

**Submission to the UN Special Rapporteur on
the Rights to Freedom of Peaceful Assembly and of Association,
Mr Clément Nyaletsossi Voule**

Summary

The Coalition for Civil Society Freedom wishes to draw your attention to restrictions on civil society organisations' freedom of association that have emerged in the last three years in Ireland. Several civil society organisations (CSOs) have been instructed to return funding to their donors or face possible prosecution, and some have been forced to close. These restrictions stem from a 2001 amendment of the Electoral Act 1997.¹

Section 22 of the Electoral Act 1997 was amended in 2001 to impose restrictions and reporting obligations on 'third parties' who accept donations over €100 for 'political purposes'. This was intended to regulate funding for political campaigns by "third parties", including their influencing of elections and referenda. However, "political purposes" was and remains defined as "to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority".

This vague and broad definition applies beyond elections and referenda periods, and can potentially cover the activities of a wide range of CSOs engaging in legitimate advocacy, including human rights NGOs; and in the past three years, the Standards In Public Offices Commissions (SIPOC) has applied this in a more expansive way. Moreover, as the EU Fundamental Rights Agency (EU FRA) pointed out in 2018, SIPOC's investigations are often triggered by complaints to the regulatory body, so enforcement can inadvertently be selectively targeted.²

The effect of applying this law to CSOs is that they are prohibited from receiving any donations from foreign sources and from any individual exceeding € 2,500 in any year for work commenting on or seeking to influence government policy (there are other funding restrictions). The blanket ban on foreign funding can have a particularly serious impact in Ireland, where most independent funding of human rights work comes from trusts and foundations based outside of Ireland, a point made by the EU FRA. In addition, we are concerned by the impact of the onerous tracking and reporting requirements attached to small domestic donations that are permitted.

CSOs have been threatened with prosecution. The criminal offences created by the Electoral Act are significant; the possible penalties on 'third parties' (and corporate donors) for failing to comply are a €25,394 fine and three years' imprisonment. SIPOC has also directed or advised several CSOs to return funds which it has deemed "prohibited".

¹ Irish Statute Book, ELECTORAL (AMENDMENT) ACT, 2001: <http://www.irishstatutebook.ie/eli/2001/act/38/section/49/enacted/en/html#sec49>

² EU FRA, *Challenges facing civil society organisations working on human rights in the EU*, January 2018: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf

Therefore, we believe that the Electoral Act is incompatible with the right to Freedom of Association under article 22 of the International Covenant on Civil and Political Rights. SIPOC had raised concerns that the definition of “political purposes” in Section 22 could impact civil society freedom in Ireland in a manner that was unintended by the legislature.³ Although this has proven to have been prescient, these concerns remain unaddressed. Concerns were also raised by the Irish Human Rights and Equality Commission⁴ in 2019 about this law; both it and FRA note reports of its broader application in recent years.

The Coalition for Civil Society Freedom launched a campaign for Electoral Act reform in October 2018. However, the Irish government has failed to address the need for reform of the section 22 provisions. We urge you to highlight the need for amendment of the Electoral Act 1997 as amended with the Irish government as a matter of urgency. Our [Policy Paper](#), below, includes proposed new wording of section 22 in the Appendix, as well as examples of the application of the section 22 provisions to CSOs’ advocacy work. Additional information can be promptly provided upon request.

³ SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003, p. 16

⁴ Irish Human Rights & Equality Commission (IHREC), *Policy Statement on the Electoral Acts and Civil Society Space in Ireland*, January 2019: <https://www.ihrec.ie/app/uploads/2019/01/Policy-Statement-on-Civil-Society-and-the-Electoral-Acts-F-11012019.pdf>

**THE COALITION FOR
CIVIL SOCIETY FREEDOM**

***KEEPING THE PEOPLE'S
VOICE IN POWER***

COALITION STATEMENT ON
THE ELECTORAL ACT





'Civil Society Organisations have an important role in the EU's democracies: they help "give a voice" to people on issues that matter to them, assist rights holders, monitor governments' and parliaments' activities, give advice to policymakers, and hold authorities accountable for their actions.'

