

ICCL Submission on the Political Advertising Provisions (Part 4) of the General Scheme of the Electoral Reform Bill 2020

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Introduction

1. The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to contribute a submission to the pre-legislative scrutiny process of this important Bill. In line with the focus on the issues of political advertising being discussed by the Joint Committee on Housing, Local Government and Heritage, this initial submission will focus on the portions of the general scheme of the Bill which are of relevance to this topic only. It is the intention of the ICCL to deliver a more comprehensive submission on the General Scheme of the Bill at a later date. The ICCL welcomes many of the provisions of this Bill, in particular the moves to establish an Electoral Commission on a statutory footing. With regard to the issue of Political Advertising, the ICCL believes that the State must vigorously safeguard the integrity of elections in order to protect democracy and the basic civil liberties that constitute and depend on it. The integrity of elections depends on voters' freedom to impart and receive information (in other words, freedom of expression) and the State must proactively facilitate that freedom. These freedoms in turn must be considered in proportion and with due regard to individual privacy. With this in mind, this submission will focus on Heads 120 & 121 of the General Scheme of the Bill which relate to "Buyers of Online Political Advertisements" and "Public Information Requirements for Online Political Advertisements" respectively.

Head 120; Buyers of Online Political Advertisements

2. The core of ICCL's commentary on Head 120 is a development of our submission on the Regulation of Online Political Advertising in Ireland¹ in advance of the Open Policy Forum on the issue in November 2018 as initiated by the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation. This section should also be understood in the context of the matters raised and addressed in the Electoral (Civil Society Freedom) (Amendment) Bill 2019 which is before the Oireachtas and seeks to amend the Electoral Act 1997 to end the chilling effect the 2001 amendment has had on civil society organisations.
3. Since 2001, the Electoral Act 1997 (As Amended) has applied donation restrictions previously reserved for political parties and those running for election to all donations made to "third parties" for "political purposes". A "third party" is *anyone* other than an election candidate or political party. The amended 1997 Act's broad definition of "political purposes" is having a negative impact on the work of CSOs in Ireland outside of election and referendum periods, has severely constrained funding efforts and led to a number of organisations being forced to shutter their activities. The Standards in Public Office Commission (SIPOC) has begun to enforce the Act's funding restrictions in relation to the work of CSOs generally, i.e. even if not within an

¹ [Public Consultation on Regulation of Online Political Advertising in Ireland Submission by the Irish Council for Civil Liberties](#)
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election or referendum period. The relevance of the 1997 Electoral Act and the 2001 amendment to the General Scheme of this Bill is set out below.

Definition of Political Purposes for the Purposes of Advertisement

4. The General Scheme of this Bill proposes to define “political advertisement” as “any form of communication in a digital format commissioned for **political purposes** for placement, display or promotion on an online platform **during an electoral period** and for which a payment is made to the online platform.”² Under Heading 120 (1)(f), this proposed regulation would apply to third parties as defined by the amended 1997 Act³. This proposal presents a potential conflict between different definitions of “political” within the wider Electoral Code. At one level, the proposal that rules relating to “political advertising” should apply only within defined “electoral periods” offers welcome certainty and clarity to the law. At the same time, the potential interaction between the proposed definition of “political advertisement” with the existing definition of “political purposes” as it applies to ‘third parties’ in the amended 1997 Act⁴ may cause further confusion in an already problematic area of law.

