

PROVISIONS OF THE ELECTORAL ACT 1997 (as amended) RELATING TO THIRD PARTIES
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**SUBMISSION TO THE MINISTER FOR HOUSING, PLANNING, COMMUNITY
AND LOCAL GOVERNMENT**

JULY 2017

I INTRODUCTION

1. The undersigned civil society organisations (“Undersigned Organisations”) seek to raise serious concerns about the provisions of the Electoral Act 1997 (as amended) which relate to “Third Parties”, as they apply to civil society organisations. These concerns have become particularly acute in recent months in light of the escalated rigour with which the Standards in Public Office Commission (“SIPOC”) has been pursuing non-governmental organisations and community groups. There is a growing concern that the Act could operate to stymie the legitimate activities of such actors in civil society.
2. At the root of the problem is uncertainty over the definition of “political purposes”, which on a strict reading, risks bringing a wide range of organisations within the scope of the Act despite their activities being unrelated to any electoral or referendum campaign. Although the Undersigned Organisations are of the view that they are not required to register as Third Parties under the Act, legal uncertainty around the term “political purposes” is causing considerable difficulties.
3. Such legal uncertainty coupled with the criminal penalties attached to failure to register, could have a chilling effect on political, human rights and community organisation. In addition, the Undersigned Organisations are concerned about the reputational harm of having their names published on the website of SIPOC. This could potentially impact upon donation streams. It is submitted that as currently drafted, the Act unintentionally risks offending both constitutional principles and human rights standards.
4. This submission briefly sets out difficulties with the legislation and makes proposals for amendments.

II THE RELEVANT PROVISIONS

II.1 Obligations on Third Parties

5. In order to appreciate the ramifications of being considered a third party for the purposes of the Act, the extensive obligations of third parties should be recalled. Section 23C of the Act requires third parties to register with SIPOC upon receipt of a donation exceeding €100.00.¹ Failure to register as a third party, if required to do so, is an offence under Section 25(1)(e) of the Act. Once registered as a third party, an individual or group is also required to comply with the provisions of the Act regarding the opening and maintenance of a political donations account² and is prohibited from accepting certain types of donations.

6. For instance, third parties may not accept anonymous donations in excess of €100.00³ or cash donations of more than €200.00.⁴ Donations from the same person in the same calendar year which exceed an aggregate value of €2,500.00 are also prohibited.⁵ In addition, the Act bans “foreign donations” to third parties⁶ and corporate donations exceeding €200.00 unless the donor is also registered with SIPOC.⁷ The Undersigned Organisations, and a much wider range of non-profit groups, could be prevented from raising the money necessary to undertake advocacy on public policy, were they required to register as third parties under the Act.

¹ The amounts stated in this submission are those set out in SIPOC’s ‘Explanatory note for third parties’, September 2015, at <http://www.sipo.ie/en/Guidelines/Explanatory-Notes/Explanatory-Notes-for-Third-Parties/Explanatory-Notes-for-Third-Parties.html>.

² Section 23B(1) of the Act provides that the third party must open and maintain an account in a financial institution in the State and lodge the initial donation and all subsequent monetary donations to that account. Monies withdrawn from the political donations account, given for political purposes, may only be used for political purposes. Section 23B(5) provides that each year, the responsible person of a third party must furnish a bank statement to the SIPO Commission which must specify the transactions which have taken place in relation to the account during the previous year. Section 23B(5) also provides that the statement must be accompanied by a Certificate of Monetary Donations on which the responsible person certifies that all monetary donations received the third party during the preceding year were lodged to the account and that all amounts debited from the account were used for political purpose. Section 23B(6) provides that the Certificate must be accompanied by a statutory declaration.

³ Section 23(1)

⁴ Section 23A(1)

⁵ Section 23A(1)

⁶ Section 23A(2) (a)

⁷ Section 23A(2)(b)

II.2. Definitional Scope of “Political Purposes”

7. Section 22(2)(aa) of the Act defines a third party as a person, other than a registered political party or a candidate at an election which accepts a “*donation*” exceeding €100.00 in value. A third party can be an individual, a body corporate or an unincorporated body of persons but in general, most third parties tend to be groups or organisations.
8. A “*donation*” for the purpose of the Act includes “*any contribution given for political purposes*”.⁸
9. Insofar as third parties are concerned, the definition of “*political purposes*” under Section 22(2)(aa) includes:

*“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**”.*⁹
10. It is the vague and expansive language of this provision which causes difficulty.