EU FUNDAMENTAL RIGHTS AGENCY, 2017

Summary

We are a coalition of civil society organisations working to influence public policy for the benefit of people living in Ireland. The Wheel is Ireland's national association of community and voluntary organisations, charities and social enterprises. Every day, members of the Wheel are not only active in providing on-the-ground services but are also busy advocating for better living conditions and supports for the communities they represent. The Irish Council for Civil Liberties (ICCL) exists to raise awareness in public of human rights issues, while Amnesty International Ireland researches and campaigns with the aim of preventing and ending grave human rights abuses. Transparency International Ireland is the Irish chapter of the worldwide movement against corruption. Front Line Defenders is an international human rights organisation based in Dublin, which works to advance the protection of human rights defenders at risk in all regions of the world. Uplift is a peoplepowered campaigning tool which allows members of the public to join together online in order to create public pressure for change in laws or policies that cause them concern.

Our coalition is deeply worried about provisions inserted in 2001 into section 22 of the Electoral Act 1997 as

amended, which appear to prohibit any person or organisation based in Ireland from accepting sizeable or any international¹ donations to assist them in influencing public policy. In addition, we are concerned by the impact of the onerous tracking and reporting requirements that attach to small domestic donations. According to the wording of Electoral Act, these donation restrictions can apply to civil society advocacy work all of the time, and not just when advocating an election or referendum result.

We believe that section 22 of the Electoral Act violates the Irish Constitution, European law and international human rights law. Our analysis of how the Electoral Act is currently out of step with human rights standards and Ireland's foreign policy is contained below. We are gravely concerned that Ireland's democratic values are compromised by the current wording of the Electoral Act.

In fact, the wording of the Electoral Act could be interpreted to mean that our advocacy on this very issue of public policy is prohibited

¹ The term 'international' is used throughout this policy paper to refer to any source outside of the jurisdiction of the Republic of Ireland.

We have drafted wording for an amendment to section 22 of the Electoral Act which we believe must be inserted into the legislation without delay. Our wording would confine the Electoral Act's civil society donation restrictions to advocacy aimed at achieving a certain result in elections and referendums only. The Appendix sets out what we believe section 22 of the Act should look like.

The Government has begun a public consultation on electoral reform and threats to election security, to which organisations in our coalition wish to contribute. However, it is imperative that the straightforward amendments we propose are made to section 22 of the Electoral Act prior to the upcoming debates and reforms in the area of election security.

The amendments we propose do not affect election or referendum financing or campaigning. They are designed to allow civil society to freely advocate on public policy issues outside of campaigning in an election or referendum for which the date has been set.

The first report of the Government's Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation itself states the importance of civil society involvement in public policy debate and design. The report's Introduction emphasises the need to conduct 'open consultation with interested parties, Civil Society Organisations, academics, and the media'

because '[t]hese matters touch on very fundamental elements of our democracy, freedom of expression and the discernment of the will of the people, who in the words of the Constitution "in final appeal" [...] "decide all questions of national policy".'

It is an irony that the Government's invitation to us to participate in reforming the national election security framework in itself raises difficulties about our compliance with the law, if we intend to use significant or international donations to help us make our voices heard!

We believe that the Irish people greatly value the role of civil society. We share the public's interest in a civil society sector that is transparent and accountable to the people it works for and with. We see transparency and accountability as the most effective methods of ensuring that Ireland's democracy is strengthened by civil society participation. Denying funding to civil society, thereby silencing the people's voice, will only weaken democracy.

We are sure that section 22 of the Electoral Act was never intended to create the chokehold that it has. However, having recently witnessed the Standards in Public Office Commission (SIPOC) restrict several advocacy organisations' activities because they were using donations to advocate certain policies in the public sphere, we can no longer stand by and hope that the law will be interpreted restrictively.

How exactly does the Electoral Act currently interfere with civil society freedom?

In 2001, the Electoral Act extended the donation restrictions that previously applied only to election candidates and political parties to all contributions given 'for political purposes' to any 'third party'. The donation restrictions include donations in kind, i.e. not just money but also the supply of voluntary services, any reduction in rates for the use of property or supply of services, and donations of property or goods.

