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August 29, 2022

To Whom it Concerns,

The Irish Council for Civil Liberties (ICCL) is writing to you with respect to notification number: 2022/376/IRL (Ireland)<sup>1</sup> concerning Part 4 (A)<sup>2</sup> of the Electoral Reform Bill (2022). ICCL wishes to express our strong reservations with respect to the passage of the Bill in its current form and the potential impact it may have on the free expression of political opinions.

Head 150 of Part 4(A) of the Electoral Reform Bill (2022)<sup>3</sup> sets out the powers which are available to the Electoral Commission (“The Commission”) vis-à-vis the removal of electoral or “political” content which is deemed to constitute mis or disinformation during an electoral period. Article 10.1<sup>4</sup> of the ECHR, and Article 11.1<sup>5</sup> of the EU Charter of Fundamental Rights limit the ability of public authorities to interfere with the right to free expression. These freedoms encapsulate a number of rights, including inter-alia, the right to hold opinions and the right to receive and impart information without regard to national frontiers.

Under the provisions of Head 150 of the Bill, the Electoral Commission will be granted powers to remove or otherwise restrict any information which may;

*(a) constitute disinformation,*

*(b) constitute misinformation, or*

*(c) involve manipulative or inauthentic behaviour, including the use of undisclosed bots,<sup>6</sup>*

These restrictions can be made solely on the basis of the opinion of the Commission that the removal or otherwise restriction of the information;

*“is necessary to protect the fairness or integrity of the election or referendum.”<sup>7</sup>*

The failure of an online platform to comply with an order to remove or otherwise restrict access to information by order of the Commission is a criminal offence<sup>8</sup>.

The scope for the potential application of these provisions is extremely wide and potentially encompasses almost any reasonable expression of political opinion during an electoral period. This is

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<sup>1</sup> The original title of this section of the Bill was Part 4(A), it was subsequently re-titled as Part 5 in the legislation. For ease of reference and consistency, we refer to the section as Part4 (A) throughout.

<sup>2</sup> [An Bille um Athchóiriú Toghcháin \(2022\) - Electoral Reform Bill \(2022\)](#) pp131

<sup>3</sup> Ibid; pp136

<sup>4</sup> [ECHR Article 10.1; Freedom of Expression](#)

<sup>5</sup> [EU Charter of Fundamental Rights; Article 11 - Freedom of Expression and Information](#)

<sup>6</sup> Ibid; pp136

<sup>7</sup> Ibid; pp 139 (Take Down Notices) pp140 (Correction Notices) pp143 (Access Blocking Order)

<sup>8</sup> Ibid; pp149

because the legislation not only applies to “electoral process information” as set out in Head 144 of the Bill, but crucially to “online electoral information” which includes

*“any online content relating to-*

- i) a candidate in an election*
- ii) a political party that has candidates standing in an election*
- iii) issues that are of relevance to an election, or*
- iv) issues that are of relevance to a referendum”<sup>9</sup>*

Head 144 of the Bill stipulates that any content which constitutes “disinformation” with respect to the above topics can be removed or otherwise restricted. “Disinformation” is defined in the Bill as;

*“any false or misleading online electoral information that—*

*(a) may cause public harm, and*

*(b) by reason of the nature and character of its content, context or any other relevant circumstance gives rise to the inference that it was created or disseminated in order to deceive;”<sup>10</sup>*

In this sense then, the power of the Commission to limit the freedom of expression of individuals is based on the Commission’s own interpretation of what is;

1. Misleading
2. Of a nature which “may” cause public harm
3. Deceitful in nature

It is the contention of ICCL that granting the Electoral Commission such wide ranging powers as this creates the potential not only for a chilling effect on the free expression of opinion but also may create scenarios where statements, utterances or other online publications incorrectly classified as “misinformation” are effectively excluded from the electoral discourse. This is a result of the inadequacy of the appeals process set out in the legislation.

