Managing the Electoral Process: Insights from, and for, Ireland, Irish Political Studies, 30:4, 445-453, DOI:10.1080/07907184.2015.1100815

7 Jennifer Kavanagh (2013) Electoral law in Ireland: Sustaining electoral integrity from process, procedure and precedent?

8 Stakeholders/Interlocutors: officials from Dept of Housing (Franchise), Department of Foreign Affairs and the Standards in Public Office Commission, The Ombudsman, Press Ombudsman, Returning Officers, RTE Head of Editorial Standards and Compliance, Secretaries General or similar for 5 political parties and representatives from Transparency International and Women for Election, Facebook.

9 OSCE Office for Democratic Institutions and Human Rights. (5 February 2020) Ireland Early Parliamentary Elections 8 February 2020 ODIHR Needs Assessment Mission Report 22-24 January 2020

10 Michael Marsh (2013) Presentation to the Convention on the Constitution (2013) Fourth Report, Dáil Electoral System p. 62

<sup>11</sup> [Report of the Joint Committee on the Consultation on the proposed Electoral Commission](#) (January 2016)

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<sup>1</sup> 187 submissions were received from a range of individuals, community and voluntary organisations, Local Authorities, public representatives and political parties

<sup>12</sup> L&RS (2015) Research paper for the Joint Committee on Environment, Culture and the Gaeltacht. Electoral Commission: an overview of the policy rationale.

<sup>13</sup> Local Government Act 2001 empowers the Minister for Housing, Planning and Local Government to divide a local authority area into local electoral areas and to amend those areas. However, in advance of deciding to make an order under section 23 of the Act, the Minister must, in accordance with section 32(2) of the Local Government Act 1991, request a boundary committee to make a report having regard to such matters as may be specified by the Minister. The Minister must publish the report of the boundary committee and must have regard to the report of that committee when deciding to make an order on local electoral area boundaries. Boundary committees are independent in the performance of their functions and stand dissolved on the expiration of such period of time as may be specified by the Minister at the time of a committee's establishment

<sup>14</sup> [Report of the Joint Committee on Environment, Culture and the Gaeltacht on the Consultation on the proposed Electoral Commission](#) (January 2016)p16

<sup>15</sup> Joint Committee on Housing (2021) Report on PLS p30

<sup>16</sup> [Report of the Joint Committee on Environment, Culture and the Gaeltacht Consultation on the proposed Electoral Commission](#) (January 2016), p54-55

<sup>17</sup> Adrian Kavanagh (2014) All Changed, Changed Utterly? Irish General Election Boundary Amendments and the 2012 Constituency Commission Report, Irish Political Studies,29:2, 215-235, DOI: 10.1080/07907184.2013.827667

<sup>18</sup> O'Malley v An Taoiseach [1990] ILRM 461

<sup>19</sup> The reference in (c) above to county boundaries is deemed not to include a reference to the boundary of a city or any boundary between any two of the counties of Dún Laoghaire-Rathdown, Fingal and South Dublin.

<sup>20</sup> Noel Whelan (2000) Politics, elections and the law.

<sup>21</sup> John Coakley (2013) Reforming political institutions. Ireland I comparative perspective. IPA

<sup>22</sup> Ibid p184

<sup>23</sup> Coakley 2013, Kavanagh (2008)

<sup>24</sup> Coakley 2013p.175

<sup>25</sup> [Local Electoral Area Boundary Committee - Legislation](#)

<sup>26</sup> [Local Electoral Area Boundary Committees 2017 - Home Page](#)

<sup>27</sup> [Regulatory Impact Assessment \(RIA\) on the establishment of an Electoral Commission](#)p11-12

<sup>28</sup> Standards Commission (2019) [Submission to public consultation on electoral commission](#) . pp7-10

<sup>29</sup> [2020-SIPOC-ARFinal-English-Web.pdf](#)

<sup>30</sup> <https://www.refcom.ie/previous-referendums/marriage-presidential-age/report-on-the-referendums-on-marriage-and-on-the-age-of-presidential-candidates.pdf>; Joint Committee (2016)

<sup>31</sup> <https://www.irishstatutebook.ie/eli/2019/si/484/made/en/print>

<sup>32</sup> Preliminary Study on the Establishment of an Electoral Commission (2008) and the Joint Committee on the Consultation on the proposed Electoral Commission (2016)

<sup>33</sup> [Standards Commission Submission to Public Consultation on Electoral Commission \(sipo.ie\)](#)p 13

<sup>34</sup> [Jane Suiter Submission to PLS 2021](#)

