

# **Policy Statement on the Electoral Acts and Civil Society Space in Ireland**

*January 2019*



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

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## Introduction

The Irish Human Rights and Equality Commission (‘the Commission’) is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen, protect and uphold human rights and equality in the State.

The Commission notes concerns raised in recent months regarding the definition of ‘political purposes’ and ‘third party’ in Section 22 of the *Electoral Act 1997*, as amended, in particular the potential impact these provisions may be having on the activity of Irish civil society organisations (CSOs). In this paper, the Commission outlines the relevant provisions of the *Electoral Act 1997* as amended, and, with reference to domestic and international standards on civil society space, makes recommendations for the review of the Electoral Act.

## The Electoral Act 1997, as amended

The *Electoral Act 1997*, as amended, regulates the conduct of elections in Ireland, including local, national, European and Presidential elections. The Electoral Act lays down standards for, *inter alia*: constituency boundaries, payments to political parties, candidate election expenses, disclosure of donations, and voter registration. The *Electoral Act 1997* was amended in 2001 and introduced a new definition of ‘political purposes’.<sup>1</sup> The definition included:

- 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;
- otherwise to influence the outcome of the election or a referendum or campaign.

The amendment also introduced a wide definition of ‘third party’ to mean any person (other than a party or candidate) who accepts, in a particular year, a donation for political purposes over €100, and imposed registration obligations on these third parties.

The amendment in 2001 also prohibited donations from non-Irish citizens not resident in Ireland and from companies that do not have a place of business on the island of Ireland. At that time, the parliamentary debate heard some discussion on how the law might be applied to campaign bodies in a manner that could lead to actions based on restrictions on free speech and free assembly.<sup>2</sup> However, the Government argued that a proper balance of such concerns was reflected in the law.

The Standards in Public Office Commission (‘SIPO’), established in 2001,<sup>3</sup> can receive complaints in relation to alleged contraventions of the *Electoral Act 1997* as amended; of the *Ethics in Office Act 1995*, and regarding matters of significant public importance.

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<sup>1</sup> Section 22 of the *Electoral Act 1997*, as amended.

<sup>2</sup> Seanad debate on Electoral (Amendment) Bill, 2000: Committee Stage (Resumed), 14 June 2001. Available at

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<sup>3</sup> SIPO has six members. The members are a chairperson (a judge, or former, Superior Court judge); the Comptroller and Auditor General, the Ombudsman, the Clerk of the Dáil, the Clerk of the Seanad and a Government appointee. Section 21 of the *Ethics in Public Office Act 1995* as amended by section 2 of the *Standards in Public Office Act 2001*.

Reform in 2012<sup>4</sup> introduced provisions to require full disclosure of donations, while reform under the Electoral (Amendment) Act 2015 made it an offence to fail to co-operate with SIPO inquiries.

In September 2015, SIPO published an *Explanatory Note for Third Parties*<sup>5</sup> setting out the registration requirements for third parties. These include an obligation to furnish to SIPO a statement of the nature, purpose and estimated amounts of donations to, and proposed expenses of, the third party during the year and an indication of any links with a political party or election candidate. The Explanatory Note sets out the relevant offences for failure to notify SIPO of relevant matters, to remit donations, to return statutory documents or to furnish false or misleading documents.

## Concerns regarding the impact of the Electoral Act's provisions on Civil Society

The Commission notes that since the Electoral Act's amendment in 2001, it has been the practice of many Irish CSOs to register as 'third parties' under the Electoral Act's provisions in the context of receiving funding for 'political purposes' during referendum campaigns and other electoral activity. However, the Commission understands that it has not been the practice or the expectation that such CSOs register as a third party due to the carrying out of their ordinary functions outside the context of elections and referenda.

It appears that the text of the Electoral Act however, lends itself to a much wider potential interpretation. During a review of the legislation<sup>6</sup>, published in December 2003, SIPO raised a number of concerns about the wide scope of the definition of 'political purposes', and the extent to which it could, in principle, apply to a wide range of community organisations,

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<sup>4</sup> Electoral (Amendment) (Political Funding) Act 2012. This Act also amended some of the monetary sums applicable to donations covered by the Act, and placed them in Euros rather than Punts.

