

Submission on Definition of 'Political Purposes' as contained in the General Scheme of the Electoral Reform Bill (2020)

Jointly Submitted by the Coalition for Civil Society Freedom & The Office of Senator Lynn Ruane

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**THE COALITION FOR
CIVIL SOCIETY FREEDOM**

**the
wheel**

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Irish Council for
Civil Liberties

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POWERED
CHANGE

**AMNESTY
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**f FRONT LINE
DEFENDERS**



**TRANSPARENCY
INTERNATIONAL**

Transparency International Ireland

Who We Are

1. The Coalition for Civil Society Freedom (CCSF) is a coalition of civil society organisations working to influence public policy for the benefit of people living in Ireland. The CCSF is comprised of 5 component organisations (listed below) with secretarial, research and administrative support based in the Irish Council for Civil Liberties.
 - *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.*
 - *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 people-powered 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.*
2. This document was compiled collaboratively between CCSF and the Office of Senator Lynn Ruane and submitted jointly as part of the pre-legislative scrutiny process for the Electoral Reform Bill (2020).
3. Prior to her election to the Oireachtas, Senator Ruane worked for many years in the community and voluntary sector, often engaging in national level advocacy for drug service reform. She is passionate about vibrant civil society spaces and empowering communities to autonomously advocate for their needs and interests. Due to the deeply concerning chilling effect on civil society and community activism caused by the definition of 'political purposes' in Ireland's electoral laws, she introduced the Electoral (Amendment) (Civil Society Freedom) Bill 2019 to rectify the issue with co-sponsors from the Labour Party, the Green Party, Sinn Fein and other independents.

Executive Summary

4. The purpose of this joint submission between The Coalition for Civil Society Freedom and the Office of Senator Lynn Ruane on the general scheme of the Electoral Reform Bill (2020) is to seek the removal of the existing definition of 'political purposes' from the 1997 Electoral Act (as amended) and its replacement with a definition that explicitly limits the fundraising and campaigning restrictions on 'third parties' to election and referendum periods. For the purposes of this Act, a 'third party' is taken to be any organisation that engages in work around public policy.
5. The existing definition of 'political purposes', inserted in 2001 into section 22 of the Electoral Act 1997, prohibits any person or organisation based in Ireland from accepting sizeable or any international donations to assist them in campaigning on or seeking to change public policy. The definition is extremely broad and means that any "third party" organisation which seeks to engage on public policy, either inside or outside of an electoral period, falls under its remit. We believe that this is an unintended consequence of the 2001 amendment.
6. 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 the 1997 Electoral Act, these donation restrictions can apply to civil society advocacy work at all times and not just when advocating an election or referendum result. The basic freedom of individuals and organisations in Ireland to raise funds and campaign on issues that affect them are constrained by the Electoral Act in ways that violate their constitutional rights, EU law and their freedom of assembly and association.
7. The practical implications of the Act in its current form means that 'third party' organisations such as ICCL, Amnesty International Ireland and so on are effectively banned from seeking funding for their domestic advocacy work and are largely excluded from the public policy process. Legislation equivalent to the 1997 Electoral Act is used to stifle civil society in countries such as Russia, and the ECJ has also recently found that comparable laws in Hungary violate EU regulations on privacy and the rules governing the single market.
8. As part of the development of the Electoral Reform Bill (2020), the definition of political purposes should be updated to limit restrictions on donations and campaigning for civil society organisations to within electoral periods. The Electoral (Amendment) (Civil Society Freedom) Bill 2019 which is currently before the Oireachtas, would provide a legislative remedy to this matter.

