

Deliberative democracy: a worthwhile contribution to the fifth province?

Choice of Topic

At the end of last year I had the honour of being asked to deliver the Michael Littleton Memorial lecture (the Littleton lecture), which was broadcast on RTÉ One on the Friday after Christmas day. The topic I chose was: “The Citizens’ Assembly: An Exercise in Deliberative Democracy”. My objective was to explain what deliberative democracy means from the perspective of an ordinary individual like me, who is bereft of the knowledge and skills of a political scientist and to demonstrate whether, first, the Citizens’ Assembly (the Assembly), having regard to its establishment, its structure and its operating principles could be regarded as a democratic institution, and secondly, having regard to the manner in which its proceedings were conducted, it could be regarded as being deliberative, that is to say, that any decisions reached by it would be the product of fair and reasonable discussion and debate among the members. On both of those issues I concluded the Assembly had met the standard required to be regarded as a deliberative democracy.

One might reasonably ask whether the topic I have chosen to address this morning differs from the topic addressed in the Littleton lecture and, in particular, why there is a question mark at the end of its title. The Littleton lecture focussed on the Assembly’s process, which will also be the focus this morning. However, the Assembly was the second exercise in deliberative democracy in this jurisdiction, the first being the Convention on the Constitution (the Convention), which was established by the Houses of the Oireachtas in July 2012. While my analysis of the process in the Littleton lecture did advert to the

Convention, it was largely informed by an academic analysis of the first ever citizens' assembly, the British Columbia Citizens' Assembly, which was established in 2004. I found that analysis in a book entitled: "Democratic Innovations Designing Institutions for Citizens Participation" by Graham Smith of the University of Southampton, which was published by Cambridge University Press in 2009. What I was unaware of at the time was that there had been an academic analysis of the Convention here. This was authored by Eoin Carolan of University College Dublin and was entitled: "Ireland's Constitutional Convention: Behind the hype about citizen-led constitutional change", which was published by Oxford University Press and New York University School of Law in 2015 (I.Con (2015) Vol. 13 No. 3, 733-748). Having become aware of the article since last December, I was prompted to revisit the democratic and deliberative nature of the Assembly. Incidentally, Carolan states (fn. 51) that, although he had to decline an invitation from the Convention to attend "an initial meeting of prospective experts", he remained interested in the potential for mini-publics to make some contribution to democratic or constitutional discourse. In fact, Carolan was the first speaker at the first meeting of the Assembly on its first topic on 26 November 2016. His paper, which was entitled: "Article 40.3.3 and the law on abortion: A history", gave the members of the Assembly a clear overview of the current state of the law on the topic. As in the case of all of the speakers who presented to the Assembly, I am very grateful for his generous contribution to the work of the Assembly.

A further prompting was the posting on the Oireachtas website on 3 April 2018 of "Oireachtas TV Debate – The Citizens' Assembly". The participants in the debate included two political scientists who are very familiar with the work of both the Convention (in an advisory role) and the Assembly, David Farrell and Eoin O'Malley. In the case of the

Assembly, David Farrell of University College Dublin has since November 2016 been the lead researcher in research on the Assembly's operations, which is being carried out by him and Jane Suiter of Dublin City University for the Assembly in collaboration with the Irish Research Council and he has been in attendance at every meeting of the Assembly. Eoin O'Malley of Dublin City University spoke to the members at the Assembly's final weekend meeting on 14 April 2018 and he delivered a very interesting paper in the session entitled: "History of political practice in Ireland of the summoning and dissolving of Dáil and Seanad Éireann". Orla Ryan, a reporter with the Journal.ie, who is also familiar with the work of the Assembly, also participated in the debate. I found the diverse views expressed by the participants in the debate to be very interesting.

So, taking account of Carolan's analysis of the Convention, and the extent to which time allows, the views expressed by the participants in the Oireachtas debate, I will now reconsider the Assembly's process.