The Electoral Act prohibits 'third parties' from using any of the following sources of income for 'political purposes': (1) donations from international sources, (2) anonymous donations of more than €100, (3) cash donations of more than €200, and (4) donations of more than €2,500 from one source. Within these limitations, donations of more than €200 may only be received from 'corporate donors' (including trusts) if the corporate donor is registered on SIPOC's Register of Corporate Donors and provides a statutory declaration with its donation.

If 'third parties' wish to use small domestic donations of more than €100 that are permissible for 'political purposes', they must (1) know the name and address of all donors, (2) register with SIPOC and state the nature, purpose and estimated amount of donations and their proposed use for every year, (3) open a separate bank account into which all donations for 'political purposes' are lodged and out of which only work for 'political purposes' can be funded, and (4) notify SIPOC of all donations exceeding the statutory limits and send the prohibited excess to SIPOC within 14 days, following which SIPOC will share such details with both Houses of the Oireachtas.

Section 22 of the Electoral Act defines 'political purposes' in a way that can potentially capture almost all advocacy work that civil society organisations in Ireland carry out. According to section 22(2)(aa) (with our emphasis on provisions relevant to civil society organisations), 'political purposes' means:

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

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

(IV) to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority;

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

(iii) *otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition.*

What is the practical impact of the Electoral Act on civil society?

According to the wording of the Act, civil society organisations that ‘promote’, ‘oppose’ or ‘comment’ on public policy risk criminal prosecution if they use donations above the threshold or any international donations to support their work, or if they fail to comply with the onerous procedural requirements attaching to small domestic donations. Corporate donors, too, risk criminal prosecution if they provide information that is misleading in respect of donations falling within the Electoral Act’s provisions.

The criminal offences created by the Electoral Act are significant; the possible penalties on ‘third parties’ and corporate donors for failing to comply with the Electoral Act are as much as a €25,394 fine and three years’ imprisonment.

The wording of the Act has a major chilling effect, because organisations and funders must be prepared to take on the burden of responding to wide-ranging inquiries from SIPOC and to incur the costs of legal advice, even where they are taking all reasonable measures to comply with the law.

In 2003, the Standards in Public Office Commission (SIPOC) itself sounded the alarm about the wide-ranging impact that section 22 could have on civil society freedom in Ireland. SIPOC stated in its Review of the Electoral Acts 1997 to 2002:

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

- *local bodies such as Tidy Towns Committees, Residents /Tenants Associations, Community Organisations, etc.,*
- *organisations such as Trocaire, Amnesty International,*

Threshold, the Society of St. Vincent de Paul, An Taisce, Credit Union Movement, Comhdháil Náisiúnta na Gaeilge, etc., representative associations such as ICTU, IBEC, ISME, IFA, USI, etc.,

- *other interest groups such as those representing vintners, lawyers, hoteliers, teachers, accountants, builders, doctors, nurses, etc.*

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

Unfortunately, several advocacy organisations in Ireland and their funders have recently felt the impact of the law as it is written. Among the examples we know of are the following:

EDUCATION EQUALITY

In 2017 SIPOC ordered **Education Equality**, an all-volunteer organisation campaigning for equal treatment within the education system regardless of belief or religious affiliation, to return €5,500 of the €10,000 seed funding they had received from the **Humanist Association of Ireland** for two years’ expenses. A representative of Education Equality organisation has explained that:

We thought it would be a simple matter of us clarifying that we hadn’t received donations for political purposes. This was not the case. We engaged in a huge amount of correspondence with SIPO over months where we took the position that it was not a political donation,



we hadn't taken money for political purposes, we were seeking registration as a charity and thought it would be absurd if we were a charity and also considered political because under the Charities Act a charitable aim cannot be political. The correspondence detracted hugely from the work we were supposed to be doing. We were all volunteers, and it took a huge amount of our time and resources to decide how to react and maintain our line that we should be able to keep our funding. The emails from SIPOC continuously referred to the fact that it was an offence under the legislation to refuse to comply, so we were a group of volunteers being constantly threatened with prosecution. It hampered our efforts at a time that was crucial in public debate because legislation was being put through.