⁸ Section 22(2)(a)

⁹ Emphasis added

III IMPLICATIONS FOR NON-PROFIT GROUPS

III.1 Implications for Non-profit groups

11. The difficulty with the definition of “political purposes”, as set out above, is that it might unintentionally capture the day-to-day activities of a wide range of non-profit groups. A key part of the advocacy, policy and campaign work of many non-profit groups is to promote particular outcomes in relation to the policies or functions of government or public authorities. For example, a residents’ association petitioning its local authority to have traffic calming measures introduced could be deemed to be attempting to “*procure a particular outcome in relation to the functions of local government*”. Likewise, a group seeking reforms to reception conditions for asylum seekers might be viewed as “*promoting a particular outcome in relation to government policy*” in this area.

12. This difficulty was previously highlighted by SIPOC in its *Review of the Electoral Acts 1997-2002*.¹⁰ The Commission suggested in that review that:

“...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, Comhdail Naisiunta, 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.”*¹¹

13. SIPOC further observed that: “*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*

¹⁰ Published December 2003

¹¹ Page 15

a particular outcome in relation to a policy or policies of the Government or any public authority, including a local authority".¹² It further 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"*.¹³

14. SIPOC has continued to inform the Minister about its concerns. In a 2009 report to the Minister it concluded that it is *"clear that a balance needs to be found to ensure that the funding of political campaigns is sufficiently transparent while at the same time ensuring that the capacity of non-governmental organisations legitimately to raise funds in support of their activities is not hampered"*.¹⁴

15. The onus is on the Third Party to register as such if required. The Undersigned Organisations are of the view that they are not required to register under the Act. It is of particular concern however that SIPOC has observed that the definition of political purposes *"...can capture the activities of a number of individuals or groups who may not have regarded themselves as being engaged in a "political" campaign"*.¹⁵

16. Failure to register as a Third Party is an offence punishable on summary conviction of a fine of up to €1,297.00 or on indictment €25,394.00 or imprisonment for up to three years. In such circumstances, it is entirely unsatisfactory and possibly unconstitutional for non-profit groups to be put in a position of such legal uncertainty, particularly with respect to the imposition of a criminal offence.

¹² Page 16

¹³ Page 16

¹⁴ Standards in Public Office Commission, *Third Parties and the Referendum on The Treaty of Lisbon*, March 2009

¹⁵ Standards in Public Office Commission, *Third Parties and the Referendum on The Treaty of Lisbon*, March 2009, page 4

III.2 Correspondence from SIPOC

17. Non-profit groups are being put in an impossible situation where the onus is on them to consider whether they are required to register yet the statutory body vested with a supervisory role in relation to the legislation, has itself identified the difficulty in discerning the precise scope of “political purposes”.
18. Section 4(4) of the Act enables SIPOC to make such inquiries as it considers appropriate to allow it carry out its functions under the Act. In that capacity, the Commission periodically issues letters to non-profit groups explaining the law and asking the organisations to consider whether they are required to register as a third party. These communications can generate anxiety within the organisations concerned, many of which are unclear about their legal obligations.
19. The Commission has taken the step of publishing, on its website, a list of all those organisations contacted by it that have no clear requirement to register.¹⁶ This has caused considerable alarm. Concern is now growing the within the sector about the implications of the law. The Undersigned Organisations are concerned that SIPOC does not lend the impression that organisations are non-compliant or are avoiding their obligations with the Act. A number of grant-making organisations have also expressed their concerns about the possible reputational damage associated with funding non-governmental organisations that could be perceived as being non-compliant or avoiding compliance with the Act.
20. Confusion is likely to increase following the enactment of the Regulation of Lobbying Act 2015. Under that Act, interest groups including non-profit groups and charities who communicate with senior officials and politicians on policy or legislation are obliged to register with SIPOC and record details of lobbying contacts on a publicly available online database. This could lead to attention being focussed on the uncertain legal status of some non-profit groups with respect to their third party obligations.