Existing Law on “Political Purposes”

5. “Political purposes” as they relate to political donations are defined in section 22(2)(aa) of the 1997 Act (as amended) as:
 - 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

² General Scheme of the Electoral Reform Bill 2020 Part 4, Heading 120 (1) pp234

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

⁴ [Electoral \(Amendment\) Act, 2001 Part 4](#)

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

6. It is important to understand that these provisions relate only to the making and receiving of donations. While aimed at addressing the risk of corruption or financial interference in Irish electoral politics, the above definition of “political purposes” is so broad as to have the potential to impact on almost all advocacy work that CSOs in Ireland engage in both inside of **and** outside of electoral periods as it explicitly refers to **“promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority”**. The restrictions on donations under section 22 include a prohibition on receiving **any** donation that is not originating from Ireland or from an Irish citizen resident abroad, and also place limitations on the size of a donation that can be received from those sources.
7. In this sense then, while the plan to limit the scope of the proposed regulations contained in Head 120 on political advertisements to only electoral periods is more limited, the proposal may also further entrench the definitions contained in the amended 1997 Act into law. This would have the effect of transposing the seemingly unintended limitations on fundraising into the arena of advertising for CSOs and other “third party” organisations.
8. The difficulty with the existing provision is acknowledged in the General Scheme of the Bill;

“The meaning of “political purposes” is similarly taken to be that set out in the Electoral Act 1997 to ensure a consistent approach is taken across the electoral codes. It should be noted that this definition is the subject of concern for a number of civil society groups who contend that it is too broad and adversely

affects the ability of third parties in funding[sic] raising in support of undertaking their ordinary day-to-day advocacy work.”⁵

9. In his response to the debate on the Electoral (Civil Society Freedom) (Amendment) Bill 2019 in October 2020⁶, the Minister set out how he intended to address this matter in the course of the development of this Bill⁷. ICCL believes that a revised definition of “Political Purposes” is urgently required to replace the current provisions relating to political donations. We will be making proposals for such a revised definition in our general submission on this Bill in due course.

Issue Based Advertisements

10. While supporting a clear and precise definition of “political purpose” in Head 120, ICCL does not exclude the possibility that transparency regulations with regard to advertising might be deemed to also appropriately apply to a wider category of ‘issues based advertising’ concerning matters of social or economic policy outside of electoral periods. Regulations such as these are already the case within the existing practice of some social media companies, for example in Facebook⁸, Twitter⁹ and Instagram¹⁰, while TikTok bans political and issue-based advertising completely¹¹.
11. However, we believe it is imperative that any such rules around ‘issues based advertising’ should be clearly distinguishable from rules pertaining to ‘political advertising’. This Bill presents an opportunity to disentangle explicitly political advertising and ‘issue-based advertising’ and to develop separate guidelines for transparency on the latter. This is particularly prescient when we consider the role played by the internet in the public’s access to news and information both inside and outside of electoral periods. Different considerations of freedom of expression and freedom of association apply in the context of individuals and civil society organisations seeking to express views on matters of public interest. Thusly different criteria with regard to the transparency of these advertisements should apply.

Recommendations on Head 120

12. In bringing forward proposals to define “political advertising” under Head 120, it is imperative that the Bill addresses and clarifies the existing definition of “political purpose” under the 1997 Electoral Act. ICCL submits that a clear and consistent definition of “political purpose” and “political advertising” should be defined in the

⁵ General Scheme of the Electoral Reform Bill 2020 Head 121, pp5

⁶ [Electoral \(Civil Society Freedom\)\(Amendment\) Bill 2019](#)

⁷ [Electoral \(Civil Society Freedom\)\(Amendment\) Bill 2019: Second Stage. Seanad Éireann debate - Thursday, 22 Oct 2020](#)

⁸ <https://www.facebook.com/business/help/167836590566506?id=288762101909005>,

⁹ <https://business.twitter.com/en/help/ads-policies/ads-content-policies/cause-based-advertising.html>

¹⁰ <https://business.instagram.com/blog/more-information-on-social-issue-ads-on-instagram>

¹¹ <https://newsroom.tiktok.com/en-us/understanding-our-policies-around-paid-ads>

Bill. This should be clearly grounded in matters concerning electoral politics: parties, candidates, elections, and referendums. Such provisions should apply within clearly defined electoral periods. Such an approach is in line with the special democratic considerations associated with the integrity of democratic elections.

