

An Coimisiún Toghcháin,  
Dublin Castle,  
Dublin  
D02 X8X8

Date 9 January 2024

**Re: Draft Research Programme**

Dear Art,

I am writing to you today to respond to the Electoral Commission's request for feedback on its Draft Research Programme (2024-2026). ICCL is Ireland's oldest human rights organisation and the only human rights organisation in the country to have a dedicated work programme on democratic freedoms. To this end, we strongly welcome the establishment of the Commission and the opportunity to contribute to the draft work programme.

As you may be aware, ICCL contributed extensively to the legislative underpinnings of the Commission by way of submissions on the Electoral Reform Act (2022), the contents of this letter broadly reflect these submissions. To this end, there are 3 areas where ICCL has substantive inputs into the work programme of the Commission;

- The long-awaited review of the 1997 Electoral Act,
- The proposals for a legislative remedy to allow for the commencement of Parts IV and V of the Electoral Act (2022) and finally,
- Ensuring that the right to public participation is incorporated into the work-plans of the Commission.

**Review of the 1997 Electoral Act**

In order to ensure that the fundamental right of freedom of association is respected, ICCL and our partners in the Coalition for Civil Society Freedom (CCSF)<sup>1</sup> consider that an urgent review of the 1997 Electoral Act should be a significant priority for the Commission. As reflected in our submissions on 2022 Electoral Act<sup>2<sup>3</sup>4</sup>, we outlined the significant chilling effect that the 1997 Act has on the day-to-day legitimate advocacy work of civil society in Ireland. This is because, in short, political donation rules are inappropriately applied to our regular advocacy efforts at all times, not only during electoral periods. This has resulted in some organisations being instructed to return funding, limiting their activities and closing altogether<sup>5</sup>. The restrictions are highly unusual for a long established and open democracy, it has been criticised by the UN<sup>6</sup>, the EU Fundamental Rights Agency<sup>7</sup>, SIPO<sup>8</sup> and the

<sup>1</sup> [The Coalition for Civil Society Freedom: Civil Society Voice \(2019\)](#)

<sup>2</sup> [Coalition For Civil Society: Submission on the Definition of "Political Purposes" as Contained in the 1997 Electoral Act \(2021\)](#)

<sup>3</sup> [Coalition for Civil Society Freedom Submission on the Electoral Reform Bill \(2022\)](#)

<sup>4</sup> [ICCL Submission on the General Scheme of the Electoral Reform Bill 2020](#)

<sup>5</sup> [Coalition for Civil Society Freedom Statement on the Electoral Act \(2018\)](#)

<sup>6</sup> [UN Letter to Irish Government on Electoral Act](#)

<sup>7</sup> [Fundamental Rights Agency Report on Civil Society Restrictions in Selected EU Member States \(2018\)](#)

<sup>8</sup> [Standards in Public Office Commission Annual Report \(2003\)](#)

European Commission<sup>9</sup>. We also believe that the laws mean the state is in breach of EU laws with respect to the free movement of capital as per CJEU Judgement C-78/18<sup>10</sup>. In response to all of these concerns, which have been known since 2003, the government has consistently said that the restrictions can only be examined as part of a wholesale review of the 1997 Act. While CCSF and others have criticised this approach as potentially further conflating the issues of day-to-day advocacy with political activity, we accept that this is the path the government has chosen. We urge a prompt commencement of the review in order to bring to an end illegitimate restrictions on freedom of association and bring Ireland into line with international norms. We have previously supplied the Commission with a legal opinion on these matters and this is attached here also for your information. [Comment from An Coimisiún Toghcháin: "The attached document referred to has not been published upon the request of the submitter given its confidential nature."]

