

Ireland as a learning experience for the Scottish Citizens' Assembly

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Ireland's recent high-profile referendums to liberalize abortion laws and to legalize same-sex marriage, both of which followed recommendations from deliberative assemblies, have been held up as examples to the world in how to tackle major reform questions in a democratic and inclusive way. However, much media coverage has over-stated the impact which the assemblies had in the results of both votes and it is dangerous to glorify the Irish process as one which develops consensus or acts as a panacea for complex national issues. Taking inspiration from the Irish model, the Scottish Citizens' Assembly will shortly begin work on a fascinating experiment in the Scottish context to deliberate on important questions with regard to the future of the country. It is useful, then, to reflect on the Irish experience and consider what lessons this might provide for the Scottish process.

A. THE IRISH EXPERIENCE

To date there have been two major experiments with deliberative assemblies in Ireland. A third on gender equality is scheduled. The first, the Convention on the Constitution, was established in 2012 following an election promise and was charged with considering a list of potential constitutional reforms.¹ The 100 members comprised: an independent chairman; 29 members of the Oireachtas; four representatives of Northern Ireland political parties; and 66 randomly selected citizens of Ireland. The citizens, chosen at random by a polling company, were selected to reflect the age, regional, and gender balance of the electorate. The Convention considered the following issues:

- Reducing the Presidential term of office from seven to five years and aligning it with the local and European elections;
- Reducing the voting age from 18 to 17;
- Review of the Dáil electoral system;

¹ For more information, see www.constitutionalconvention.ie.

- Giving Irish citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;
- Provision for same-sex marriage;
- Amending the clause on the role of women in the home and encouraging greater participation of women in public life;
- Increasing the participation of women in politics;
- Removing the offence of blasphemy from the Constitution;
- Additional issues of choice: Dáil reform and economic, social and cultural rights.

While not specifically included in its mandate, an expert advisory group was appointed to assist the Convention in its deliberations. All presentations, documents and reports were available publically on the Convention's website. Initially, the public were sceptical about the Convention, primarily because the issues set for consideration were limited and many might even have been termed "non-issues". Indeed, presenting issues such as lowering the voting age, reducing the term of the presidency and removing the dead-letter reference to blasphemy from the Constitution as major reform questions was seen as "a joke".² Same-sex marriage was seen to be the only "major" issue but even then there was doubt about the suitability of the Convention as a forum for its resolution and concern that this was a cop-out by political parties, many of which did not yet taken a policy position on the issue.

Despite a rocky start, the Convention is widely regarded to have been a success. This is mostly due to the level of commitment and engagement from members but also because of the success of the resulting referendum on same-sex marriage. The remaining issues, however, received little attention. Further referendums were held on the issues of blasphemy and reducing the qualification age for the presidency. While the blasphemy referendum passed, it generated almost no interest from the public, and the presidential age proposal failed.³ There are plans to hold referendums on removing Article 41.2, or the "women in the home" provision, and on extending voting rights to the diaspora.

² C O'Mahony, "This So-called Constitutional Convention is a Charade", *Irish Times*, (June 7, 2012)

³ The Presidential age referendum was held on the same day as the same-sex marriage vote and some argued that the later issue dominated. It was defeated by a majority of 891,704 votes. See M Minihan and M Hilliard, "Presidential age vote defeated by three to one margin" *Irish Times* (23 May 2015) available at

One interesting facet of the Convention relates to the inclusion of politicians in this exercise. When reports from the Convention were presented to the Oireachtas, the major advantage was that the politicians who had been involved in the process felt a level of ownership over the reports, which generated meaningful parliamentary engagement with the recommendations.

Following the 2016 general election, and in the political-horse trading around government formation, it was agreed that a Citizens' Assembly would be established, this time without politicians and "with a mandate to look at a limited number of key issues over an extended time period".⁴ The Convention model was adopted albeit with some alterations; the Assembly, chaired by a former Supreme Court judge, comprised 99 citizens randomly selected to be representative of the population at large. Like the Convention, it was supported by a secretariat and expert advisory group, although unlike the Convention, different experts were appointed according to the particular subjects under consideration. While the Convention had considered constitutional issues only, the Assembly was given a mix of constitutional reform issues and more broad societal issues, specifically:

- The Eighth Amendment of the Constitution (guaranteeing the equal right to life of the mother and the unborn and limiting legal regulation of abortion);
- How we best respond to the challenges and opportunities of an ageing population;
- Fixed term parliaments;
- The manner in which referenda are held; and
- How the State can make Ireland a leader in tackling climate change.