Introduction and Overview

9. It is the position of CCSF that the development of the Electoral Reform Bill presents an opportunity to replace the deeply problematic definition of ‘political purposes’ inserted in 2001 into section 22 of the Electoral Act 1997. **While the purpose of the Electoral Act is to protect the integrity of elections and referendums, this definition appears to prohibit any person or organisation based in Ireland from accepting any international donations or grants or any substantial domestic donations or grants to assist them in influencing public policy.** In addition, we are concerned by the impact of the onerous tracking and reporting requirements that attach to small domestic donations. **The wording of the 1997 Electoral Act (as amended) means that legitimate electoral donation restrictions apply also to a much wider range of civil society advocacy work all of the time, and not just when advocating an election or referendum result.**

10. We believe that section 22 of the Electoral Act violates article 40.6.1° of the Irish Constitution as it pertains to freedom of association and assembly¹, article 44.2.1° as it pertains to freedom of conscience² and article 40.6.1° as it pertains to freedom of expression³. Furthermore, CCSF contends that the Act as it stands violates European law and international human rights law. Rather than protecting democratic institutions and processes, these provisions stifle and limit public discourse and civic participation. **We are gravely concerned that Ireland’s democratic values are compromised by the current wording of the 1997 Electoral Act.**

General Scheme of the Bill Head 2: Interpretation

11. The central issue of concern for CCSF with regard to this section of the General Scheme of the Bill in its current form is the failure to take the opportunity to amend the 1997 Electoral Act (as amended) with respect to the definition of ‘political purposes’ contained therein. In the Draft Heads of Bill, the definition of Political Purposes is set out under Head 2 as;

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

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

“The meaning of “political purposes” is similarly taken to be that set out in the Electoral Act 1997 to ensure a consistent approach is taken across the electoral codes. It should be noted that this definition is the subject of concern for a number

¹ http://www.irishstatutebook.ie/eli/cons/en/html#article40_6_1

² http://www.irishstatutebook.ie/eli/cons/en/html#article44_2_1

³ http://www.irishstatutebook.ie/eli/cons/en/html#article40_6_1

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.”⁴

13. SIPOC have similarly set out their concerns with regard to both the scope of and their ability to enforce the restrictions that the Act provides for. This was first highlighted in their 2003 annual report and numerous times subsequently. SIPOC’s commentary is dealt with in more detail later in this submission.
14. Section 22 of the 1997 Act (as amended), defines ‘political purposes’ in such a broad manner that it is possible that it encapsulates almost all advocacy work that civil society organisations in Ireland conduct both inside **and** outside of electoral events. The 2001 amendment meant that restrictions were expanded to include any ‘third party’ as can be seen below;⁵
- 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*

⁴ General Scheme of the Electoral Reform Bill 2020 pp

⁵ <http://www.irishstatutebook.ie/eli/2001/act/38/section/49/enacted/en/html>

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.

15. The central issue with Section 22 of the act as it stands is contained in paragraph (IV) above. 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"**.
16. CCSF accepts that the law should guard against third parties being agents of political parties, however the law as written inhibits and restricts all work on public policy by any third party. This restriction is a clear violation of rights to freedom of expression and freedom of association that are protected by the Irish Constitution, European Law and international human rights standards.
17. The 2001 amendment to the act has meant that restrictions on donations, which previously only applied to political parties and electoral candidates, were applied to all contributions given "for political purposes" to any "third party". A 'third party' in this sense then can be taken to mean any organisation that engages in work around public policy. These donation restrictions apply not only to direct financial contributions, but also to the supply of voluntary services, donations of property or goods, supply of services and so on.
18. 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.
19. 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.

20. In practice, the above definitions and donation restrictions mean that any civil society organisation which engages in work to "promote", "oppose" or "comment" on public policy are at risk of prosecution if they use donations exceeding the above thresholds and/or any international donations as part of their campaigns. Organisations similarly face enforcement action and possible criminal prosecution if they fail to comply with the complex and onerous documentation requirements attached to small domestic donations. The criminal offences proscribed in the Act are also very significant, amounting to possible fines of €25,394 on 'third parties' and corporate donors and up to three years imprisonment.
21. The impact of these restrictions on civil society organisations is well documented and extensive, we have outlined case studies later in the submission. Only two years after the 2001 amendment was inserted into the 1997 Act, SIPOC raised serious concerns about the impact that it could have on organisations;