<sup>35</sup>International electoral-management-design-2014.pdf (idea.int)

<sup>36</sup> [Government Press Release 21 July 2021](#)



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- <sup>37</sup> [gov.ie](http://www.gov.ie) - Significant Modernisation of Ireland's Electoral System to be delivered under Electoral Reform Bill ([www.gov.ie](http://www.gov.ie))
- <sup>38</sup> In 2016, Census 24 April, Preliminary results 14 July 2016, Final results 6 April 2017. In 2011, Census 10 April 2011, Preliminary results 30 June 2011, Final results 29 March 2012
- <sup>39</sup> Dáil Debates [PQ Constituency Commission 1 March 2022](#)
- <sup>40</sup> [Regulatory Impact Assessment \(RIA\) on the establishment of an Electoral Commission](#) p11-12
- <sup>41</sup> Joint Committee on Housing (2021) [Report on PLS](#) p.21
- <sup>42</sup> ACE, the Electoral Knowledge Network (2012) Voter Registration [https://aceproject.org/ace-en/topics/vr/explore\\_topic\\_new](https://aceproject.org/ace-en/topics/vr/explore_topic_new)
- <sup>43</sup> <https://aceproject.org/ace-en/topics/vr/vra/vra08/vra08a>
- <sup>44</sup> <https://opac.oireachtas.ie/Data/Library3/Library2/DL044618.pdf> p.3
- <sup>45</sup> Eoin O'Malley (2001) Apathy or error? Questioning the Irish register of electors, Irish Political Studies, 16:1, 215-224, DOI: 10.1080/07907180108406641
- <sup>46</sup> Keogh, Gary and Whelan, Brendan J. (1986) A statistical analysis of the Irish electoral register and its use for population estimation and sample surveys. General Research Series Paper No. 130, July 1986. <http://aei.pitt.edu/98889/1/GRS130.pdf>
- <sup>47</sup> Eoin O'Malley (2001) Apathy or error? Questioning the Irish register of electors, Irish Political Studies, 16:1, 215-224, DOI: 10.1080/07907180108406641
- <sup>48</sup> [Political analyst raises electoral fraud concerns ahead of by-election \(irishexaminer.com\)](#)
- <sup>49</sup> Kavanagh Adrian, submission to Joint Oireachtas Committee on the Constitution (2010) Inquiry on the electoral system.
- <sup>50</sup> Stephen Quinlan (2015) Facilitating the Electorate: A Multilevel Analysis of Election Timing, Registration Procedures, and Turnout, Irish Political Studies, 30:4, 482-509, DOI:10.1080/07907184.2015.1099041 p39
- <sup>51</sup> Joint Oireachtas Committee on the Environment, Heritage and Local Government (2008) [First Report: the Future of the Electoral Register in Ireland and related matters](#)
- <sup>52</sup> For details about who can apply for inclusion on the Postal Voters List and the Special Voters List see [Registering to vote \(citizensinformation.ie\)](#)
- <sup>53</sup> L&RS (2015) Electoral commission: overview of policy rationale. Research paper for the Joint Committee on Environment, Culture and the Gaeltacht published as appendix to the Committee Report
- <sup>54</sup> Joint Committee on Housing, Local Government and Heritage [PLS Debates 22 January 2021](#)
- <sup>55</sup> Stephen Quinlan (2015) Facilitating the Electorate: A Multilevel Analysis of Election Timing, Registration Procedures, and Turnout, Irish Political Studies, 30:4, 482-509, DOI:10.1080/07907184.2015.1099041
- <sup>56</sup> [https://www.gov.ie/en/consultation/dbf9ff-public-consultation-on-proposals-to-modernise-the-electoral-registra/?referrer=http://www.housing.gov.ie/sites/default/files/publications/files/public\\_consultation\\_report.pdf](https://www.gov.ie/en/consultation/dbf9ff-public-consultation-on-proposals-to-modernise-the-electoral-registra/?referrer=http://www.housing.gov.ie/sites/default/files/publications/files/public_consultation_report.pdf) pp21-23
- <sup>57</sup> Data Protection Commission [Submission to the Pre-Legislative Scrutiny of the General Scheme of the Electoral Reform Bill 2020](#)
- <sup>58</sup> [Council Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) OJ L119/1](#)
- <sup>59</sup> 'Guidance Note: Legal Bases for Processing Personal Data', December 2019, available at <https://www.dataprotection.ie/en/dpc-guidance/guidance-legal-bases-processing-personal-data>, accessed on 4 April 2022.