Similar processes were adopted for both exercises: meetings were held at weekends when members were presented with expert information, took part in question and answer sessions and round-table deliberations before formulating ballot papers and voting on proposals. Both exercises included a public submissions process. The Assembly allocated more time to some issues, particularly the abortion question, which was considered over five weekends. In contrast, the Convention spent one weekend on each topic.

<https://www.irishtimes.com/news/politics/presidential-age-vote-defeated-by-three-to-one-margin-1.2223665>. The blasphemy vote passed with 64.85% in favour. It was held on the same day as presidential elections but turnout was only 43.79%. See

<https://www.irishtimes.com/news/politics/blasphemy-referendum-results>.

⁴ See <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/Background/>

However, like the Convention, the only issue which gained any attention following the Assembly was the major social issue: the eighth amendment and its relation to abortion regulation. The decision to exclude politicians this time did not receive much attention. However, it is an interesting difference between these two exercises. While the Eighth amendment was so divisive that it was always going to attract a level of interest and engagement and ensure a parliamentary response, most people probably did not realise that the Assembly also considered four other issues. One potential reason for the lack of attention elsewhere was the fact that since politicians were not involved in the Assembly, there was less interest at the parliamentary stage when the reports came in and thus nobody to champion those issues.

Despite this, the Assembly has been praised as an innovative and effective exercise in deliberative democracy and it has been credited with paving the way for the successful abortion referendum. Of course, the path to the referendum involved further and sometimes complicated stages. First, the Assembly made recommendations to replace the existing constitutional provision in order to explicitly authorise the Oireachtas to legislate for termination of pregnancy. These recommendations were then considered by a Joint Oireachtas Committee, which also heard evidence from legal and health experts and sought its own legal advice, and ultimately recommended simple repeal of the existing provision. However, the Attorney General subsequently recommended replacing the provision with the text which was approved in the referendum of 2018.⁵ While the impression is sometimes given that the Assembly led to a consensus on the issue of abortion,⁶ in fact at various stages the work of the Assembly was criticised by pro-life groups who complained that the process was not representative and raised questions about the recruitment process.⁷

B. REFLECTIONS

⁵ On the process see D Kenny, “Repeal or Replace? The Challenge of Debating Complex Legal/Constitutional Questions in the Citizens’ Assembly” IACL-AIDC Blog (10 December 2018) available at <https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/12/10/repeal-or-replace-the-challenge-of-debating-complex-legalconstitutional-questions-in-the-citizens-assembly>.

⁶ L Brooks, “Scotland citizens’ assembly will not ask directly about independence” *The Guardian* (28 Aug 2019) available at <https://www.theguardian.com/uk-news/2019/aug/28/scotland-citizens-assembly-recruiters-to-avoid-independence-question>.

⁷ See J Leogue, “Citizens’ Assembly chair rejects criticism of 8th report” *Irish Examiner* (23 Feb 2018) available at <https://www.irishexaminer.com/ireland/citizens-assembly-chair-rejects-criticism-of-8th-report-467523.html>.

The Citizens' Assembly has been widely lauded as a success, both within Ireland and internationally. However, some of the praise may have overstated the effect of the exercise. First, it is important to remember that the success pertains largely to the issue of the Eighth Amendment only. This exercise proved useful in that once the Assembly had made its recommendations, it then allowed the Government to proceed with a referendum on the basis that there was a solid reasoning for putting the question to the people and that there was a reasonable expectation of support. Where Governments had previously been reluctant to proceed on such divisive issues for fear of a negative response from the electorate, the Assembly provided an impetus and the confidence needed to press ahead with the abortion referendum. Similarly, the Convention's report on same-sex marriage gave the Government the confidence to proceed with a referendum. However, as noted above, many Irish people are unaware that the Assembly involved anything more than the abortion issue and thus it is open to question whether in fact the Assembly model truly educates and empowers the public as is claimed.⁸

Furthermore, even on the abortion issue itself, the Assembly is sometimes credited with bringing the issue to the attention of the wider public by live streaming and recording presentations, and through the media coverage of the deliberations, which sometimes is equated with the mood change amongst the Irish people. However, various opinion polls demonstrate that there was already growing support for repeal of the eighth amendment prior to the Assembly⁹ and it is difficult to say whether members of the public truly followed the Assembly deliberations.¹⁰

Another important consideration is that these processes might be used as a means of political procrastination whereby governments and parliamentarians abdicate their law reform responsibilities and delay taking action on sensitive issues. Indeed, take the Convention's recommendation to replace the controversial "woman in the home" provision. This recommendation was considered by a Department of Justice taskforce which produced

⁸ See J Suiter, "Lessons from Ireland's recent referendums: how deliberation helps inform voters" LSE British Politics and Policy Blog (10 Sept 2018) available at <https://blogs.lse.ac.uk/politicsandpolicy/irish-referendums-deliberative-assemblies/> and J A Elkins et al, "Understanding the 2015 marriage referendum in Ireland: context, campaign, and conservative Ireland" (2017) 32(3) *Irish Political Studies* 361.