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

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

*The list is far from exhaustive. It is highly likely that, in conducting their day to day business, any of the above could be involved in activity which would fall within the definition of political purposes in that they would be attempting to promote or procure a particular outcome in relation to a policy or policies of the Government or any public authority, including a local authority."*⁶

⁶ SIPOC Annual Report 2003 pp35-36

22. The lack of clarity from central government on guidelines in which the above provisions should be enforced with regard to third parties has unfortunately meant that SIPOC's 2003 warnings were accurate. Changes in the enforcement environment have led to a number of high profile organisations, including Education Equality, Amnesty International Ireland, ICCL and EQUATE to return funding, limit their activities, or shutter their organisation entirely.⁷

The Case for Reform

23. It is the view of CCSF that the Electoral Act, in its current form, violates basic rights that are fundamental to the functioning of a healthy democracy and which are guaranteed by the Irish Constitution, European law and international human rights law. As it stands, the Electoral Act's restrictions on CSO funding infringe on the rights to freedom of association and freedom of expression. The EU Fundamental Rights Agency (EU FRA) has noted the positive obligation on the state to ensure freedom of association which may include a duty to facilitate access to resources by CSOs that face difficulty in participating in public life.⁸ In addition, the law as it stands may conflict with rights to equal treatment and non-discrimination and the right to the protection of personal data. The impact of similar laws that restrict the ability of CSOs to fundraise have recently fallen foul of the European Commission and the European Court of Justice as is demonstrated by the below example of the situation in Hungary.
24. CCSF acknowledges that democratic rights such as freedom of expression, freedom of assembly and freedom of association are not absolute. The Irish Constitution, European and international human rights law allows for the setting of limitations on these rights in order to ensure the common good, transparency and so on. However, in restricting any of these rights, three basic tests must be considered:

- 1) *Is the limitation set out in domestic law in a manner that is accessible and clear to the individuals or groups who may be impacted by it?*
- 2) *Has the government identified the legitimate democratic purpose of the limitation being placed?*
- 3) *Is the limitation a necessary and proportionate measure to achieve the legitimate aim that is being pursued?*

The current restrictions imposed on civil society by the 1997 Electoral Act (as amended) fail to meet all three of these requirements.

⁷<https://www.iccl.ie/human-rights/civil-society/education-equality-sipoc/>

⁸ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society-summary_en.pdf

25. Question 1: *Is the limitation set out in domestic law in a manner that is accessible and clear to the individuals or groups who may be impacted by it?*

Answer: *No, the rules that apply to civil society funding under the Electoral Act are not clear and accessible.*

26. It is impossible for CSOs to know in advance how to regulate their affairs in a manner that will not fall foul of the Electoral Act's restrictions. There are three areas of particular concern:

1) *Conflicts with Charities' Regulator Advice*

The restrictions contained in the 1997 Electoral Act (as amended) on funding for civil society advocacy are incompatible with the Charity Regulator's approach to regulating the activity of charities. In advice dating from 2018 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"⁹. This guidance from the Charities Regulator does not set out that the 1997 Electoral Act (as amended) can impose restrictions on funding for engaging in public policy debates.

2) *Conflicting info from SIPOC*

SIPOC has issued conflicting interpretations of how the electoral act applies to civil society organizations since the law came into effect. For example in 2009 SIPOC called for the government to review "all provisions of the act relating to third parties."¹⁰ This follows on from a 2003 review from SIPOC, which stated 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."*¹¹

Despite this, in recent years, several organisations such as ICCL and Amnesty International Ireland have experienced an uptick in enforcement activity related to the 1997 Electoral Act (as amended). Oftentimes, these actions were in response to queries from members of the public as opposed to SIPOC's own regulatory investigations. This again highlights the reactive and selective nature of enforcement. For example, while conducting enquiries into a grant in 2017, SIPOC formally notified

⁹ <https://www.charitiesregulator.ie/media/1337/guidance-on-charities-and-the-promotion-of-political-causes-english.pdf>

¹⁰ 2009 SIPOC Report on Third Parties at the Referendum on the Treaty of Lisbon

¹¹ SIPO Annual Report 2003 pp36

Amnesty International Ireland that they were not required to register as a 'Third Party' before reversing the decision with no prior warning the following year.