<sup>60</sup> Ibid at 18, original emphasis

<sup>61</sup> [Council Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) OJ L119/1](#)

<sup>62</sup> Joint Committee on Housing, Local Government and Heritage, Pre-legislative scrutiny of the general scheme of the Electoral Reform Bill, [Opening Statement of the Data Protection Commission](#), 23 March 2021

<sup>63</sup> Joint Committee on Housing (2021) Report on PLS, Report of Public Consultation on Proposals to Modernise the Electoral Registration Process (2019)

<sup>64</sup> ICCL submission on the General Scheme <https://www.iccl.ie/wp-content/uploads/2021/06/ICCL-Submission-on-The-General-Scheme-of-the-Electoral-Reform-Bill-2020-1-1.pdf>

<sup>65</sup>

[https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint\\_committee\\_on\\_housing\\_local\\_government\\_and\\_heritage/2021-06-22/debate/mul@/main.pdf](https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_housing_local_government_and_heritage/2021-06-22/debate/mul@/main.pdf)

<sup>66</sup> UK House of Commons Library (2020) [Briefing Paper: Anonymous electoral registration](#)

<sup>67</sup> [John B. Holbein, D. Sunshine Hillygus](#) (2015) 'Making Young Voters: The Impact of Preregistration on Youth Turnout'. *American Journal of Political Science*

<sup>68</sup> For example, Facebook's archive of online political advertising records 72445 advertisements worth €4,163,318 from April 2019 until end of 2021.

<sup>69</sup> A Report by the Council of Europe notes how the failure to regulate political advertising online results in the severe decline in the **effectiveness of the regulations of regular broadcast media** [Jean F Furnemont and D. Kevin \(2020\) \*The Regulation of political advertising: a comparative study with reflections on the situation in South-East Europe\* Council of Europe. P.46.](#)

<sup>70</sup> Transparency Initiative, Liz Carolan (October 2018) *Submission to Public Consultation on Transparency in online political advertising*.

<sup>71</sup> Ball J 'As our politics goes online can the laws keep up?' *Prospect Magazine* 19 January 2018.

<sup>72</sup> This policy process commenced with a Private Members' Bill in 2017 which proposed transparency rather than a ban on online political advertising (Online Advertising and Social Media Transparency Bill 2017).

<sup>73</sup> It tends to be the case in countries with long traditions of public service broadcasting.

<sup>74</sup> Centre for Law and Democracy cited above p. 5.

<sup>75</sup> Institute of Future Media and Journalism 'Digital News Report Ireland' in association with BAII and Reuters/YouGov. Accessible from [here](#).

<sup>76</sup> See here to reference the 2021 [Digital News Report Ireland](#).

<sup>77</sup> [Ireland - Reuters Institute Digital News Report 2020](#).

<sup>78</sup> 'Facebook bans foreign ads for eighth amendment referendum' *Irish Times* 8 May 2018. This was announced by Facebook at a hearing of the Joint Committee on the *Online Advertising and social media transparency bill 2017 PMB*.

<sup>79</sup> Oxford University Politics Blog (2018) '[Tracking the Twitter Conversation in the Irish abortion referendum](#)'

<sup>80</sup> 'How Twitter Coaxed its Boss on Trump Ban' *New York Times* 17 January 2021.

<sup>81</sup> Furnemont and Kevin (2020) [Council of Europe Report cited](#) above p.119

<sup>82</sup> Except for s119(7)

<sup>83</sup> (except for from Irish citizens, certain companies (FNOTE) or nationals or political parties from, or a body (FN) registered in, an EU Member States in case of European Parliament elections) or

<sup>84</sup> Summary offences can only be dealt with by a Judge in the District Court without a jury.

<sup>85</sup> Political purpose' has the meaning assigned to it by s22(2) of the Electoral Act 1997 [which is the meaning used for a political donation i.e. a donation for political purposes is a donation for the purposes of '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.' SIPO recommended aligning these definitions in its submission to the Consultation process in 2018. The Joint Committee recommended instead using the definition in the Electoral (Civil Society Freedom) (Amendment) Bill 2019 which is narrower and endeavours to exclude activity by third parties.

<sup>86</sup> Online platform (s117) is "any provider of a website, web application, digital application or other seller or an online political advertisement accessible to the general public or a section of the public that (a) has not less than 10,000 unique monthly users in the State for a period of not less than 7 months during the 12 months immediately preceding the date of the making of a polling day order and (b) receives payment or payments in kind for the placement, display, promotion or dissemination of an online political advertisement on the provider's website, web application or digital application.