<sup>5</sup> SIPO, *Explanatory Note For Third Parties*, September 2015. Available at <https://www.sipo.ie/en/guidelines/explanatory-notes/explanatory-notes-for-third-parties/explanatory-note-for-third-parties.pdf>

<sup>6</sup> SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003. Available at <https://www.sipo.ie/en/About-Us/Our-Policies/Review-of-Legislation/Review-of-Electoral-Acts/>.

non-governmental organisations, representative bodies and interest groups.<sup>7</sup> SIPO observed the likelihood that in conducting their normal business, such groups:

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. If a donation exceeding €126.97 was received in support of that activity, they would be regarded as third parties and would be required to comply with all of the relevant provisions of the legislation.<sup>8</sup>

SIPO expressed doubt as to whether the legislature intended for such bodies to fall under the provisions of the legislation in the normal conduct of their business, stating that it would: '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.'<sup>9</sup> SIPO recommended the further examination of the definition of political purposes: 'to determine the extent of its application beyond elections and referenda'.<sup>10</sup> SIPO further commented that it is 'mindful of the difficulty in attempting to legislate for inclusion of certain groups to the exclusion of others and in attempting to include certain groups at particular times depending on the nature of the activity being undertaken by them at the time.'<sup>11</sup>

In January 2018, the Fundamental Rights Agency of the European Union (FRA) reflected these concerns in its report on *Challenges facing civil society organisations working on human rights in the EU*,<sup>12</sup> noting the risk of 'a particularly serious impact in Ireland' on CSOs,

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<sup>7</sup> A non-exhaustive list of examples was provided, and which included: local groups such as Tidy Towns Committees, Residents / Tenants Associations and Community Organisations; NGOs such as Trocaire, Amnesty International, Threshold, the Society of St. Vincent de Paul, An Taisce, Credit Union Movement, Comhdháil Náisiúnta na Gaeilge; representative associations such as ICTU, IBEC, ISME, IFA, USI; and other interest groups such as those representing vintners, lawyers, hoteliers, teachers, accountants, builders, doctors, nurses, etc.

<sup>8</sup> SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003, pp 15-16. Note that the sum of €126.97 referred to was the threshold applicable at the time, before the passage of the 2012 Act.

<sup>9</sup> SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003, p. 16.

<sup>10</sup> SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003, p. 16.

<sup>11</sup> SIPO, *Standards in Public Office Commission Review of the Electoral Acts, 1997 to 2002*, December 2003, p. 16.

<sup>12</sup> European Union Fundamental Rights Agency (2017) available at: <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu> (hereafter referred to as the 'FRA Report')

owing to the fact that ‘most independent funding of human rights work comes from trusts and foundations based outside of Ireland.’<sup>13</sup>

Concerns have been raised in recent months by CSOs in Ireland regarding the wording and application of Ireland’s *Electoral Act 1997* as amended and its effect on the ability of Irish CSOs to carry out their work, or to seek funding for their activities from international sources such as philanthropic trusts or foundations.<sup>14</sup> Further concerns have been raised, regarding a perceived shift in approach to the enforcement of the Electoral Act in recent years.

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<sup>13</sup> Page 22 of the FRA Report.

<sup>14</sup> See, for example, Coalition for Civil Society Freedom (2018), *Coalition Statement on the Electoral Act*. Available at <https://www.iccl.ie/wp-content/uploads/2018/10/Coalition-for-Civil-Society-Freedom-statement-on-Electoral-Act.pdf>. The Coalition for Civil Society Freedom is made up of Irish civil society organisations working in the community and voluntary sector, domestic and international human rights advocacy, and community campaigning. These are: The Wheel, the Irish Council for Civil Liberties (ICCL), Uplift, Amnesty International, Front Line Defenders and Transparency International.