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

Head 121: Public Information Requirements for Online Political Advertisements

14. There are a number of issues with regard to Head 121 of the General Scheme of the Bill which ICCL believe deserve further consideration. These mostly refer to the need to balance privacy rights with the objective of protecting electoral integrity. Any use of personal data to ensure advertising transparency is bound to and must be balanced with the principles relating to the processing of personal data as outlined in Article 5 of GDPR.¹² ICCL also notes the EU’s forthcoming Digital Services Act which may necessitate the revisiting of this proposed legislation in the near future.

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

“the name, postal address, email address and, where applicable, the website address of the buyer who paid for the online political advertisement;”¹³

The related obligations on the buyers to provide this is set out under Head 127 and stipulates that an offence will be committed by the buyer if this information is not provided¹⁴. The penalties for this offence¹⁵ are described under Heading 130.

16. ICCL would have serious concerns with regard to the scope of personal data that individuals would be forced to disclose in order to place these advertisements, in particular when the advertisement is placed by an individual as opposed to an organisation. It is important to be mindful of potential negative effects this provision could have on vulnerable groups in society e.g. forcing members of discriminated against minorities to publicly declare their support for an organisation or cause. If the hosting platform does not receive all of the information as stipulated in the General

¹² <https://gdpr-info.eu/art-5-gdpr/>

¹³ General Scheme of the Electoral Reform Bill 2020 Head 121(2)(a), pp236

¹⁴ General Scheme of the Electoral Reform Bill 2020 Head 127, pp252

¹⁵ General Scheme of the Electoral Reform Bill 2020 Head 130, pp261

Scheme of the Bill, they are precluded from running the advertisement(s) in question. This provision is set out in Head 122 (2);

“An online platform which is unable to obtain such information and documentation as a result of any failure on the part of the buyer, shall not provide the service sought by the buyer for so long as the failure continues.”¹⁶

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

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

“ensure public access to that online archive or library is maintained in the public interest and for the purpose of research relating to the holding of elections and referendums and on matters connected therewith”¹⁷

18. The accessibility of this archive and the details provided in the privacy notice for a lengthy period such as this should be scrutinised in terms of proportionality in the need to ensure the transparency of funding. This need has to be weighed against the rights of individual privacy and freedom of political expression. It should be noted however, from a transparency perspective it would be advisable that any online archive is made available in real-time as opposed to when the electoral event has concluded.
19. Heading 121(2)(b) and 121(2)(c) set out the transparency provisions that political advertisements must contain with regard to so-called “micro-targeting” and “look-alike” targeting lists. However, many (perhaps all) such technologies are incompatible with the GDPR because they process personal data, including “special category” data, unlawfully. ICCL has submitted detailed evidence on this point to the DPC.
20. Furthermore, it is the view of ICCL that Heading-121(2)(a) should include provision for, inter alia, a prominent link to the Electoral Commission website, or another independent resource, with a notice informing individuals that “*further information on your rights with regards to political advertising can be seen here*” or similar. While websites hosting these advertisements have an important role to play in ensuring

¹⁶ General Scheme of the Electoral Reform Bill 2020 Head 122(2), pp239

¹⁷ General Scheme of the Electoral Reform Bill 2020 Head 121(6)(b), pp237

transparency, it is critical that individuals are signposted to impartial information regarding their digital rights.

Recommendations on Head 121

21. While ICCL welcomes the focus on the need for transparency in the arena of political advertising, it is crucial that the measures are proportional and align with existing data protection and privacy rights. Therefore, ICCL recommends that the Public Information Requirements as included under Heading 121 and related provisions are re-examined in order to ensure that these rights are respected and vindicated.
22. In addition, it is essential that transparency efforts should be linked to a greater understanding of digital rights more broadly. For this reason, we believe that any transparency notice should include links to further impartial resources as outlined above.
23. Furthermore, it is the view of ICCL that legislating for transparency with regard to so-called “micro-targeting” and “look-alike” targeting lists is inappropriate as these activities are incompatible with the GDPR.