Public Consultation on Regulation of Online Political Advertising in Ireland

Submission by the Irish Council for Civil Liberties

19 October 2018

Introduction

The Irish Council for Civil Liberties (ICCL) welcomes this opportunity to participate in the Government's consultation on the Regulation of Online Political Advertising in Ireland in advance of the Open Policy Forum on the issue in November 2018.

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.

The right to freedom of expression is enshrined in the Irish Constitution and in numerous European and international human rights instruments to which Ireland is a party. As the ICCL highlighted in its May 2018 policy paper on *Freedom of Artistic Expression and the Referendum on the 8th Amendment,* the European Court of Human Rights (ECtHR) has held that freedom of "political" expression is particularly important and requires heightened protection in the period preceding an election.[1]

Civil society's freedom to associate and thereby participate in public affairs is also a crucial aspect of democracy. In October 2018, the ICCL-led Coalition for Civil Society Freedom launched a campaign and issued a policy paper highlighting that a law intended to limit financial influence on election and referendum results in Ireland (the Electoral Act 1997 as amended) has been enforced in a manner that is stifling civil society freedom in general.[2] There is a real need to ensure that the heightened regulation of expression during election and referendum periods does not unintentionally over-reach and cause adverse consequences for the general health of civil society.

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1 Irish Council for Civil Liberties, *Freedom of Artistic Expression and the Referendum on the 8th Amendment* (18 May 2018), https://www.iccl.ie/wp-content/uploads/2018/05/ICCL-Freedom-of-Artistic-Expression-and-Referendum-on-the-8th-Amendment.pdf p4, citing *Bowman v United Kingdom* [1998] 26 EHRR 1 para 42.

2 The Coalition for Civil Society Freedom, *Keeping the People's Voice in Power: Coalition Statement on the Electoral Act* (October 2018), https://www.iccl.ie/wp-content/uploads/2018/10/Coalition-for-Civil-Society-Freedom-statement-on-Electoral-Act.pdf

The ICCL recognises that the rights to freedom of expression and association are not absolute. However, under the Constitution and European and international law, the Government may only interfere with these rights to the degree **necessary** to achieve a legitimate democratic aim, and only to the degree that is **proportionate** to the aim being pursued (including that **no less restrictive method** will achieve that aim).

With that in mind, the ICCL makes the following responses to a number of the questions and suggestions in the Consultation paper:

1. How should political advertising be defined?

The ICCL insists that "political advertising" must be defined, for the purposes of both interim and legislative measures following this Consultation, to mean advertising **designed to influence the outcome of an election or referendum** for which the polling day has been set by Government.

We recognise that the entire realm of online advertising needs to be regulated to a certain extent, and that legitimate concerns have arisen worldwide over opaque and intensive dissemination of false information, harmful content and micro-targeted advertising online outside of the electoral context. However, we insist that it is not possible nor desirable to attempt to regulate expression during election or referendum periods in the same way – or from the same starting points – as expression more generally.

We call on the Government to focus the upcoming Open Policy Forum exclusively on the question of how to regulate online advertising **designed to influence the outcome of an election or referendum** for the following reasons:

(a) A broader interpretation of the term "political" than what we propose would entrench the current problem of the over-reaching and potentially rights-violating advocacy restrictions contained in the Electoral Act. The ICCL-led Coalition for Civil Society Freedom's recent policy paper on the impact of the Electoral Act 1997 (as amended) explains that the Electoral Act's current, over-broad definition of "political purposes" is having severely detrimental effects on the functioning of civil society in Ireland. The Coalition's policy paper argues that there is an urgent need to amend the definition of "political purposes" in section 22 of the Electoral Act to confine its reach to third party advocacy intended to achieve a particular outcome in an election or referendum, which is carried out during the election or referendum period. The current sprawling definition of "political purposes" in the Electoral Act appears not to have been intended by the Oireachtas - as explained in the Coalition's policy paper. It has been criticised by the Standards in Public Office Commission (SIPOC) and the European Union Fundamental Rights Agency (EU FRA), and it is creating a stranglehold on civil society that is directly contrary to Irish foreign policy.

(b) Regulation of expression must always meet the requirements of lawfulness, necessity and proportionality under the Constitution and European and international law. It may be the case that restrictions that are permissible during an election or referendum period may not be permissible at other times. As a 2018 Council of Europe study on the use of internet in electoral campaigns

states, “political communication during election periods has long been subject to various forms of regulation… The overarching objective of campaign regulation is to protect the integrity of elections, ensure they are free and fair, and not captured by a narrow range of interests.[3] More intensive regulation may reflect that the people elected and the result chosen in the election and referendum contexts have direct and immediate power to change the laws of the country, and because the election and referendum contexts are time and subject limited.

(c) Regulation of expression regarding contested social issues, matters of public interest, and public policy is an extremely sensitive matter which requires careful balancing and proportionality assessments. While the ICCL welcomes transparency and makes every effort to ensure that our own advocacy is as transparent as possible, we can think of situations where certain transparency requirements may disproportionately impede people’s ability to express challenging ideas. For example, a blanket requirement to publish the personal details of every individual who spends money promoting ideas that are of public interest, or relate to public policy or contested social issues, could lead to chilling effects which disproportionately deter people from expressing minority, personal or unpopular opinions.

