



Paper of

Niamh Hyland SC

delivered to

The Citizens' Assembly

on

13 January 2018

The Citizen's Assembly – 13th January 2018

Topic: The manner in which Referenda are held

Referendums in Ireland- Legal background and process

Niamh Hyland SC

I. Background and Constitutional Provision for Referendums

Referenda have long been a staple of Irish legal and political life.¹ The Free State Constitution of 1922 established a referendum procedure in Ireland for the first time,² and even provided an 'initiative' mechanism which allowed the people acting alone to trigger the holding of a referendum.³

The Constitution of Ireland 1937 retains the centrality of the referendum, but dispenses with the initiative mechanism. The Constitution provides for a relatively straightforward mechanism of amendment.

At least partly as a result of the ease of the process, constitutional referenda take place quite regularly in Ireland. The tenure of the last government saw an unprecedented flurry of referendum activity, with the holding of eight separate constitutional referenda.⁴

Article 46 of the Constitution governs amendment of the Constitution. In summary, it provides that:

¹ See generally O'Neill, "The Referendum Process in Ireland" (2000) *Irish Jurist* 305

² Article 47, Irish Free State (Saorstát Éireann) Constitution, 1922.

³ Article 48, Irish Free State (Saorstát Éireann) Constitution, 1922. O'Neill notes however that the Cumann na nGaedhail party distrusted both the initiative mechanism, and referendums in general. O'Neill, "The Referendum Process in Ireland" (2000) *Irish Jurist* 305 at 309.

⁴ These were on the issues of: judges' pay, Oireachtas inquiries, the European Fiscal Compact, children's rights, abolition of the Seanad, establishment of the Court of Appeal, same-sex marriage, and eligibility age for presidential candidacy.

- Proposals to amend the Constitution shall be commenced in Dail Eireann as a Bill and if passed, a referendum will be held.
- A Bill to amend the Constitution may not contain any other matters.
- If the proposal is approved by the people following a referendum, the Bill is signed into law by the President.

The referendum itself is governed by Article 47 of the Constitution, which provides:

- That a referendum is approved by the people where a majority of the votes cast are in favour of the proposal;
- That every citizen who has the right to vote at an election for members of Dail Eireann shall have the right to vote at a referendum;
- That legislation may be adopted regulating the holding of a referendum.

Oddly, Article 47 does not provide a time within which a Bill to amend the Constitution is to be submitted to referendum after passing by both Houses of the Oireachtas. Nor does it expressly provide that voting is to be by way of secret ballot.⁵

It should be noted that the majority required by Article 47 for constitutional referenda is a simple majority rather than a “super” majority. As such, amendments may pass by only a tiny margin of votes, as was the case in the Divorce Referendum of 1995, in which the difference between the two sides was only .58% of the vote.

II. The Referendum Acts 1994-2001

Regulation of the referendum by law has been effected through the Referendum Acts 1994–2001.⁶ The key statute is the Referendum Act 1994. Part II of this Act sets

⁵ These unusual omissions are noted in Hogan and Whyte (eds), *JM Kelly: The Irish Constitution* (2003, 4th ed, Tottel) at 2102. The secrecy of the ballot is provided for in section 7, Referendum Act 1994.

⁶ The Referendum Acts 1994, 1998, and 2001. The 1994 Act repeals the referendum acts that preceded it.

out procedures for the taking of a referendum. Whenever a Bill containing a proposal for a referendum is passed by the Houses of the Oireachtas the Minister must, by order, appoint a polling day between 30 and 90 days from the date of the making of the order.⁷ That polling day may be held on the same day as a general election.⁸ Polling on the day must continue for at least 12 hours.

The constituencies are the same for both Dáil elections and referenda,⁹ and the person who would be the returning officer for a Dáil election in a given constituency is the returning officer for a referendum.¹⁰ The constituencies only serve an administrative purpose in terms of voting and counting of votes. There is no requirement that the referendum be passed in a majority of constituencies. The 1994 Act makes limited provision for postal voting,¹¹ and provides for special measures for polling on islands.¹²

Part III of the 1994 Act governs the counting of the votes. It provides the rules on what kind of mark is to be interpreted as a valid vote. While an 'X' is specified as the proper way of indicating a preference, votes are not to be regarded as invalid simply because the voter has made a different mark such as a '1' or the word 'one,' which in the opinion of the local returning officer clearly indicates a vote in favour of or against the proposal.¹³ Provision is made for recounting of the votes,¹⁴ and the obligation of the local returning officer to furnish a report to the referendum returning officer.¹⁵ The Act provides that the High Court may make an order allowing for the inspection of documents including counted ballot papers, spoiled ballots and counterfoils of ballot papers sent to postal voters.¹⁶