## **Parts IV & V of the 2022 Electoral Act**

As part of its role, the Electoral Commission is responsible for the regulation of online political advertising and preventing the spread of online mis and disinformation. ICCL has been highly critical of the manner in which the latter provisions were added to the Electoral Act in its passage through the Oireachtas<sup>11</sup>. The insertion of such complex and extensive provisions by way of ministerial amendment so late in the legislative process was, as we said at the time, extremely problematic. The lack of substantive analysis of the provisions of the amendments have now resulted in a situation where they are in a legal limbo in the form of EU TRIS infringement proceedings<sup>12</sup><sup>13</sup>. We have serious concerns with respect to the provisions of parts IV & V of the act from not only a freedom of expression perspective, but also from an enforcement perspective. As part of the infringement process, ICCL wrote to the European Commission<sup>14</sup> to outline our concerns.

As part of the Commission's work programme, we would urge you to insist on a re-examination of these provisions. The proposals are so extensive and significant that they require proper public engagement and to be subject to the full scrutiny of the Oireachtas to ensure, not only that they are robust and human rights compliant, but also that they are compatible with EU law. We note that in committee on November 28th<sup>15</sup>, there was a lack of clarity with respect to the plans for legislation to bring Parts IV and V into line with EU law. We would urge the Commission to seek clarity from the Department regarding their plans to legislate to address these issues. It would be preferable that this issue is addressed in advance of the next general election given the potential for electoral mis/disinformation to impact on campaigning given current discourse with respect to migration and other issues.

In the interim, and until a legislative approach is decided upon, the Commission could commence work on examining best international practice on combatting political mis/disinformation and the regulation of political advertising. Our ICCL colleague Johnny Ryan has been in contact with the Commission separately on related electoral security matters, of note in particular is his work on electoral integrity with the African Union. This is expected to be published in Q1 of 2024.

## **The Right to Public Participation**

ICCL strongly supports the measures outlined by the Commission in the Draft Work Plan to investigate measures that can be taken to enhance democratic participation and make the voting process more accessible.<sup>16</sup>, Ireland is highly unusual in an international context insofar as outside of in-person voting on the day of an election or referendum, the ability of those eligible to vote to express their democratic preferences are extremely limited. The experiences of other states show that the expansion of options for participation are workable and secure. We would urge the

<sup>9</sup> [European Commission Rule of Law Report: Country Chapter for Ireland \(2023\)](#)

<sup>10</sup> [CJEU: Judgment in Case C-78/18 Commission v Hungary \(2020\)](#)

<sup>11</sup> [Liam Herrick: Democracy may not die by guillotine, but it's seriously injured](#), Irish Examiner July 2022

<sup>12</sup> [European Commission TRIS Notification 17149 \(2022\)](#) Political Advertising

<sup>13</sup> [European Commission TRIS Notification 15799 \(2022\)](#) Mis/Disinformation

<sup>14</sup> [ICCL Submission on TRIS Proceedings \(2022\)](#)

<sup>15</sup> [Committee on Housing, Local Government and Heritage Meeting November 28th 2023](#)

<sup>16</sup> [ICCL Submission on the General Scheme of the Electoral Reform Bill May 2021](#)

Commission to examine best practice for the use of non “in-person day of” voting methods in other states, this could include, for example, postal ballots, early voting, secure electronic voting<sup>17</sup> and so on. We would also urge the Commission to consider conducting research into the expansion of the franchise to non-Irish residents. In a comparative sense, Ireland is quite restrictive in the options for democratic engagement it offers to resident non-citizens, limited mostly to local elections. This is another area where the right to public participation could be enhanced through recommendations based on comparative analysis of the experience of franchise expansion in other states. The work of Professors David Farrell, John Coakley and the late Richard Sinnott provide a critical comparative overview of Ireland in this regard.

We look forward to ongoing discussions and engagement on the work programme of the Electoral Commission going forward. We are always available to discuss any aspect of the Commission’s work as may be useful.

Best wishes with developing what will be a fascinating programme of work.



Liam Herrick  
Executive Director

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<sup>17</sup> [Valimised](#) (Estonian Electoral Commission)