3) *SIPOC Powers Not Set Out in Law*

SIPOC's enforcement powers are not set out in law or in publicly available guidance. In its letters to CSOs, SIPOC has repeatedly cited its power under Section 4(4) of the 1997 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 with the Commission may require for the purposes of his duties under the Act."¹²

This is in spite of the fact that the Electoral Act does not explicitly give SIPOC powers to make decisions about CSO compliance with the 1997 Electoral Act, or to make orders (e.g. requiring the return of donations.) SIPOC has not outlined publicly what powers it deems itself to have, nor have they published any guidance to explain how it conducts its inquiries and how it guarantees fair procedures while doing so. This has made compliance for CSOs extremely difficult as decisions seem to be made on an ad-hoc basis. In the case of the educational organization EQUATE and Amnesty International Ireland, SIPOC contacted the organizations' funders without notifying the organisations.

27. Question 2: *Has the government identified the legitimate democratic purpose of the limitation being placed?*

Answer: No, the government has not identified the legitimate democratic purpose that the 1997 Electoral Act's civil society funding restrictions seeks to achieve.

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

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

¹² <http://www.irishstatutebook.ie/eli/1997/act/25/section/4/enacted/en/html>

¹³ SIPOC Annual Report 2003

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

30. In addition to commentary from SIPOC, Several excerpts from the Oireachtas debates preceding the enactment of the Electoral (Amendment) Act 2001 indicate that the Government intended the ‘third party’ donation limitations to apply to funding for advocacy within the electoral context, rather than generally. When the Government introduced the draft legislation in the Seanad in 2000, the legislation’s restrictions on ‘third party’ financial activity were by way of spending, rather than donation, limits. Then-Minister for the Environment and Local Government, Noel Dempsey TD, explained that ‘third party’ spending needed to be 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.”¹⁵

31. Subsequently at Seanad Committee Stage, the Government introduced the ‘third party’ donation restrictions. The responsible Minister for State, Robert Molloy TD’s explanation of the proposal clearly suggests that the Government intended to bring

¹⁴ <https://www.sipo.ie/documents/english/Standards-Commission-submission-to-public-consultation-on-electoral-commission.pdf>

¹⁵ <https://www.oireachtas.ie/en/debates/debate/seanad/2001-02-21/speech/106/>

'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."¹⁶

32. It is also worth noting that to the extent that its funding restrictions apply to non-electoral advocacy by CSOs, the 1997 Electoral Act (as amended) unambiguously contradicts Ireland's explicit foreign policy aims and sees the state funding and championing activity abroad that it restricts at home. For example, at the 38th session of the Human Rights Council in Geneva in 2018, the Council adopted an Irish led resolution that championed Civil Society Space.¹⁷ Speaking after the adoption, the Minister for Foreign Affairs issued a statement outlining his;

"[Delight] to see once again that Ireland has led on championing Civil Society Space at the relevant United Nations Bodies. The promotion and protection of Civil Society Space is a foreign policy priority for Ireland. Across the world we are witnessing a retrenchment of civil society as it comes under increasing pressure through the stigmatisation, harassment and even criminalisation of civil society actors."¹⁸

33. As noted by CIVICUS;

"At the international level, Ireland is one of the strongest supporters of the defence 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 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"¹⁹

¹⁶ <https://www.oireachtas.ie/en/debates/debate/seanad/2001-06-14/speech/398/>

¹⁷ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/213/97/PDF/G1821397.pdf?OpenElement>

¹⁸ <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2018/july/human-rights-council-in-genevea/>

¹⁹ <http://www.civicus.org/documents/RegulatingPoliticalActivityOfCivilSociety.pdf>

34. Question 3: *Is the limitation a necessary and proportionate measure to achieve the legitimate aim that is being pursued?*

Answer: No, the 1997 Electoral Act's funding restrictions are neither a necessary or proportionate means of achieving a legitimate democratic aim.