EQUATE

Beginning in January 2017, SIPOC spent a year intervening in the operations of EQUATE, an organisation established to support teachers and parents in ensuring that children and young people are included in their local schools, and which was advocating removal of the 'baptism barrier' from school admissions. The intensity of SIPOC's pursuit of EQUATE, and the uncertainty that SIPOC's actions created, were factors in EQUATE's decision to wind down in late 2017.

SIPOC never made its procedures clear to EQUATE; its correspondence simply demanded that EQUATE respond to complaints made by a named organisation and a member of the public who claimed that EQUATE was contravening the Electoral Act. SIPOC repeatedly requested extensive records and required EQUATE representatives to engage in numerous phone calls and meetings, all the while reminding EQUATE of the criminal penalties under the Electoral Act.

Documents released under the Freedom of Information Act show that a SIPOC staff member kept in ongoing telephone and email contact with one of the complainants, a member of the public known to have engaged in advocacy on behalf of the Church of Ireland, who at this time were lobbying against EQUATE's work to amend school admissions legislation. SIPOC informed this individual of its dealings with EQUATE and of EQUATE's internal decision-making.

Records also show that in March and May 2017, SIPOC staff informed the Board that there was no evidence to support the complaints against EQUATE under the Electoral Act. Nonetheless, in July 2017 SIPOC contacted EQUATE's primary funder and demanded information from them and a meeting to discuss whether they were involved in prohibited activities under the Act.

AMNESTY INTERNATIONAL IRELAND

Amnesty International Ireland received occasional correspondence from SIPOC inquiring about 'third party' status since not long after the Electoral Act was amended in 2001. In November 2017, SIPOC for the first time decided that the organisation's work fell within the Act's 'political purposes' definition. SIPOC decided that a grant it had received from the Open Society Foundations, a US-based funder of human rights work around the world, was a 'prohibited donation', and instructed that it be returned. This instruction came despite SIPOC previously, in August 2016, accepting that the work covered by this grant was not for 'political purposes'. The grant part-funded the organisation's 2016/2017 campaign for human rights compliant abortion law in Ireland, and was not directed at a particular referendum outcome as no referendum was scheduled at that point.

Amnesty International Ireland believed the decision unjust, and also potentially very harmful to its reputation and campaigning work. It was also gravely concerned about the impact on civil society freedoms here and globally should the Electoral Act be applied to civil society organisations in Ireland in this way. Therefore, it launched judicial review proceedings in the High Court challenging SIPOC's decision. In July 2018, the case was settled on the basis that SIPOC accepted that the process leading to the adoption of its 2017 decision was procedurally flawed. That decision was quashed.

Amnesty International Ireland believes that this case illustrates how problematic the vague wording of the Electoral Act is for civil society groups' rights and freedoms. Also, SIPOC's investigation of this grant was the result of complaints. This illustrates how this Act can be used by who oppose the legitimate work of human rights and social justice organisations to target them.

ICCL

The negative effect of the Electoral Act are not confined to enforcement proceedings. In the past, in response to complaints from individuals, SIPOC has sent general requests to ICCL for wide-ranging information about its funding. Last year ICCL was contacted by an individual claiming to be a journalist (but who failed to provide any evidence of this), who also contacted a number of ICCL's funders and regulatory authorities in Ireland and other states about ICCL's funding, alleging that the organisation was in violation of the Electoral Act. SIPOC did not initiate an investigation. However, due to the legal uncertainty around this issue both ICCL and its funders were forced to seek legal advice, and existing funding agreements were put at risk.

The Electoral Act is violating basic rights which are vital to democracy

Our coalition believes that, in its current form, the Electoral Act is violating numerous basic civil and political rights that are guaranteed by the Irish Constitution, European law, and international human rights law.

Most obviously, the Electoral Act's restrictions on funding for civil society activity infringe the rights to freedom of association and freedom of expression. As explained in both reports that are being launched in tandem with our coalition's statement, by the EU Fundamental Rights Agency (EU FRA) and CIVICUS, the right to freedom of association includes the right to seek, secure and use financial resources, including from international sources.ⁱⁱⁱ In fact, the EU FRA notes, the positive obligation on States to ensure freedom of association may include a duty on the State to purposefully facilitate access to resources by civil society actors that face difficulties in participating in public life.