The case for a citizens' assembly

In considering the case for a citizens' assembly, or as it is frequently called, a mini-public, on a theoretical basis, Carolan considers it from two perspectives: first, the democratic perspective; and, secondly, the perspective of normative legitimacy. He ascribes the recent popularity of such processes to a combination of growing disenchantment with the performance of elected institutions, and the rise in academic interest in deliberative democracy and support for the suggestion that citizen composed institutions can provide added value to public decision making processes. While accepting that the foregoing factors may explain the increased interest in citizens' assembly's or mini-publics, Carolan questions

the normative justification for this. He points to the key underlying conditions identified by academics in support of the process: representativeness; and genuine deliberation. Not ignoring that there is scope for empirical scepticism, Carolan recognises that citizens' assemblies can provide a useful input to public and political discourse about constitutional issues. However, he emphasises that the actual representative and deliberative legitimacy of a citizens' assembly is "process dependent". That is a statement with which I am in entire agreement. The process he then assessed was the Convention. He did so by examining its composition and its "operation". In considering the relevance of Carolan's observations to the Assembly, it is necessary to identify differences, albeit not fundamental differences, between the Convention, on the one hand, and the Assembly, on the other hand.

Composition

Both the Convention and the Assembly have been established and regulated by resolutions of the Houses of the Oireachtas. While membership of each has consisted of 100 persons, the composition differs, in that the Convention consisted of a Chairperson, 66 citizens and 33 elected representatives (members of both Houses of the Oireachtas and members of the Northern Ireland Assembly), whereas the Assembly consisted of a Chairperson and 99 citizens. As regards the citizen members, it was stipulated by each resolution that the citizens, who must be entitled to vote at a referendum, should be "randomly selected so as to be broadly representative of Irish society". In each case, the selection process was outsourced, in the case of the Assembly, to Red C Research and Marketing Ltd (Red C), following a tendering process. Citizens who actually became members of the Assembly, either from the original recruitment process in September/October 2016 or the subsequent recruitment process for substitutes, were publically identified by reference to their names

and general area of residence, which were recorded on the Assembly's website, which has resulted in 152 current and former members being now listed on the website.

One cannot but agree with Carolan that the essential appeal of recruiting by random selection is its fundamentally egalitarian character, in the sense that any citizen has an equal chance to be appointed. The methodology employed for the selection of members to the Assembly was designed to, and should, I believe, achieve that objective. One can never absolutely guarantee a proper implementation of such methodology at all times and in all circumstances. Therefore, it is crucial that, if it transpires that in some respect implementation is defective, such defect be identified and made public and that steps are taken to redress its effect. I mention this, because after its weekend meeting in January this year, when the Assembly had considered and voted on the manner in which referenda are held, I was made aware that seven new substitute members who were present and voting at that weekend had been recruited in a manner which did not comply with the agreed methodology for recruiting members. The consequence of that was that, as regards four of the thirteen questions in relation to the topic which were voted on, the majority view of the properly recruited members of the Assembly could not be determined. Full details of this will be provided in the Assembly's report to the Oireachtas on the matter, which will also cover the final matter considered (fixed term parliaments), which was a victim of Storm Emma and "the Beast from the East" and, consequently, was considered only three weeks ago.

Following receipt of the outcome of an extensive internal audit carried out by Red C in relation to the recruitment of the members who participated in the Assembly, I formed the view that the recruitment irregularity discovered after the meeting in January this year had

no impact on the work of the Assembly on previous topics and on its final topic. I am still of that view. In the interests of transparency, the audit has been posted on the Assembly's website.

In the Littleton lecture I alluded to Smith's comment on a "sampling problem", which relates to the element of "self selection" in the recruitment process, in that citizens are under no obligation to participate, so that those who are invited can choose not to participate. In some cases, in the absence of any financial incentive, or any necessary financial support, a potential member may have no option but to decide not to participate. A problem encountered during the Convention related to supports for childcare, but, as David Farrell observed during the debate, it was resolved for the Assembly. That was because provision was made for childcare expenses where appropriate.