⁹ See D Loscher, "Irish Times' poll: Clear shift in attitude to abortion since 2013" *Irish Times* (20 April 2018) available at <https://www.irishtimes.com/news/social-affairs/irish-times-poll-clear-shift-in-attitude-to-abortion-since-2013-1.3467547>.

¹⁰ The number of views for some of the videos on its Youtube channel, even on controversial issues, can be low. See https://www.youtube.com/channel/UC2DgyetL9aUTMry_F9B9yUw.

further recommendations. Following this, the Government proposed a referendum to delete the provision but the Oireachtas decided to carry out pre-legislative scrutiny to decide whether repeal or replace was a more suitable option. However, having heard from experts and community groups the Joint Oireachtas Committee was unable to come to a conclusion and so this has been sent to a further Citizens' Assembly which will also consider general issues of gender equality.

It is important to remember that parliament itself is a citizens' assembly and so it is not necessary to farm every question of constitutional or law reform out to such a body for lengthy deliberation. If such exercises occur too often they will lose their effect and, from a practical perspective, it may become difficult to recruit members.

Ultimately, these exercises are advisory and so the decision on whether or not to act on recommendations remains with the government or parliament. As we have seen from the Irish experience, many of the assemblies' reports lie gathering dust on shelves due to a lack of political will to act. Doyle and Walsh have pointed to the example of Economic, Social and Cultural (ESC) rights; the Convention used its power to consider "any additional issues" to address the question of constitutional protection for ESC rights and recommended that these should be included in the Constitution. Despite a certain amount of political support and seemingly a great amount of public support, the Government have not taken action. Doyle and Walsh conclude that:

[t]he example demonstrates that although a complex array of voices feed into constitutional amendment processes, a phenomenon that is given a formal institutional structure through the integration of deliberative elements, elite initiation retains a powerful influence. Constitutional amendment proposals are still unlikely to progress absent Government support.¹¹

This is not to say that there is no value in these types of deliberative assemblies. On the contrary, they can be extremely effective. At a basic level, the Irish exercise raised public awareness of the issues and also provided a useful and trustworthy sources of information on

¹¹ O Doyle and R Walsh, "Mediating Political Disagreements: Interpretation, Deliberation and Constitutional Amendment Processes" unpublished paper presented at conference on "Sovereignty, Populism and Constitutional Politics", 30-31 Aug 2019 at University College Cork.

reform proposals.¹² The primary success of both exercises, however, was that they paved the way for the Government to run referendums on what otherwise would have been regarded as risky or controversial topics. As Colm O’Cinnéide has put it:

[T]he real impact of the Irish experience lay in how the Assembly’s conclusions challenged accepted political wisdom as to how Irish voters perceived the abortion issue. It also encouraged politicians to show their heads above the parapet...In other words, the real value of the Citizens’ Assembly model may lie in how it impacts on the political class.¹³

Similarly, for Doyle and Walsh:

[T]he inclusion of a deliberative element is useful as a means of deepening political reflection on proposals for constitutional change, including on the mechanisms for such change...Where citizen deliberation proves most useful as a practical problem-solving mechanism is where the political system is gridlocked on how to progress a particular constitutional reform.¹⁴

C. LESSONS AND CHALLENGES FOR SCOTTISH ASSEMBLY

The Scottish Government has opted for the Irish Citizens’ Assembly-type format. It is also following the practice of meeting on weekends, trying to ensure representation of a cross-section of society, hearing presentations from experts, employing facilitators to ensure certain voices do not dominate, live streaming meetings or parts of meetings, and publishing all

¹² Ireland does have an independent Referendum Commission which produces neutral information in advance of referendum campaigns but due to the constrained nature in which they view their role, the information is usually brief and presented without much context; arguments for either side are not given for fear of framing one side in stronger terms than the other. Many people feel this information is inadequate. However, it is difficult to gauge levels of public engagement given that the viewing levels are quite low.

¹³ Colm O’Cinnéide, “The Citizens’ Assembly viewed in External Perspective: Useful, but not a Deliberate Deus Ex Machina” IACL-AIDC Blog (12 Dec 2018) available at <https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland>.