⁷ Section 10, Referendum Act 1994

⁸ Section 11, Referendum Act 1994

⁹ Section 18, Referendum Act 1994

¹⁰ Section 15, Referendum Act 1994

¹¹ Section 28, Referendum Act 1994

¹² Section 30, Referendum Act 1994

¹³ Section 34, Referendum Act 1994

¹⁴ Section 36, Referendum Act 1994

¹⁵ Section 37, Referendum Act 1994

¹⁶ Section 39, Referendum Act 1994

As soon as the referendum returning officer has received a report from every local returning officer he or she must sign the provisional referendum certificate, recording the number of votes for and against the proposal. The referendum returning officer then publishes a copy of this certificate in *Iris Oifigiúil* with a statement saying that the certificate will become final and incapable of being questioned when the officer is informed by the Master of the High Court (a statutory officer with specific powers under the Courts Acts) either that no referendum petition has been presented, or that every such petition has become null and void.¹⁷ Part IV of the Act governs Referendum Petitions, discussed below at section V. If a person wishes to challenge the outcome of a referendum, they can only do so by way of a Referendum petition prior to the result being finalized.

III. The Referendum Commission

The 1998 Act established the Referendum Commission. It seems that the establishment of the Referendum Commission was, to a large extent, influenced by the need for the dissemination of neutral information about referendum proposals by the State following the judgment of the Supreme Court in the case of *McKenna v. An Taoiseach*¹⁸. The principal functions of the Referendum Commission are:

- To prepare one or more statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate;
- To publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate and to ensure as far as practicable that the means employed enable those with a sight or hearing disability to read or hear the statements concerned; and,

¹⁷ Section 40, Referendum Act 1994

¹⁸ (No. 2) [1995] 2 IR 10

- To promote public awareness of the referendum and encourage the electorate to vote at the poll.¹⁹

The Referendum Commission is not a permanent body. Rather, it is established by the Minister when a referendum is held. Establishment of the Referendum Commission is not mandatory, it need only be established where the Minister considers it appropriate.²⁰ Ruane notes that the time allowed to the Referendum Commission to complete its functions is rather short, and that this has been the subject of criticism.²¹

The Commission consists of the chairperson and four ordinary members. The chairperson must be a former judge of the Supreme Court or the High Court, or following consultation with the President of the High Court, a serving judge of the High Court nominated by the Chief Justice. The ordinary members are: the Comptroller and Auditor General, the Ombudsman, the Clerk of Dáil Éireann, and the Clerk of Seanad Éireann. Members of the Commission are restricted from promoting or advocating a particular result at the referendum in respect of which the Commission has been established. The Commission is entitled to engage consultants or advisors as may consider necessary to perform its functions.

The 1998 Act makes provision for the designation by the Referendum Commission of 'approved bodies.' Approved bodies are entitled to appoint a person to act as an agent to be present at the issuing of ballot papers to postal voters, the opening of postal ballot boxes and the counting of votes.²² They may also appoint a 'personation agent' to be present in each polling station in order to check whether or not persons voting are in fact who they say they are. This is designed to prevent impersonation of voters. The test for appointment as an approved body is framed in negative terms. A body shall not be appointed as an approved body if it does not have a *bona fide* interest in the referendum proposal, it fails to provide reasonably

¹⁹ Section 3 Referendum Act 1998, as amended by Referendum Act 2001.

²⁰ Section 2 Referendum Act 1998.

²¹ Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 27.

²² Section 11 Referendum Act 1998.

requested information to the Referendum Commission, or it shares the name of a political party, or so closely resembles the name of a political party as to cause confusion.²³

Importantly, the provisional referendum certificate cannot be challenged on the grounds of non-compliance by the Referendum Commission with its statutory obligations, or a mistake by the Commission if the High Court concludes that the Commission complied with the statutory principles and that the non-compliance or mistake did not materially affect the outcome. Ruane notes that this affords considerable protection to the Commission, but that this protection only operates after the poll. The position as regards pre-poll challenges is less clear.²⁴

In the case of *Doherty v Referendum Commission*²⁵ the applicant, a sitting Sinn Féin TD, challenged the impartiality of the Referendum Commission's actions during the Fiscal Compact Treaty referendum in 2012. He claimed that the Commission had provided inaccurate information in relation to the effect of the Fiscal Compact Treaty on governmental powers as regards the European Stability Mechanism. The challenge was brought just two days before the poll.