Other rights at stake include the right to equal treatment and non-discrimination, and the right to the protection of personal data. In addition, a range of other EU law requirements are relevant: the Treaty on the Functioning of the European Union (TFEU) obliges EU member states to ensure freedom from discrimination on grounds of nationality, free movement of goods, freedom of establishment, free movement of services, and free movement of capital.

EU ENFORCEMENT PROCEEDINGS

The European Commission last year initiated infringement proceedings against Hungary regarding a law designed to discourage international funding for non-governmental organisations (NGOs) working in the country. As the EU FRA explains, the Commission took the view that Article 63 TFEU (the prohibition of restrictions on the movement of capital between Member States and between Member States and third countries) is contravened by legislation that has the following effects:

The Hungarian law on foreign-funded NGOs, adopted on 13 June, introduced new obligations for certain categories of NGOs receiving annual foreign funding above HUF 7.2 million (approximately € 24,000) to register and label themselves in all their publications, websites and press material as 'organisations supported from abroad'. Such NGOs are also required to report specific information on the funding they receive from abroad to the Hungarian authorities, including when a donor provides funding above HUF 500,000 in a given year, detailing data concerning the donor and

each donation. These data are included in a special registry, which is then made available to the public. The concerned organisations face sanctions if they fail to comply with the new registration, reporting and transparency obligationsⁱⁱⁱ

In a report published by the EU FRA earlier this year to highlight increasing crackdowns on civil society activity in several European countries, Ireland's Electoral Act was included as an example of legislation that threatens the basic democratic right to freedom of association.^{iv}

FIRST PRINCIPLES OF HUMAN RIGHTS LAW

The coalition acknowledges that the democratic rights listed above are not absolute. The Irish Constitution and European and international human rights law allow the Government to place certain limitations on the rights to freedom of association and freedom of assembly, and many other rights.

However, a basic test must be met before these limitations will be permitted by the Constitution and European and international human rights instruments. The test is: (1) whether the limitation is set out in a domestic law or rules that are sufficiently accessible and clear for people to be able to understand how the law could apply to them; (2) whether the Government has identified the legitimate democratic purpose of its limitation; and (3) whether the limitation is a necessary and proportionate measure to achieve the legitimate aim being pursued.

The current restrictions imposed on civil society by the Electoral Act fail to meet all three requirements of this basic test.

First, the rules that apply to civil society funding under the Electoral Act are not clear and accessible.

It is impossible for civil society organisations to know in advance how to regulate their affairs to ensure that they do not fall foul of the Electoral Act's prohibitions. Uncertainty arises from the following, in particular:

- (1) The Electoral Act's restrictions on funding for civil society advocacy are incompatible with the Charities Regulator's approach to regulating the activity of charities operating in Ireland. In its February 2018 'Guidance on Charities and the Promotion of Political Causes', the Charities Regulator states that 'engaging in activities to promote a political cause that is of direct relevance to the charitable purpose of a charity can be an important means by which a charity can achieve its charitable purpose'. The



Andrea Rocca of Front Line Defenders at the launch of the campaign for reform of the Electoral Act.

Guidance gives the examples of a youth charity that works with young migrants organising a march to Leinster House to encourage the Government to provide more funding for integration projects; and a charity that provides medical care and support services to people with addiction problems providing a speaker for a public meeting on the topic of the national addiction framework. Nowhere in the Guidance document does the Charities Regulator mention that the Electoral Act imposes draconian restrictions on funding for engaging in public policy debates, including a complete ban on international donations, anonymous donations of more than €100 and donations of more than €2,500 from one source for that purpose.

- (2) SIPOC itself has demonstrated conflicting interpretations of how the Electoral Act applies to civil society over the past 15 years. In 2009, SIPOC called on the Government to review 'all provisions of the Act relating to third parties' having stated in its 2003 Review of the Electoral Acts 1997 to 2002 that:

The Standards Commission doubts if it was the intention of the legislature that such bodies, in conducting their ordinary affairs, could find themselves covered by the legislation. It would, of course, be a different matter if any of them became involved in campaigning at an election or referendum in which case they should, and would, be covered.