While the drawing of the appellate panel from the Electoral Commission itself<sup>11</sup> is sub-optimal, it is understandable from an efficacy perspective. However, the timeframe of 5 days<sup>12</sup> to lodge an appeal through an online portal with all supporting materials being provided is unrealistic at best and an attempt to deny effective recourse at worst. No timeframe is given for the conclusion of the appeals process which means that the electoral period in question may well be over by such time as the, by then irrelevant information is reinstated.

Head 152 of the Bill sets out the limitations of the power of the Commission and stipulates that the powers under Head 150 may only be used; “when it is in the public interest to do so”.<sup>13</sup> Head 152 (2) sets out that in using its powers, the Commission must give “due weight” to “the right to freedom of expression.<sup>14</sup>” While the Irish Constitution does place certain limits on the exercise of this right, no precedent has been set in terms of limiting the free expression of political opinions, be they

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<sup>9</sup> Ibid; pp131

<sup>10</sup> Ibid; pp131

<sup>11</sup> Ibid; Head 161 pp146

<sup>12</sup> Ibid; pp139-146

<sup>13</sup> Ibid; pp136

<sup>14</sup> Ibid; pp138

“misleading”, “deceitful” or “intended to cause public harm”. It is the view of ICCL that limitations on the Commission’s powers are insufficient and that Head 10 of this Bill violates Article 10.1 of the ECHR, and Article 11.1 of the EU Charter of Fundamental Rights with respect to the right to impart and receive information.

Finally, it is unclear how these regulations will interact with existing limitations on the activities of organisations deemed to have a “political purpose” under the scope a 2001 amendment to the 1997 Electoral Act. Under this legislation, “political purpose” is defined as any activity designed to;

*(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;<sup>15</sup>*

This definition applies to organisations who accept donations to fund their activities, such as NGOs and other charitable groups and is taken as the working definition in the Electoral Reform Bill<sup>16</sup>. Despite questioning<sup>17</sup>, the responsible line Minister was unable to outline how these new restrictions would impact on the ability of NGOs and others to advertise their day-to-day activities during electoral periods without falling under either the political advertising restrictions (as being examined by the Commission under Notification 2022/184/IRL)<sup>18</sup> or potentially being subject to the regulations on mis and disinformation being proposed. This may have the effect of further interfering with the ability of NGOs to operate within the Irish context as it will place a chilling effect on our ability to advertise and promote our work during electoral cycles.

It should also be noted that significant procedural issues have arisen during the passage of this legislation. While the Bill itself was published in March of 2020, the entirety of section 4(A) was only introduced as an amendment to the Bill by the Minister very late in the legislative process. This has meant that an extremely complex and contentious set of regulations which impinge on some of the most fundamental civil and political rights were passed through the Irish parliament with no debate and without elected officials being aware of what they were voting for. The legislation was signed into law on July 25<sup>th</sup> while still under two Notification processes by the Commission, the second concerning

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<sup>15</sup> Electoral (Amendment) Act (2001)

<sup>16</sup> Ibid;pp103

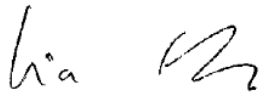
<sup>17</sup> [Electoral Reform Bill 2022: Seanad Committee Stage Debate, June 30<sup>th</sup> 2022](#)

<sup>18</sup> [Notification Detail Electoral Reform Bill 2022 \(Part 4 - sections 117 to 139 inclusive\)](#)

the restrictions on political advertising as previously mentioned. The parliament was not informed of these Notifications and the government have stated that while they have passed the legislation, it is not their intention to issue a Commencement Order to bring the potentially offending provisions into force until the Notification “standstill” period has ended. It is unclear what legislative process will be used to amend the legislation if it is found to be contrary to EU law. While this information is outside the scope of the Notification process, it is the view of ICCL that it is critical that this abuse of the legislative process is noted.

We hope that these matters will be taken into consideration in the TRIS process. We are available to answer any further questions which you may have with respect to this submission or the legislation more generally.

Yours sincerely,



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