The High Court adopted the test that the Court could only interfere in the holding of the referendum where the Commission's statement was plainly wrong and or manifestly inaccurate or misleading, and likely to materially affect the outcome of the referendum. On the facts, the Court found the impugned statements of the Commission not to meet this threshold.²⁶

There is a considerable volume of case law on State Funded Information Campaigns and what are known as the "McKenna Principles". However, these are being dealt

²³ Section 7 Referendum Act 1998.

²⁴Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 29.

²⁵ [2012] 2 IR 594

²⁶ See discussion of this judgment in Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 34-35.

with by another speaker and therefore I do not propose to address them in this paper.

IV. Referendum Challenges

Referendum Petitions

Part IV of the Referendum Act 1994 establishes the procedures whereby the result of a referendum may be challenged. This procedure is a 'referendum petition' which challenges the result of a provisional referendum certificate.

The petitioner must first pass the 'leave stage' that entails establishing before the High Court that there is *prima facie* evidence of an irregularity and that the said matter is such as to affect materially the result of the referendum as a whole.²⁷

An application for leave to present a referendum petition may be made by the Director of Public Prosecutions, or by any person registered as a presidential elector.

Section 43 of the Referendum Act sets out the substantive grounds for challenge to a referendum petition. That section provides in substance that:

- A referendum may be challenged on the basis that the result of the referendum was affected **materially** by the following factors:

(a) the commission of certain types of offences referred to in Part XXII of the Act of 1992 (as applied by section 6),

(b) obstruction of or interference with or other hindrance to the conduct of the referendum,

²⁷ Section 42, Referendum Act 1994.

(c) failure to complete or otherwise conduct the referendum in accordance with this Act, or

(d) mistake or other irregularity in the conduct of the referendum or in the particulars stated in the provisional referendum certificate.

The Act provides that the outcome of a referendum cannot be challenged simply because the Referendum Commission made a mistake or didn't comply with the Act governing it provided that the Commission complied with the principles in the Act and such non compliance or mistake did not materially affect the result of the referendum.

The key phrase in this section is “affected materially,” and much of the discussion around referendum challenges has centred around the precise meaning of these words.

The High Court is empowered to order a number of different remedies in the event that a petitioner is successful. It may order that all the votes in a constituency be counted afresh, or that all the votes in a particular parcel be recounted.²⁸

The Court may order that the referendum be retaken in a constituency, but the ordering of this remedy is not permissible where it appears to the court that the error did not affect the result of the referendum as a whole.²⁹

At any stage of a trial of a referendum petition the High Court may, of its own motion or on the application of any party, state a case for the opinion of the Supreme Court on any question of law arising at the trial.³⁰

²⁸ Section 47, Referendum Act 1994.

²⁹ Section 48, Referendum Act 1994.

³⁰ Section 55, Referendum Act 1994.

Case Law

In two leading cases the Supreme Court has addressed the issue of the effect of a breach of the McKenna Principles on the outcome of a referendum. These cases involved the application of the provisions of Part IV of the Referendum Act 1994, and their interpretation by reference to the Constitution.

Hanafin v Minister for Environment

In the case of *Hanafin v Minister for Environment*³¹ the petitioner sought a declaration that the unconstitutional acts of the government which had led to the ruling in *McKenna* meant that the result of the referendum should be set aside.

Importantly, the divorce referendum had passed by a margin of less than one percent, which appeared to provide potential for a successful referendum challenge.

The petitioner in *Hanafin* argued that 'material effect' for the purposes of the 1994 Act should be understood as equivalent to showing that the interference or wrongdoing was not trivial or inconsequential, in circumstances where it was accepted by the Supreme Court that there had been unconstitutional wrongdoing.

The Supreme Court rejected this argument, finding that the Act required that the result of the referendum could only be questioned if it was established that the result was materially affected by the alleged wrongdoing and that this was in accordance with the right of the citizens to vote in a constitutional referendum and to have the result thereof accepted, respected, and not interfered with.

The Supreme Court concluded that even though the result of the referendum had been so close, each voter must be taken to have voted freely, and to have been sufficiently enlightened on the issue in question. O'Flaherty J. interpreted this as

³¹ [1996] 2 IR 321

meaning that the presumption of constitutionality in favour of the referendum result had not been displaced.³²

Barrington J engaged in a detailed discussion of the way in which public opinion may have been affected in the run-up to the referendum. The Supreme Court's ruling in *McKenna* had been handed down on 17 November, while the eventual poll was on 24 November. Barrington J said that it was impossible to say what effect the government information campaign had had, but that the wrong had been discovered before the date of the referendum and the people had voted with full knowledge of what the Government had done. As such, the burden of proving material effect had not been discharged.