Several organisations in the coalition have experienced a change in SIPOC's practice, as SIPOC has decided to interrogate our general advocacy funding after years of routinely accepting our practice of registering as 'third parties' only in the context of an election or referendum campaign. In the case of its 2017 inquiries into a grant received by Amnesty International Ireland, SIPOC had in 2016 formally notified the organisation that 'your organisation is not currently required to register with [the Commission] as a third party' before changing its mind a year later and issuing a contrary decision without asking for further comment from the organisation.

(3) SIPOC's enforcement powers are not clearly set out in law or in publicly available guidance. In its letters to civil society organisations, SIPOC has repeatedly cited its power under section 4(4) of the Electoral Act to 'make such inquiries as it considers appropriate and [to] require any person to furnish any information, document or thing in the possession or procurement of the person which the Commission may require for the purposes of its duties under the Act'. However, the Electoral Act does not explicitly give SIPOC powers to make decisions about civil society organisations' compliance with the Act, or to make orders (e.g. requiring the return of donations). SIPOC has not clarified publicly what powers it deems itself to have. SIPOC has not published any guidance to explain how it conducts its 'inquiries' and how it guarantees fair procedures while doing so. In the cases of EQUATE and Amnesty International Ireland, SIPOC contacted the organisations' funders without notifying the organisations.

Second, the Government has not identified the legitimate democratic aim that the Electoral Act's civil society funding restrictions pursue.

The Government has never articulated the purpose that it is pursuing by way of the draconian wording of the Electoral Act insofar as it relates to civil society organisations. Our coalition believes that this is because the Oireachtas did not intend in 2001 for the Electoral Act's funding restrictions to apply to the everyday advocacy work of civil society organisations.

To the extent that its funding restrictions apply to ordinary (non-electoral) advocacy by civil society, the Electoral Act contradicts Ireland's explicit foreign policy. As CIVICUS notes:

At the international level, Ireland is one of the strongest supporters of the defense of civil society space and the position of human rights defenders, through the leading role it played in the development of EU Guidelines on Human Rights Defenders, and



Michael Barron of EQUATE, Val Heller of EU Fundamental Rights Agency and April Duff of Education Equality at the launch of the campaign for reform of the Electoral Act

through its sponsorship of the Human Rights Council Resolution on Civil Society Space. Ireland has also developed a progressive overseas development programme which places support for civil society at the heart of its strategy, and which is supported by significant investment in civil society organisations in its priority countries. The protection of HRDs [human rights defenders] is explicitly stated as a priority in The Global Island, Ireland's foreign policy strategy paper.'

We agree with the view expressed by SIPOC in 2003 that the Oireachtas intended the restrictions to be confined to third parties' advocacy of a particular result during an election or referendum.

Limiting electoral campaign expenses is recognised throughout Europe as a legitimate democratic aim. The Council of Europe's Venice Commission for Democracy through Law (Venice Commission) has agreed that '[i]n order to ensure equality of opportunities for the different political forces, electoral campaign expenses shall be limited to a ceiling, appropriate to the situation in the country and fixed in proportion to the number of voters concerned'.^{vi} Regarding electoral campaigns, the Venice Commission has also agreed that '[t]he State should participate in campaign expenses through funding equal to a certain percentage of the above ceiling or proportional to the number of votes obtained', and that '[c]ontributions from foreign States or enterprises must be prohibited'.^{vii}

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

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

expenditure limits. The limits I am proposing may not be adequate in such circumstances but they will help, especially when a single advertisement in a newspaper can cost thousands of pounds. While a third party has a constitutional right to freedom of expression, a candidate at an election also has a constitutional right to vindicate his or her good name. For example, the weekend before the next election any group can register with the Public Offices Commission and produce an onslaught in the media or through literature and leaflets, making all sorts of statements in relation to a party or an individual candidate. The issue which arises is whether a candidate has the right to place ads in newspapers to defend and vindicate their good name. It will be interesting if it arises and while I do not want to raise hares about it, it is a possibility. There is already evidence of it in some areas in relation to different issues. There exists a right to freedom of expression, but there also exists the right of a person to vindicate their good name.