That solution does not, however, meet Carolan's concern that a process that is required to make extensive use of the self-interested, the enthusiastic, and the zealous, will inevitably carry with it a heightened risk of partisan influence or bias. His solution for avoiding that would be to ensure that the members are paid at a level likely to overcome the randomly selected citizen's reluctance to participate. While overall I believe Carolan's concerns should be taken on board, my instinct is that suggesting that a risk of "partisan influence or bias" exists is not justified; rather the risk is to the representativeness of those selected of Irish society.

Referring back to the Littleton lecture, I noted that Smith observes that the element of self selection does appear to have some effect, citing that in the British Columbia Citizens' Assembly participants tended to be more politically knowledgeable and civically active than

the general population. Indeed, as I noted, that point was made by Red C in its document on methodology, in that it acknowledged that the fact that a financial incentive was not offered to encourage participation might result in a group whose members have a stronger civic interest than a truly representative sample. Nonetheless, I expressed the view, which I still adhere to, that I am satisfied that the methodology used by Red C, as explained in that document, which is available on the Assembly's website and contains details of random sampling points and how area stratification was used, demonstrates that the members have been and are broadly representative of Irish society.

"Operation" of the Process

The role and the functions of both the Convention and the Assembly were regulated by the relevant resolution of the Houses of the Oireachtas. In relation to each, the resolution stipulated –

- its calling or convening,
- its role – to consider, to make recommendations on and to report to the Houses of the Oireachtas on certain specified matters and other matters,
- the timescale allowed for its work,
- that its rules of procedure for the effective conduct of its business in as economical a manner as possible were to be agreed,
- that it could invite and accept submissions from interested bodies and seek such expert advice as it considers desirable, and,

- the manner of determining matters (by a majority vote of the members present and voting other than the Chairperson who would have a casting vote in the case of an inequality of votes).

When it comes to the detail, in the resolutions there are some differences between the scheme for the Convention and the scheme for the Assembly, which, in the context of Carolan’s commentary on the Convention I consider to be relevant, although I’m still of the view expressed in the Littleton lecture that, as regards the fundamentals of the process, the Assembly is not significantly different from the Convention.

The first such difference relates to the matters which each body was mandated to consider. In the case of the Convention, eight specific matters were outlined (e.g. reducing the voting age to 17; and provision of same sex marriage). In addition, it was provided that following completion of the reports on the eight specified matters, the Convention could consider –

“such other relevant constitutional matters or amendments that may be recommended by it”.

In the case of the Assembly, five specific matters were outlined (the Eighth Amendment of the Constitution; 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). Of significance, in my view, is the fact that while a recommendation in relation to three of those matters could involve a constitutional amendment, the Assembly was not given authority to consider other relevant constitutional amendments that might be recommended by it, as the Convention had been given. The scope of the Assembly’s role and functions was extendable only by the

Oireachtas referring “other matters” to it, which did not happen. Accordingly, Carolan’s concerns in relation to the possibility of “specific elites” having excessive influence over the Convention process certainly could not arise in relation to the Assembly, because of the clear limitation on the scope of its functions. Having been involved in, and having observed the work of, the Assembly over a year and a half, I’m of the view that it is appropriate that the Oireachtas should retain control over the topics to be considered in a deliberative democracy process.

The second relevant difference relates to the outcome of the submission of a report and recommendations on a matter considered by the Assembly, albeit the really significant difference relates to only one matter on which the Assembly was asked to consider and report on. In relation to all other matters before the Convention or the Assembly, it was stipulated that the outcome was that the Government would provide in the Houses of the Oireachtas a response to each recommendation and, if accepting the recommendation, would “indicate the timeframe it envisages for the holding of any related referendum”. In the case of the Convention a four month time limit was stipulated for the response, but no time limit was stipulated in relation to the Government’s response to a recommendation of the Assembly, which could be frustrating for members who gave their time and energy to the Assembly if the response was delayed or, indeed, delayed indefinitely. In addition, the fact that, in the case of two of the matters which the Assembly was asked to consider and make recommendations on, the holding of a referendum would be highly unlikely to arise seems to be overlooked.