¹⁶ See <http://www.sipo.gov.ie/en/Reports/Register-of-Third-Parties/>

21. In addition to their reporting obligations to donors and professional bodies such as the Law Society, many non-governmental organisations are now subject to regulation and oversight by five State authorities: the Charities Regulatory Authority, the Revenue Commissioners, the Companies Registration Office, the Lobbying Regulator and the Standards in Public Office Commission. Few other sectors are subject to this degree of onerous reporting and regulatory oversight.

22. Furthermore, at a general level, there is concern that a perception of onerous regulatory obligations could have a chilling effect on citizens organising themselves, whether as community organisations, advocacy groups, citizen ad-hoc initiatives or indeed in forming non-governmental organisations. This would be a particularly insidious consequence of legislation which was surely introduced to enhance fairness in the democratic process rather than to burden reduce civic participation.

IV INAPPROPRIATENESS OF PROVISIONS IN A DEMOCRATIC SOCIETY

23. The third party rules were introduced by the Electoral (Amendment) Act 2001. Oireachtas Debates suggest that there were particular concerns that apparently well-funded pressure groups working outside but parallel to the political process were not subject to the donation restrictions which applied to political parties around elections and referendums.¹⁷ The rules appear therefore to be aimed at ensuring balance in an electoral or referendum context. The Undersigned Organisations accept that there is a legitimate need for representative democracies to limit the disproportionate influence of wealthy individuals and special interest groups on the outcomes of elections and referendums. It is not proposed therefore to disapply electoral law in the context of third parties; rather, it is proposed that the scope of application of the Act should be limited to campaigns aimed at promoting or procuring a particular referendum or electoral outcome.
24. As explained above, there is a fear that the Act could operate to stymie the legitimate activities of variety of individuals and groups in civil society. This would constitute interference with a number of rights and principles under both the Irish Constitution and international human rights documents.
25. In particular, the Irish Constitution guarantees a democratic State¹⁸ (which denotes one in which all citizens have equal political rights¹⁹) and protection of the right to freedom of expression as well as freedom of assembly and association.²⁰ Likewise, and of direct legal application in Ireland given the incorporation of the European Convention into Irish Law in 2003, the European Court of Human Rights has found freedom of expression, particularly freedom of political debate, to form (along with free elections) the bedrock of any democratic system.²¹
26. Several international human rights instruments also contain guarantees for engagement by non-governmental organisations in political and public policy activities. For example, Articles 19, 22 and 25 of the International Covenant on Civil and Political

¹⁷ <http://debates.oireachtas.ie/seanad/2001/05/31/00006.asp>

¹⁸ Article 5

¹⁹ *O'Donovan v Attorney General* [1961] IR 114; *De Burca v Attorney General* [1976] IR 38 at 47

²⁰ Article 40.6.1

²¹ See Article 10 of the European Convention of Human rights; *Bowman v United Kingdom* (1998] 26 EHRR 1

Rights (ICCPR) recognises and protects the right of every citizen to freedom of expression, to freedom of association, and to take part in the conduct of public affairs, without unreasonable restriction.. The right to freedom of association not only includes the right of individuals or legal entities to form and join an association but also to seek, receive and use resources from domestic, foreign and international sources. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has highlighted that any restrictions to the right of associations to access funding, including from foreign sources, are only permissible when determined by law and necessary and proportionate to a legitimate aim. In his 2013 report to the UN Human Rights Council, the Special Rapporteur stated that the ability of civil society organisations to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association.²²

27. It is clear therefore that interference with the capacity of an individuals or groups to organise and raise funds for their activities, can constitute an interference with rights. It is well established by case law that such interference must be proportionate, insofar as it must have a legitimate aim and be necessary in a democratic society. It is submitted that the Electoral Act 1997 as amended does not meet this test, with respect to Third Parties, because its scope is not limited to campaigns aimed at outcomes of elections and referendums.
28. In this regard, it is noteworthy that the legislation governing Third Parties in the United Kingdom and Canada applies mainly in relation to activity at elections and referendums and not to general advocacy and political campaigning.²³
29. It is also noteworthy that only a small number of jurisdictions apply controls on foreign donations to non-governmental organisations that are comparable to those provided for under the Electoral Act 1997. The list of countries that have imposed similar bans and limits on donations to non-governmental organisations include Azerbaijan, Egypt, Ethiopia, Pakistan, Russia, Sudan and Venezuela.²⁴ We note that more recently similar provisions have been introduced in Hungary and this has drawn a strong response from

²² UN Doc A/HRC/23/39

²³ Standards in Public Office Commission, *Third Parties and the Referendum on The Treaty of Lisbon*, March 2009

²⁴ <http://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations>

the European Union, which is pursuing legal action against Hungary in this regard.²⁵ Ireland is believed to be the only advanced western democracy to have such draconian controls in place.