Subsequently at Seanad Committee Stage, the Government introduced the 'third party' donation restrictions. The Minister's explanation of the proposal clearly suggests that the Government intended to bring 'third parties' within the parameters of the existing rules

relating to elections, rather than establishing a new system of regulating civil society funding, per se:

The definition of political purposes is also important to bring some certainty and parameters to the scope of the legislative measures. It is based on the definition of electoral expenses and includes campaigns conducted by third parties. The definition of third parties is also new and it relates to bringing campaign groups within the control on donation limits. It states that a third party is a person, other than a registered political party or a candidate at an election, who accepts a donation for a political purpose which exceeds £100 in a particular year. A person is already defined in the Act as including corporate and unincorporated bodies.^{viii}

Third, the Electoral Act's funding restrictions on civil society are not a necessary and proportionate means of achieving a legitimate democratic aim.

Some people have argued that the wording of section 22 of the Electoral Act should remain as it is because there is a legitimate need to protect Ireland's political system from being hijacked by wealthy and/or foreign interests.

Our organisations fully believe that in order to preserve democracy, people need to be able to access information, express their views and participate in public life on equal terms with each other. We also recognise that money provides individuals, groups and interests with the means to influence the spread of information through the public sphere. However, we firmly reject the idea that shutting down civil society participation in public discussion is a necessary or proportionate method of achieving equality of debate and preserving democracy in Ireland.

It is unquestionably the case that were the Electoral Act to properly function as it reads, civil society participation in public debate would effectively come to an end. Education Equality's case demonstrates that not even expenses for volunteers to hire venues, print information materials, maintain a web presence, or obtain accountancy services would be easily obtained or managed. The Electoral Act's definition of 'donation' to include donations in kind (such as services provided for free or at a reduced cost) means that even the services of volunteers would largely be prohibited. Civil society organisations would be unable to engage in or commission in-depth research or analysis, and those that rely on international assistance and/or non-governmental sources of funding because they tend to counter majority views or State actions would be immobilised.

The Electoral Act's sweeping restrictions on civil society funding are **not the necessary response** to the threat of distortion of democratic debate by financial influence because:

- (1) Civil society advocacy is only one form of engagement with the political system and influence on public debate. It exists alongside other influences that the Government will not prohibit, and in fact will continue to support, such as commercial interests and political party activity. Civil society advocacy provides a vital counter-balance to these permanent influences on the democratic system, acting as a vehicle through which a wider range of people can access and contribute to public debate and the formulation of public policy and law; and
- (2) Civil society advocacy is an absolutely necessary mechanism for ensuring that incursions on democratic rights, including those that may (but do not simply by their nature) emanate from wealthy or foreign sources, are revealed to the public. A weak civil society creates opportunity for singular influences to take over public debate, rather than the opposite.

The Electoral Act's wide-ranging prohibitions and conditions on the use of funding by civil society are **not a proportionate** method of achieving a thriving democracy with free and equal access to information and opportunity for public participation, because:

- (1) Other influences on public policy and the political system will remain funded while civil society is denied its voice;
- (2) Regulations that require transparency and accountability are more effective tools for ensuring that members of the public are aware of the range of influences on public policy, and for guarding against interference with democracy. Currently, all civil society organisations that have at least one employee must register their interactions with public officials on the Lobbying Register, and funding to civil society organisations is monitored by the Charities Regulator and the Revenue Commissioners; and
- (3) Participation by civil society in public debate is crucial to ensuring that the electoral system – that is, the most sensitive element of our democracy – remains robust and secure. As highlighted above, the Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation has explicitly recognised the need for civil society involvement in monitoring and responding to threats to the integrity of elections.

By contrast, we believe, the Electoral Act's restrictions on donations to 'third parties' for the purpose of election or referendum campaigning could be necessary and proportionate because the people elected and the result chosen in those contexts will have direct and immediate power to change the laws of the country, and those contexts are time- and subject-limited.

APPENDIX: PROPOSED NEW WORDING OF SECTION 22 ELECTORAL ACT 1997 (AS AMENDED)

22 –

(2) For the purposes of this Part–

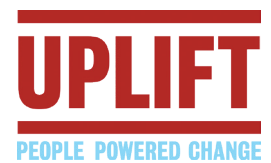
[...]