<sup>87</sup> Irish Council for Civil Liberties, Irish Human Rights and Equality Authority and Liz Carolan

<sup>88</sup> Joint Committee Report on the General Scheme, 2021, 15.

<sup>89</sup> Some groups who qualify as third parties (in that they accept a donation 'for political purposes' of over €100 in a calendar year) argue that the statutory limits on the size of the donations which they may accept affect their capacity to engage in lobbying and advocacy activity (€2,500 is the maximum which can be received by any one donor).

<sup>90</sup> See here for link to L&RS post on this Bill which links to the Bill and examines policy rationale and key provisions.

<sup>91</sup> See L&RS Note, 2021,15.

<sup>92</sup> Nelson and Jaunson (March 2020) [Germany's new Media Treaty demands that platforms explain algorithms and stop discriminating: can it deliver?](#) The Treaty is the The German State Media Treaty – Legal Requirements on Telemedia (2020).

<sup>93</sup> SIPO (2017) Annual Report 2016

<sup>94</sup> BAI Submission to Government's Consultation on Transparency of online political advertising (2018) cited above.

<sup>95</sup> Research referred to by the Institute on Future Media and Journalism, DCU in its submission to the Department's Consultation (October 2018).

<sup>96</sup> See Cunningham and March (2018) *Voting Behaviour* in Gallagher and Coakley, eds., *Politics in the Republic of Ireland* pp.137-163. London; Routledge

<sup>97</sup> Farrell, Marsh, Reidy (2017) 'The post-crisis voter'. The 2016 election is described as one of the most volatile elections in Ireland (and among one of the most volatile elections in Europe), leading to a very fragmented party system – the most fractionalized party system in the history of the state - and the emergence of new parties and groups, some of these of a 'populist' hue.

<sup>98</sup> See Oireachtas L&RS Note (2021) *The Regulation of online political advertising: evaluating the Government's policy proposals*

<sup>99</sup> Wood Abby K 'Campaign Finance Disclosure' *Annual Review of Law and Social Science Vol 14: 11-27*

<sup>100</sup> Wood Abby K 'Campaign Finance Disclosure' *Annual Review of Law and Social Science*

<sup>101</sup> The Code was agreed to by big online platforms – Google, Facebook, Twitter, Mozilla – as well as by a key trade representative body for online platforms ( EDIMA). It commits social media platforms to a range of actions designed to tackle disinformation and to bring transparency to online political advertising. The initiative commenced with the European Commission's Communication on Tackling Online Disinformation

issued in 2018) and the Code was published alongside an Action Plan on Tackling Online Disinformation. The research undertaken by FuJo concerned the application of the Code by online platforms in Ireland during the campaign for the European Parliamentary elections in 2019 (in particular the Code's commitments on online political advertising). Two reports have been issued since concerning the application of the Code during ELecCheck (2020) and CovidCheck (2021). Similar research was undertaken in 12 other states and the results were together published in a report by European Regulators Group for Audiovisual Media Services (ERGA) – which has been assigned a monitoring role in the Code. The Code is currently being updated and strengthened.

<sup>102</sup> Online platforms, leading social networks, advertisers and advertising industry

<sup>103</sup> 'How technology is powering election coverage' *The Guardian* 19 January 2021. Software engineers working with the Guardian applied software solutions to delve into the demographics of parties' targeting during the campaign.

<sup>104</sup> Defined in s117 as 'a targeting method involving the use of data analysis techniques, tools or other methods to address, transmit or communicate a tailored online political advertisement either to a specific person or group of persons or to increase the circulation, reach or visibility of an online political advertisement.'

<sup>105</sup> Defined in s117 as "a targeting method involving the use of data from an existing online audience and which applies the use of data analysis techniques, tools or other methods to identify new persons who have similar characteristics or are engaged in similar activities on an online platform"

<sup>106</sup> See Nelson and Jaunson, 2020 cited above.

<sup>107</sup> Kirk, Culloty et al (2019) *ElectCheck: A Report on political advertising online during the 2019 European Elections*. Institute of Future Media and Journalism, DCU and BAI.

<sup>108</sup> During an election period and the Chief Executive is 'satisfied' that there is or has been a clear contravention of s119, 120, 121, 122 or 123

<sup>109</sup> Toby James and Sead Alihodzic (2020) 'When is it democratic to postpone to postpone an election? Elections during natural disasters, COVID-19 and emergency situations' *Election Law Journal*, Volume 19, Number 3.

<sup>110</sup> L&RS Note (2020) [Holding elections during the Covid-19 pandemic](#)

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