## Commission Views and Recommendations

The Commission notes the protections afforded to freedom of association in the Irish Constitution,<sup>15</sup> and in the various international human rights treaties to which Ireland is a party.<sup>16</sup>

The Commission further notes the significant emphasis Ireland has placed on promoting the role of civil society internationally in its foreign policy,<sup>17</sup> including during its membership of the United Nations Human Rights Council.<sup>18</sup>

A number of international human rights monitoring and implementation bodies have also stressed the important role played by civil society in democratic discourse, and in the promotion and protection of human rights.<sup>19</sup>

On 28 November 2018 the Council of Europe Committee of Ministers adopted a Recommendation 'on the need to strengthen the protection and promotion of civil society space in Europe', that Member States should, *inter alia*:

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<sup>15</sup> The right to freedom of association is recognized by the Constitution of Ireland, 'subject to public order and morality'. The Constitution further permits laws 'to be enacted for the regulation and control in the public interest' of the exercise of the right to freedom of association. (Article 40.6.1(iii), Constitution of Ireland).

<sup>16</sup> Article 22, International Covenant on Civil and Political Rights (ICCPR); Article 11, European Convention on Human Rights (ECHR); Article 12 Charter of Fundamental Rights of the European Union. Under these treaties, Ireland has an obligation not to unduly interfere with the right to freedom of association, save for in a manner prescribed by law, and necessary in a democratic society.

<sup>17</sup> 'Strong, independent and inclusive civil society empowers communities, contributes to good governance and provides a voice to the powerless'. Government of Ireland (2015) *The Global Island: Ireland's Foreign Policy for a Changing World*, p.30.

<sup>18</sup> During its membership of the United Nations Human Rights Council, Ireland led the drafting and negotiations on two Council resolutions on the creation of a safe and enabling environment for civil society in law and practice. These resolutions underscored 'the crucial importance of the active involvement of civil society, at all levels, in processes of governance and in promoting good governance', recommended that 'that domestic legal and administrative provisions and their application should facilitate, promote and protect an independent, diverse and pluralistic civil society'. UN General Assembly (2013), Human Rights Council Resolution 24/21: *Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment*, A/HRC/RES/24/21; and (2014), Human Rights Council Resolution 27/31: *Civil Society Space*, A/HRC/RES/27/31.

<sup>19</sup> See, for example: Committee of Ministers Recommendation on Legal Status of non-governmental organisations in Europe, CM/Rec(2007)14, para. 50. (available at <https://rm.coe.int/16807096b7>); Commissioner for Human Rights Nils Muižnieks (2017) *The shrinking space for human rights organisations* [press release] 4 April 2017 (available at <https://www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rights-organisations>). See also Dragan Golubović for the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe (27 November 2018), *International Standards Relating to Reporting and Disclosure Requirements for Non-Governmental Organizations*. The concerns raised by the FRA regarding the Irish civil society space are referred to at paras 17, 94.

‘ensure an enabling legal framework and a conducive political and public environment for human rights defenders, enabling individuals, groups, civil society organisations and national institutions for the protection and promotion of human rights (NHRIs) to freely carry out activities, on a legal basis, consistent with international law and standards, to strive for the protection and promotion of all human rights and fundamental freedoms.’<sup>20</sup>

In June 2017, the UN Special Rapporteur on the right to freedom of peaceful assembly and association, drew attention to the ways in which CSOs have ‘tangibly improved societies across the world’ and ‘advanced global peace, human development and respect for human rights’. The report highlighted the importance of an ‘enabling civic environment’,<sup>21</sup> and recommended that States:

‘(e)nsure the ability of civil society to seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without undue impediments’.<sup>22</sup>

Transparency and accountability as regards the activities of Third Parties’ and others’ activities during elections and referendums are crucially important to the integrity of the State’s electoral process. Legislative measures to place funding restrictions, reporting requirements and other obligations on such activity are entirely appropriate. In this context, the Commission notes the commitment in the Programme for Partnership Government to the establishment of an Electoral Commission, whose functions it is proposed would include regulation of ‘political funding and election expenditure’.<sup>23</sup>

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<sup>20</sup> Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, adopted on 28 November 2018 at the 1330th meeting of the Ministers’ Deputies, Appendix, Para 1a. Available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=09000016808fd8b9](https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9). The Recommendation further states that Member States should ‘remove any unnecessary, unlawful or arbitrary restrictions to civil society space, in particular with regards to freedom of association, peaceful assembly and expression’ (at Appendix Para. 1c).