(aa) ‘political purposes’ means any of the following purposes, namely–

- (i) (I) to promote or oppose directly or indirectly, the interests of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament, or
 - (II) to present, directly or indirectly, the policies or a particular policy of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament **or a third party**, or
 - (III) to present, directly or indirectly, the comments of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament **or a third party** with regard to the policy or policies of another political party, political group, a member of either House of the Oireachtas, representative in the European Parliament, **third party** or candidate at an election or referendum or otherwise, or
 - (IV) to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome **in relation to a policy or policies or functions of the Government or any public authority** at a Dáil, Seanad or European election, or referendum; **A “campaign conducted with a view to promoting or procuring a particular outcome at a Dáil, Seanad or European election, or referendum” shall be understood to include any activity intended to affect the electoral prospects of a party or a candidate, to enhance or prejudice the standing with the electorate of a party or a candidate, at a Dáil, Seanad or European election, or to promote the acceptance or rejection of a referendum proposal by the electorate in relation to a referendum for which the polling day has been set by the government;**
- (ii) to promote or oppose, directly or indirectly, the election of a candidate at a Dáil, Seanad or European election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate with regard to the policy or policies of a political party or a political group or of another candidate at the election or otherwise;
 - (iii) otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition;

REFERENCES

- ⁱ European Union Fundamental Rights Agency (EU FRA), Challenges Facing Civil Society Organisations Working on Human Rights in the EU (December 2017) 34, <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu> See further Civicus, Regulating Political Activity of Civil Society (October 2018) 5, <http://www.civicus.org/documents/RegulatingPoliticalActivityOfCivilSociety.pdf>
 - ⁱⁱ EU FRA, Challenges Facing Civil Society Organisations Working on Human Rights in the EU (December 2017) 9, <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgshuman-rights-eu>
 - ⁱⁱⁱ EU FRA Challenges Facing Civil Society Organisations Working on Human Rights in the EU (December 2017) 35, <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-humanrights-eu>
 - ^{iv} EU FRA Challenges Facing Civil Society Organisations Working on Human Rights in the EU (December 2017) 22, <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-humanrights-eu>
 - ^v The Global Island, Ireland's Foreign Policy for a Changing World, January 2015: <https://www.dfa.ie/our-role-policies/our-work/casestudiesarchive/2015/january/the-global-island/>
 - ^{vi} Venice Commission, Guidelines and Report on the Financing of Political Parties Strasbourg, 23 March 2001, CDL-INF (2001) 8, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2001\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)008-e)
 - ^{vii} Venice Commission, Guidelines and Report on the Financing of Political Parties Strasbourg, 23 March 2001, CDL-INF (2001) 3, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2001\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)008-e)
 - ^{viii} Section 31 Electoral Act 1997 as amended defines election expenses as follows:
- 1 (a) ***In this Part 'election expenses' means all expenses falling within paragraph (b) incurred in the provision of property, goods or services for use at an election during the period referred to subsection (3) in order –***
- (i) to promote or oppose, directly or indirectly, the interests of a political party or a political group formed in accordance with the rules of procedure of the European Parliament, or to present the policies or a particular policy of a political party or a political group or the comments of a political party or a political group on the policy or policies of another political party or political group or of a candidate at the election; or
 - (ii) to promote or oppose, directly or indirectly, the election of a candidate at the election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate on the policy or policies of a political party or a political group or of another candidate at the election; or
 - (iii) otherwise to influence the outcome of the election.
- (b) ***The expenses mentioned in the foregoing definition of "election expenses" shall be those, and only those, set out in the Schedule to this Act.***
- 2 Where property, goods or services are provided to a political party or a candidate at an election without payment or other consideration therefor or at a price which is less than the commercial price, the provision of the property, goods or services shall be deemed to be an election expense and the property, goods or services shall be deemed to have been provided at the commercial price and shall be accounted for accordingly by the national agent or election agent, as the case may be, in the statement to be furnished under section 36 to the Public Offices Commission.



The Coalition for Civil Society Freedom



Irish Council for
Civil Liberties

**the
wheel**

Stronger Charities.
Stronger Communities.

UPLIFT
PEOPLE POWERED CHANGE



**TRANSPARENCY
INTERNATIONAL**
Transparency International Ireland

**AMNESTY
INTERNATIONAL**



**f FRONT LINE
DEFENDERS**