(d) The ICCL is concerned that there is an **urgent** need to take action to safeguard the integrity of elections and referendums in Ireland. We believe that defining “political advertising” beyond the scope of election or referendum advertising will prevent swift progress *and* will risk designing regulations that unnecessarily and/or disproportionately interfere with the basic democratic freedoms of expression and association.

2. Proposed interim measures pending online political advertising legislation

Reform of section 22 Electoral Act

The ICCL calls for immediate reform of section 22 Electoral Act 1997 (as amended), so that the Act confines the meaning of “political purposes” work by third parties to advocacy aimed at influencing the outcome of an election or referendum for which the polling date has been set.

SIPOC Guidance

Bearing in mind that SIPOC has an existing mandate under the Electoral Act to regulate election and referendum campaigning (albeit limited to parties based in Ireland and to donations for campaigning, rather than campaign spending), the ICCL believes that there is an urgent need for SIPOC to develop and publish Guidance covering (a) its current powers and procedures concerning online political advertising; and (b) its current powers and procedures regarding the regulation of donations to “third parties” for “political purposes”. It was noticeable during the recent referendum on the Eighth Amendment to the Constitution that SIPOC did not take a strong role in investigating or enforcing the provisions of the Electoral Act in relation to online political advertising. In addition, as the Coalition for Civil Society stated in our recent policy paper: SIPOC’s

3 Council of Rueope study DGI(2017)11 prepared by the committee of experts on media pluralism and transparency of media ownership (MSI-MED), *Internet and Electoral Campaigns: Study on the use of internet in electoral campaigns* (2018) https://edoc.coe.int/en/internet/7614-internet-and-electoral-campaigns-study-on-the-use-of-internet-in-electoral-campaigns.html pp7-9.

enforcement powers and procedures as they relate to "third parties" (i.e. civil society) are not set out in any publicly available Guidance. SIPOC recently settled a court action taken by Amnesty International Ireland by admitting that its decision-making process was flawed. The case studies of other organisations' experiences of SIPOC action set out in our policy paper provide additional evidence to show that SIPOC procedures require clarification.

Voluntary Standards

The ICCL supports the proposal by the Transparent Referendum Initiative (TRI) that, pending the introduction of legislation to regulate online political advertising, immediate non-legislative action should be taken to safeguard the integrity of upcoming elections. In terms of the transparency standards to be agreed, we are concerned that:

- The standards should uphold and implement rights under the GDPR, particularly regarding the protection of the 'sensitive' category of political opinion data and other 'sensitive' data categories
- Information should be disclosed in real-time and in a manner that is accessible by civil society

Measures to enhance press freedom

The ICCL also recognises that a free press is an essential safeguard for the open and free exchange of ideas in society, and a strong independent media is an efffective means to ensure transparency and accountability in public and political discourse. In the face of concerns about the prevalence of misinformation and malicious spreading of misinformation through on-line media, the role of regulated professional journalism takes on an additional importance. In this regard, ICCL notes the recent proposals from Newsbrands Ireland under its "Journalism Matters" campaign to support independent journalism in Ireland through changes to law and policy. While matters of taxation wider media regulation lie beyond the scope of the present consultation, ICCL believes that proposals of this kind merit serious consideration.

3. Proposals regarding legislation

Urgent need for Electoral Commission Bill

The ICCL urges the Government to act swiftly to develop a legislative framework to regulate online political advertising and all other aspects of elections and referendums through the establishment of an Electoral Commission with sufficient powers and resources, and flexibility, to deal effectively with emerging technological threats to the integrity of elections and to the privacy of voters.

James Lawless TD's Online Advertising and Social Media (Transparency) Bill 2017

The ICCL has engaged positively with Deputy James Lawless on the matter of his Online Advertising and Social Media (Transparency) Bill 2017. We generally welcome the proposals in the Bill. However, we are concerned about the definition of "political" messages in section 2 of the Bill for the reasons set out above. As stated above, we believe that there is a need to consider separately, and legislate separately for, (a) restrictions on freedom of expression during election

and referendum periods, and (b) restrictions on freedom of expression at other times. Therefore, we recommend that the remit of Deputy Lawless' Bill is changed.

Taking Deputy Lawless' proposals as they would apply to online advertising in an **election or referendum context** specifically, we recommend that the transparency requirements be increased to require also:

- The amount of money spent on the advertising
- The reach of the advertising, for example the amount of online space acquired for campaigning and the population reached
- All criteria according to which the advertising is targeted at its recipient (so as to protect individuals' rights under the GDPR with respect to micro-targeting and automated decision-making in relation to data including 'sensitive' personal data)
- A disaggregated account of the criteria according to which the advertising is targeted at all other recipients, demonstrating how many recipients are receiving the advertising and on what basis
- That information is disclosed in real-time and in a manner that is accessible by civil society

Further transparency requirements

In addition to the above recommendations, the ICCL believes that a future Election Commission will need to regulate campaign spending rather than donations, and all campaigning directed at / received by people within the jurisdiction of Ireland (even if originating from outside the jurisdiction).