<sup>21</sup> Paragraph 2 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and association, A/HRC/35/28 (available at <http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx>).

<sup>22</sup> Paragraph 91(l) of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and association, A/HRC/35/28.

<sup>23</sup> Government of Ireland (May 2016), *A Programme for Partnership Government*, p. 152. The Department of the Environment, Community and Local Government published a *Consultation Paper on the Establishment of an Electoral Commission in Ireland* (available at <https://www.housing.gov.ie/local-government/voting/electoral-commission/consultation-paper-establishment-electoral-commission>). The Joint



The Commission is of the view that the work of CSOs in Ireland, and their sources of funding, should continue to be clearly regulated and subject to high standards of scrutiny, transparency and accountability.

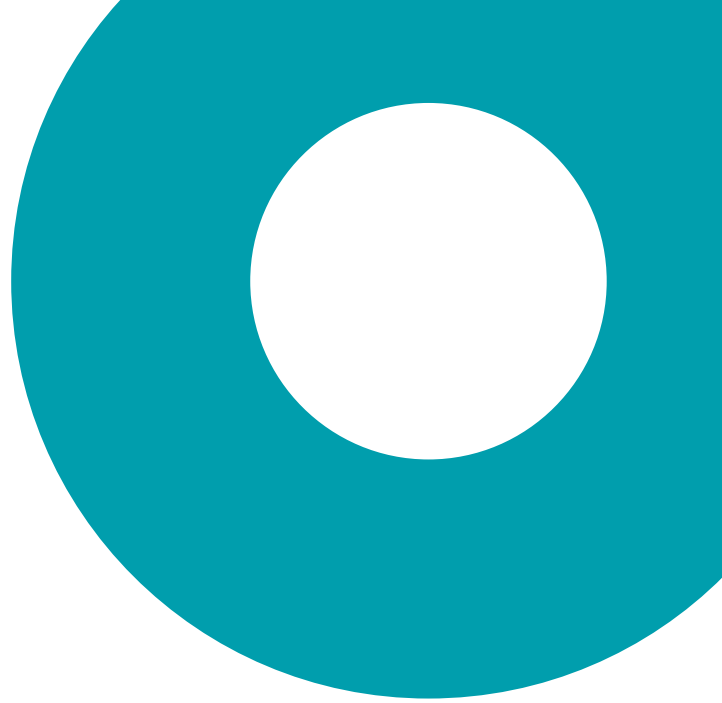
However, such regulatory measures should avoid placing undue restrictions on wider civil society activity engaging in legitimate advocacy aiming to influence political decision making and policy making, including with regard to human rights and equality issues.

**The Commission recommends that a review of the Electoral Acts be undertaken and that such a review**

- **considers how the State ensures an enabling legal framework and a conducive political and public environment for human rights defenders, enabling individuals, groups, civil society organisations and national institutions for the protection and promotion of human rights (NHRIs) to freely carry out activities, on a legal basis, consistent with international law and standards, to strive for the protection and promotion of all human rights and fundamental freedoms;**
- **considers a clearer linkage of restrictions placed on ‘third party’ activity and activity for ‘political purposes’ with electoral matters – namely elections and referendums – rather than to wider civil society activity aiming to influence political decision making and policy making; and**
- **takes due account of the wider reforms in oversight of electoral processes being considered in the context of the development of legislation on an Electoral Commission.**

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Oireachtas Committee on the Environment, Culture and the Gaeltacht conducted a consultation on this and published a report in January 2016 (available at <https://webarchive.oireachtas.ie/parliament/media/committees/archivedcommittees/environmentcultureandthegaeltacht/report-on-electoral-commission-final-20160113.pdf>). It recommended, *inter alia*, that a new Electoral Commission be charged with regulation of political funding and election expenditure at the national level, which is currently carried out by Standards in Public Office Commission. Work in the Department is ongoing, and a Regulatory Impact Analysis for a draft Bill is expected shortly.



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