35. It has been argued by some that the current restrictions that result as an unintended consequence of the 1997 Act (as amended) should remain in place as they protect the political system from being overly influenced by wealthy/foreign interests. The Coalition share the view that there is a legitimate need to protect our democracy from overt external influence, however, deriving these protections from an unintended consequence of legislation is inappropriate. If the amended 1997 Act was enforced as written, it would ban CSOs from participating in public debate and position Ireland even further out of step with norms in other developed democracies as outlined below.

36. We firmly reject the notion that ending civil society participation in public debate is a necessary or proportionate means of achieving transparency or equality in debate or for the protection and preservation of democracy in Ireland. The Coalition further rejects the idea that the sweeping restrictions that the amended 1997 Act imposes on CSOs are a necessary response to the threats that financial influence poses for the following reasons:

1) Civil society is only one among a myriad of other forms of engagement with the political system and public debate in Ireland. It exists alongside other influences that the Government does not seek to regulate, and in fact supports; such as commercial interests and political parties. Civil society acts a counterweight to these influences on the democratic system and acts as a method through which citizens can contribute to public debate, policy formation and so on in an accessible manner.

2) Civil society advocacy is an essential tool for preventing interference with democratic rights, including from those who the 1997 Act (as amended) seems to restrict, i.e. overtly wealthy/foreign sources. A weak civil society creates the conditions for singular or nefarious forces to dominate public discourse rather than prevent them.

37. The amended 1997 Act's wide-ranging and unintended limitations and restrictions governing funding and expenditure by CSOs are not a proportionate mechanism through which to foster a vibrant and thriving civic culture that supports our democracy. This is because:

1) Other influences on the development of public policy and on the political system are not subject to similar draconian and unencoded oversight measures.

2) Regulations that are based on transparency and accountability are more effective tools for ensuring that members of the public are aware of the range of influences on public policy, and for guarding against interference with democracy. Currently, all CSOs that have at least one employee must register their interactions with public officials on the Lobbying Register, and funding to civil society organisations is monitored by the Charities Regulator and the Revenue Commissioners;

3) Participation by civil society in public debate is crucial to ensuring that the electoral system – that is, the most sensitive element of our democracy – remains robust and secure. The Interdepartmental Group on the Security of Ireland’s Electoral Process and Disinformation has explicitly recognised the need for civil society involvement in monitoring and responding to threats to the integrity of elections.²⁰

38. 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

International Comparisons and the Case of Hungary

39. In 2017, the European Commission launched proceedings against Hungary after the country passed a law (*Law on the Transparency of Organisations Supported from Abroad*²¹) designed to discourage international funding for CSOs and NGOs working in the country. The Commission took the view that the law violated article 63²² (prohibition of restrictions on the movement of capital between Member States and Member States and third countries) of the Treaty on the Functioning of The European Union (TFEU). In its ruling of 18 June 2020, the Court of Justice of The European Union found²³ the Hungarian law on NGOs to be in breach of EU rules on the free movement of capital and the fundamental rights to protection of personal data and freedom of association, protected by the EU Charter of Fundamental Rights. In its judgement, the Court highlighted;

“the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society and includes the rights of civil society organisations to seek, secure and utilise resources. The Court concluded that the Hungarian legislation threatens the role of civil society as an independent actor in democratic

²⁰ <https://assets.gov.ie/2224/241018105815-07f6d4d3f6af4c7eb710010f2ae09486.pdf>

²¹ <https://ecnl.org/sites/default/files/2020-09/ECNL-briefer-on-Hungarys-Lex-NGO.pdf>

²² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

²³ <https://curia.europa.eu/juris/liste.jsf?num=C-78/18>

societies, undermining their right to freedom of association, creating a climate of distrust towards them as well as limiting the privacy of donors.”²⁴