Jordan v. Minister for Children and Youth Affairs

In the case of *Jordan v Minister for Children and Youth Affairs*³³ the applicant challenged the outcome of the Children's Rights Referendum on the basis that the information campaign conducted by the Minister, which had been found in *McCrystal* to constitute a breach of the McKenna Principles, had tainted the outcome of the referendum. The applicant argued in the Supreme Court that on a true construction of the Referendum Act 1994 the petitioner was not required to demonstrate material effect on the outcome of the referendum, or that in the alternative material effect should not have been interpreted to require the petitioner to demonstrate that a different result would have ensued. Accordingly the applicant also argued that the High Court judge had misapplied *Hanafin*, or that in the alternative *Hanafin* was wrong and should not be followed.

O'Donnell J, with whom the other members the Court concurred, found that the *Hanafin* could not be understood as resolving the matter of the precise interpretation of 'material effect' because the judges in that case took the view that the evidence presented by the petitioner failed to reach any threshold and did not

³² At p. 437.

³³ [2015] IESC 33

raise a real likelihood that the outcome of the referendum might have been different. He went on to say that the Constitution did not require that a material effect on the result of a referendum be interpreted as meaning “must necessarily have altered the result, or even as a matter of probability.”³⁴

O’Donnell J’s analysis focused on the necessity for the reasonable person to have trust in the referendum process. He commented:

This conclusion in my view follows as a matter of not just textual analysis and precedent, but also as a matter of constitutional principle. Modern liberal democracy involves the ascertainment of the will of the people which it is accepted will be determined by the decision of the majority of them. But democracy depends as much if not more upon the consent of the minority and their acceptance of the result. Part of the consent of the minority is based on acceptance of, and trust in, the process by which the result has been arrived at. Where an irregularity has occurred which is an interference in the conduct of an election or referendum, then there will come a point at which it can be said that a reasonable person will no longer have the requisite confidence in the outcome to allow the result to be accepted as the basis upon which society should collectively proceed. In such circumstances it will be necessary to re-run the election or referendum notwithstanding the difficulties and imperfections of that course.³⁵ (Emphasis added)

On the basis of this approach, O’Donnell J formulated a test which aims to ensure the protection of the reasonable person’s confidence in the democratic system:

Accordingly, I would hold that “material effect on the outcome of a referendum” involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of this test, it may be useful to add that the object of this

³⁴ [2015] IESC 33 at para. 79.

³⁵ [2015] IESC 33 at para. 84.

*test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum.*³⁶

This would appear to be a significant gloss on *Hanafin* which makes it substantially easier for a petitioner to succeed in an application of this nature.

V. The Venice Commission: Code of Good Practice on Referendums

The European Commission for Democracy through Law, known as the Venice Commission because it meets in Venice, is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to the member states and, in particular, to help states bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.³⁷

In March 2007 the Venice Commission adopted the Code of Good Practice for Referendums. Part I of the Code deals with the principles of Europe's electoral heritage applicable to both elections and referendums. The foundational principle is universal suffrage, which is subject to qualifications of age, nationality, residence, and limited other qualifications flowing from mental incapacity or a criminal conviction for a serious offence. The code separately emphasizes the importance of equal suffrage, comprising equal voting rights, equality of opportunity, and equality for minorities. Notably, the requirement of balanced coverage is part of the requirement of equality of opportunity. This principle requires a neutral attitude by administrative authorities in broadcasting, advertising and the right to demonstrate on public thoroughfares. The Code also states secret suffrage as a fundamental principle.

³⁶ [2015] IESC 33 at para. 85.

³⁷ See [website of the Venice Commission](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN), http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

Part II of the Code concerns the conditions for implementing those principles in Part I. These conditions are respect for fundamental rights, regulatory levels and stability of referendum law, procedural guarantees and regulation of funding. *McKenna* is reflected in the Code's funding requirements, which state that the use of public funds by the authorities for campaigning purposes must be prohibited. The Code's procedural guarantees include the requirement that the referendum be organized by an impartial body, that there must be national and international observers to the referendum and that there must be an effective system of appeal providing for a final appeal to a court.

Part III sets out specific rules for referenda. These rules require that the use of referenda comply with the legal system as a whole and the principle of the rule of law. Texts submitted to a referendum must be procedurally valid, and substantively valid. To ensure substantive validity they must comply with all superior law, and not be contrary to international law or to the Council of Europe's statutory principles.