¹⁴ Doyle & Walsh (n 12) at 6.

documents on the Assembly's website in order to ensure transparency. One significant decision was to provide expenses and a stipend of £200 in order to make it easier for people to attend. In the Irish context, where this was not given, people with caring responsibilities or those with long distances to travel were less likely to participate or were more likely to drop out during the process. Because of this, the Irish Government has committed to provide similar support for participants of the new Assembly on Gender Equality. In general, the Scottish Assembly will model the Irish example but it remains to be seen whether it will result in similar levels of success. Problems have already arisen.

The first major issue is that, when the intended creation of the Assembly was announced by the First Minister in April 2019, it was presented alongside a package of measures designed to prepare for a second independence referendum. This created the impression amongst some that this would be a pre-determined exercise and that only one outcome would be acceptable.¹⁵ This has also led some Scottish Conservative and Lib Dem politicians to call for a boycott of the process. This was an unfortunate mistake by Ms Sturgeon. Inevitably some will disagree with the outcome of Assembly recommendations. (Indeed, we saw this particularly in relation to abortion in Ireland.) However, for the process to be criticised in this way at the outset could undermine any recommendations made in the eyes of the general public.

Another major challenge for the Assembly is to narrow its vague remit to consider:

- What kind of country we are seeking to build;
- How best we can overcome the challenges Scotland and the world face in the 21st century, including those arising from Brexit; and
- What further work should be carried out to give us the information we need to make informed choices about the future of the country.

Just the first question could be interpreted in so many ways and could provide months of discussions on any one direction alone. If it is to have any real purpose, one of the first crucial tasks will be to decide where to focus the energy and attention of the Assembly.

A perhaps questionable decision was the idea to target certain percentages of participants in favor of and against Scottish independence. This is a departure from the Irish

¹⁵ See C McCall, "Citizens' Assembly 'perfect way' to boost Scottish independence" *The Scotsman* (2 July 2019) available at <https://www.scotsman.com/news/politics/citizens-assembly-perfect-way-to-boost-scottish-independence-1-4957480>.

exercises where participants were not canvassed about their views in advance. Potential recruits are being asked three questions:

1. If there was a Scottish Parliament election tomorrow and all parties were standing in your area, which party, if any, would you vote for or would you not vote?
2. If there was a referendum on the UK's membership of the European Union tomorrow, how would you vote?
3. If there was a referendum on Scottish independence tomorrow, how would you vote?¹⁶

The target quotas include 40% in favour of independence and 45% opposed, along with 56% in favour of remaining in the EU and 30% who want to leave. On Holyrood voting intention, the targets are 30% of the membership supporting the SNP, 18% Scottish Conservative and 16% Scottish Labour.¹⁷ The legitimacy of these deliberative exercises is often based on their representative character so it is important that this decision is well grounded. The recruitment information published on the website of the Assembly outlines that the aim is to ensure a diversity of political views, but hopefully it will not be a complicating factor.

A different kind of challenge involves setting realistic expectations. The Assemblies in Ireland did not directly lead to constitutional change; rather, they were significant parts of a much more nuanced process. Also, as we have seen, the recommendations of both Assemblies have had mixed fortunes depending on the types of issues involved and on the level of political will to implement them. The Guardian newspaper, in a report about the establishment of the Scottish Assembly, reported that the Irish assembly reached consensus on abortion and same-sex marriage.¹⁸ That is not what happened at all – there was no consensus and there is always dissent and differing views. There is a danger here that too much is expected of the Scottish Assembly. In a press conference before its establishment, David Martin, one of the co-conveners, expressed the hope that the Assembly would be a “healing” process in the context of two divisive referendums. Of course the hope is that the Scottish public will be more informed the relevant issues as a result of the exercise, and that a reasoned conversation can be had, but it is naïve to expect that the process will somehow harmonize views on such contentious questions.

¹⁶ See the recruitment information available on the Citizen Assembly website at https://www.citizensassembly.scot/sites/default/files/inline-files/Recruitment_paper_final2_0.pdf.

¹⁷ Ibid.

¹⁸ See (n6).

A related challenge is that, in order for the work of the Assembly to be respected by the public, it is necessary that it is well publicized and that people generally are aware of what is happening. Otherwise, there is a danger that issues like Brexit and talk of independence more generally will dominate and that the work of the Assembly could be lost in obscurity.

At the date of writing the Assembly is in the process of recruitment and so very much in its infancy but it is to be hoped that the realities of the Irish process will be borne in mind and that this will prove to be a useful and productive exercise in deliberative democracy for Scotland. In the Scottish Parliament recently, Michael Russell declared: “We need to know what Scotland thinks”.¹⁹ If the Assembly can at least provide an insight into the views of the ordinary Scottish public then perhaps it will have done its job.

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¹⁹ Scottish Parliament, Official Report cols 43-44 (11 Sept 2019).