30. Furthermore, we note that Ireland has played a strong and positive role internationally in defending the important democratic role of independent civil society at the global level; and especially in advocating for the protection of human rights defenders and for the protection of civil society space. Ireland is, quite rightly, recognised as a leader in this area: through its work in leading the drafting of the UN Human Rights Council resolutions on civil society space in 2013, 2014 and 2016; through the importance attached to civil society space in the work of Irish Aid; and through the prioritisation which Ireland has given to the protection of human rights defenders at the UN level over several decades.

²⁵ http://europa.eu/rapid/press-release_IP-17-1982_en.htm

V PROPOSALS FOR TECHNICAL AMENDMENTS

31. The Undersigned Organisations are proposing amendments to Section 22 of the 1997 Act with a view to limiting the scope of campaigning activities which might fall within the definition of “*political purposes*”.

32. The proposed amendments are highlighted in bold:

22 –

(2) *For the purposes of this Part-*

(a) "donation" means any contribution given for political purposes by any person, whether or not a member of a political party, to a political party, a member of either House of the Oireachtas, a representative in the European Parliament or third party or a candidate at a Dáil, Seanad or European election and includes all or any of the following, namely—

(i) a donation of money,

(ii) a donation of property or goods,

(iii) conferring the right to use, without payment or other consideration, indefinitely or for a specified period of time, any property or goods,

(iv) the supply of services without payment or other consideration therefor,

(v) the difference between the commercial price and the price charged for the purchase, acquisition or use of property or goods or the supply of any service where the price, fee or other consideration is less than the commercial price,

(vi) in the case of a contribution made by a person in connection with an event organised for the purpose of raising funds for a member of either House of the Oireachtas, a representative in the European Parliament or a third party or a

candidate at a Dáil, Seanad or European election, the proportion attributable to that contribution of the net profit, if any, deriving from the event,

(vii) in the case of a contribution made by a person in connection with an event organised for the purpose of raising funds for a political party, the proportion attributable to that contribution of the net profit, if any, that is derived from the event and that, although not specifically raised for the purpose of supporting one or more of the political party's candidates at a Dáil, Seanad or European election, is used for the latter purpose;

(viii) a payment by the person on their own behalf, or on behalf of one or more than one other person, of a fee or subscription for membership or continued membership of a political party;”,

[...]

(aa) 'political purposes' means any of the following purposes, namely-

(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~~ at a Dáil, Seanad or European election, or referendum;

A “campaign conducted with a view to promoting or procuring a particular outcome at a Dáil, Seanad or European election, or referendum” shall be understood to include any activity intended to affect the electoral prospects of a party or a candidate, to enhance or prejudice the standing with the electorate of a party or a candidate, at a Dáil, Seanad or European election, or to promote the acceptance or rejection of a referendum proposal by the electorate in relation to a referendum for which the polling day has been set by the government;

(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;

VI CONCLUSION

33. The third party rules under the Electoral Act 1997, as amended, have created a legislative anomaly. The statutory body exercising a supervisory role within respect to the Act has itself highlighted the vagueness and uncertainty of the provision. It is apparent that until recently, SIPOC and the non-profit sector had developed an uneasy *modus vivendi* in relation to the law.

34. The ambiguous legal position of non-profit groups, however, is becoming increasingly untenable. The approach of SIPOC appears to have intensified and the online register of lobbying activities to follow the Regulation of Lobbying Act 2015 is likely to cause even more confusion. It is further submitted that the Act is vulnerable to legal challenge.

35. It is the opinion of the Undersigned Organisations that immediate revision of Section 22 of the Act is necessary in order to address the difficulties identified in this submission.

Signed by:

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