The significant difference is that, in relation to the Assembly's duty to report on the first specified matter, the Eighth Amendment of the Constitution, the resolution directed that on receipt of the Assembly's report the Houses of the Oireachtas would -

“refer the report to a Committee of both Houses which will in turn bring its conclusions to the Houses for debate”.

The relevant report of the Assembly was delivered to the Houses of the Oireachtas at the end of June 2017 and by December 2017 the Committee of both Houses which had been established brought its conclusions to the Houses for debate.

In the context of the Convention, Carolan warns that the potential for deliberative democracy processes to be used for “political buck-passing” should not be underestimated. Indeed, in relation to the Assembly one frequently heard commentators, whether political, media or academic, suggesting that it was a “kicking the can down the road” operation. In reality, the specific provision in relation to the receipt of the Assembly's report on the Eighth Amendment and its actual implementation makes it clear that, in relation to that matter, it was not such an operation.

By way of general observation, I consider that the imposition of a time limit for, and, stipulating the format of, the process which will follow receipt of a report and recommendation from a deliberative democracy process would make it more encouraging for a potential Chairperson or potential members to participate in the process, in that it would give some assurance in relation to, using Carolan's terminology, the fate of the recommendation. Having said that, it is crucial to emphasise, as David Farrell did in the Oireachtas TV Debate, that the role of the Assembly is purely advisory.

The third relevant difference relates to the assistance which the Convention or the Assembly was and is authorised to receive. In relation to each, as noted earlier, the resolution provided that it “may invite and accept submissions from interested bodies and will seek such expert advice as it considers desirable.” In addition, in the case of the Assembly it was mandated that –

“an Expert Advisory Group will be established to assist the work of the Assembly in terms of preparing information and advice”.

On the basis of my experience, it was undoubtedly in the interest and for the benefit of the Assembly that it be required to have an Expert Advisory Group to assist it in the terms specified. In fact I would acknowledge that I would not have been able to perform the task I undertook as Chairperson without the assistance (which has been invariably preceded by the epithet “invaluable” in my speeches to the Assembly) of each of the four Expert Advisory Groups which were established to assist the Assembly in relation to the five topics, the topics on fixed term parliaments and the manner in which referenda are held being conjoined for this purpose. By way of example, in relation to the climate change topic, it was only at the first meeting with the Expert Advisory Group that the enormous scope of that topic, the range and variety of the sectors involved, and the importance of, and the distinction between, concepts such as mitigation and adaptation “sunk in” for me. Given that the Assembly had to consider this matter over two weekends, it would have been impossible to structure the work programme and identify the speakers without the assistance of the Expert Advisory Group. The identity of the members of the relevant Expert Advisory Group has been made public on the Assembly’s website at all material times and, indeed, they have been identified in all of the reports of the Assembly completed to date.

Moreover, the reports set out the terms of reference of the Expert Advisory Group, including advising on the criteria for selecting specialists/experts to appear before the Assembly and recommending names for consideration by the members of the Steering Group. The role of the Expert Advisory Group at the meetings of the Assembly was also decided on in advance and is set out in the reports of the Assembly completed to date.

I fully agree with the view expressed in Carolan's article that there should be transparency around, inter alia, the identification, recruitment and selection of experts and the process used to identify and select speakers and also the decisions in relation to the agenda and the organisation of the topics. Such transparency, in my view, is wholly achievable and I'm satisfied that it has been achieved in the case of the Assembly.

Openness was the first principle in the list of key principles adopted by the members of the Assembly at its inaugural meeting. That principle was adhered to, not just in the public sessions, but the Assembly has also been open about its internal structure and workings through the medium of publishing relevant information on the Assembly's website and in its reports to the Oireachtas. This is illustrated, for example, by the fact that there has been included in the reports the document which governs the input of the facilitators and note takers in the members deliberations during roundtable discussions – The Practical Guide to Facilitation.