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

“This broad definition can potentially cover the activities of a wide range of CSOs, including human rights NGOs, and in the past year, it appears that the regulatory body has applied the law in a more expansive way. In addition, investigations are often triggered by complaints to the regulatory body, so enforcement can inadvertently be selectively targeted”²⁵

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

“The blanket ban on foreign funding can have a particularly serious impact in Ireland, where most independent funding of human rights work comes from trusts and foundations based outside of Ireland.”²⁶

“Although overall comparisons are not possible, available figures do show reductions in funding in some EU Member States. In Greece, Ireland and the United Kingdom, public funding has dropped significantly.”²⁷

42. CCSF accepts that while the situation in Ireland and Hungary are different, they are comparable. The Hungarian NGO law **explicitly sets out** to limit the ability of civil society to organise effectively as part of a broader attempt to erode democratic freedom and the rule of law, whereas the Irish Electoral Act 1997 (as amended) has the **unintended consequence** of restricting civil society fundraising and engagement. Despite this, the practical effects of the laws are similar insofar as they undermine basic civil and political rights of freedom of association and expression. The above case study also highlights the fact that the Irish law as it stands may be in conflict with EU laws on the free-movement of capital, freedom of association and privacy.

43. In 2018, CCSF member ICCL carried out a comparative study²⁸ of controls on CSO finance in other developed European democracies. The study highlighted the fact that when compared to The Netherlands, Finland and Germany, Ireland's restrictions are far in excess of what would be considered proportionate in an established democracy.

²⁴ https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441

²⁵ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf pp22

²⁶ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf pp22

²⁷ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf pp29

²⁸ <https://www.civicus.org/documents/RegulatingPoliticalActivityOfCivilSociety.pdf>

Fig (i) Comparative Matrix: How Selected Countries Regulate “Political Activities” of CSOs²⁹

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

Practical Impacts of the Act on Civil Society

CASE 1: Education Equality

44. 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. **Correspondence from SIPOC continuously referred to the fact that it was an offence under the legislation to refuse to comply with their demands, despite Education Equality setting out the fact that as they were seeking to register as a charity, their aims were, by definition, not political.** The threats of prosecution from SIPOC severely constrained the ability of this group of volunteers to engage effectively with relevant legislation which was passing through the Oireachtas at the time. The organisation eventually wound down their activity.

CASE 2: EQUATE

45. Beginning in January 2017, SIPOC spent a year investigating 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**

²⁹ <https://www.civicus.org/documents/RegulatingPoliticalActivityOfCivilSociety.pdf> pp17

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.

CASE 3: Amnesty International Ireland

46. 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 that Amnesty International Ireland 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.
47. 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, again highlighting the inadequacy of the law as it stands. The decision was quashed.**³⁰

CASE 4: Irish Council for Civil Liberties (ICCL)

48. The negative effects 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. In 2017 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 1997 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 costly legal advice, and existing funding agreements were put at risk.**

³⁰ <https://www.thejournal.ie/sipo-amnesty-decision-4156736-Jul2018/>

Recommendation: Updating the Definition of Political Purposes

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

“Ultimately, the political donations regime as provided for in the 1997 Act needs to apply in a manner that is proportionate, fair and balanced to all participants. Anything less than a thorough review could possibly result in more unintended consequences arising, over and above those that civil society has rightly argued have given rise to the current situation, with potential adverse implications for transparency in our electoral processes. Against this background, the Government is opposed to this Private Members' Bill. However, I wish to assure this House that the issues at the heart of the Bill can be considered further in the context of wider electoral reform proposals, which I intend to bring forward shortly.”³¹

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

Amendment of section 22 of Principal Act

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

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

- (i) (l) 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

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

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

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

(iii) otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition;".³²

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

³² <https://data.oireachtas.ie/ie/oireachtas/bill/2019/35/eng/initiated/b3519s.pdf>