I also agree with the view expressed by Carolan that there should be transparency around the engagement of a deliberative democracy process with the public comments and submissions received. I am satisfied that this was also achieved in the case of the Assembly. As it was authorised to do by the resolution of the Houses of the Oireachtas, the Assembly

invited submissions in relation to each matter it has considered. With the exception of the final topic, fixed term parliaments, there was a phenomenal response to the request for submissions. For example, on the climate change topic, the Assembly received 1,205 submissions, of which 1,085 were posted on the Assembly's website and were available to access by the members of the Assembly and also by members of the public. To assist the members in considering the submissions in relation to the topic, the Secretariat provided a "signpost document" to outline some of the key issues and possible solutions which were identified by individuals, non-governmental organisations and professionals who made the submissions. That document was published in the report on the climate change matter.

One of the weaknesses identified by Carolan in relation to the Convention which he considered could be traced to a lack of resources has already been referred to, that is to say, the fact that the members were not paid. Another weakness which he ascribes to the Convention's financial limitation is that the opportunities for the members to deliberate on any issue were confined to a single two-day period. In the case of the Assembly, while the Oireachtas required it to complete its deliberations not later than one year from the date of its first meeting, by November 2017, the Oireachtas subsequently accommodated the Assembly by granting two extensions. It must be acknowledged that it was Storm Emma which necessitated the second extension. In any event because of such accommodation, it was possible to assign five weekend (two-day) meetings for consideration of the Eighth Amendment and two weekends for each of the topics on non-constitutional issues: the ageing population and climate change. In my view, those periods were essential to the proper deliberation of the complex issues which had to be considered.

The Assembly considered each of the remaining two matters, on referenda and fixed term parliaments, over one weekend. The issues which had to be considered on each of these weekends were unquestionably narrower and less complicated than the issues addressed on the earlier matters. Nonetheless, on the basis of my own experience, the time allotted for giving the members the opportunity to be fully informed, have adequate discussions, to have ownership of the process and, in particular, to have input on the questions to be voted on was very tight. Whether one weekend is adequate for deliberation on any specific matter is something which needs to be considered very carefully in the future.

Conclusions

At the beginning of his conclusions on the success or otherwise of the Convention, Carolan remarks that the process seems to have been a positive and engaging experience for the participants and that it confirms that citizens are capable of engaging in a serious manner with complex questions of constitutional or political reform. At the end, however, certain frailties in a deliberative democracy process which he has identified, and which he has outlined earlier, and some of which are referred to above, re-emerged. His “bottom line” is that the symbolic power of such a process should not obscure the essentiality of careful procedural scrutiny and design.

The participants in the Oireachtas TV Debate expressed diverse views on whether, and in what circumstances, the process should be used in the future. For instance, Orla Ryan expressed the view that an issue like the climate change issue is probably not a topic to have this type of debate on and that it did not engage the wider public. David Farrell was of the view that the process should be used sparingly, indicating that he was not impressed with

the final topic (fixed term parliaments), which, incidentally, had not been considered by the Assembly when the debate took place. However, he stated that he wished the Assembly had discussed housing and water charges. Although stating that the process, which I understand to mean the Assembly, should not continue, Eoin O'Malley did state that the process has a place for complex issues where the members of the Oireachtas are not engaged.

As was the case in the Littleton lecture, my final observation is to remark on the dedication of the members of the Assembly and the extent to which their sense of civic duty and commitment to the process has been a constant source of amazement and inspiration to me. On the basis of my experience, however, I am very conscious, as Carolan puts it, of the essentiality of careful scrutiny and design in setting up and conducting a process of deliberative democracy, the responsibility for which, in the first instance, lies with the Oireachtas.

Equating the fifth province as “an emerging Ireland of tolerance and empathy”, as President Mary Robinson did in her inaugural speech at the Burren Law School, I feel that I am entitled to give a positive answer to the question in the title. Deliberative democracy is a worthwhile contribution to the fifth province.