

Bye/By, Elections in Ireland may comply with legislation however they do not comply with the Constitution.

Submitted to the Dail Petitions Committee

<https://www.oireachtas.ie/en/committees/33/petitions/>

I also wish to advise you that your item of correspondence will be retained on file and will be brought to the attention of the Committee as soon as possible.

If you require any further information, please do not hesitate to contact me.

Is mise le meas,

Regards,

Leo Bollins

Príomhchléireach

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On Wednesday 16 December 2020, 13:16:00 GMT, Robert Kennedy-Cochrane <robert.kennedy-cochrane@oireachtas.ie> wrote:

I've forwarded your query to the Committee [remainder of message body omitted; too large]

Attention of Dail Petitions Committee

The onus is on representatives elected to the Dail/Seanad to ensure that the Democratic Process in relation to Dail Elections is compliant with the Constitution.

I am now asking you to amend legislation to make Bye/By Elections compliant with the **current Constitution**, to ensure that the wishes of the electorate are adhered to for the duration of the Dail. This can quite easily be done by amending ('It is necessary for the minutiae of many legislative provisions to be formulated, and indeed revised and updated, following the enactment of the principal law') legislation similar to the system applied to EU and Council/Corporations elections where the electorate decisions are adhered to during the duration of the said bodies tenure even though such bodies electoral systems are not enshrined in the Constitution. Or alternately will you consider getting an all party committee to examine same.

Or if you persist with the current legislation are you going to organise a Referendum?

If you are in any doubt see = See Crotty v An Taoiseach 1987.= *"It is not within the competence of the Government, or indeed the Oireachtas to free themselves from the constraints of the Constitution"*

See research below---

- (1) **Bye/By Elections in Ireland may comply with legislation however they do not comply with the Constitution.**

The election of the Dail members is explicitly covered in the Constitution especially in Article 16. However despite the wide references to the filling of vacancies by a method commonly referred by almost everybody as Bye Elections there is no mention of Bye Elections anywhere in the Constitution. What is mentioned is - legislation may be put in place to fill casual vacancies ----Article 16 -7 *Subject to the foregoing provisions of this Article, elections for membership of Dáil Éireann, including the filling of casual vacancies, shall be regulated in accordance with law (emphasis added)*

Never the less all legislation must comply with the (1937) Constitution see highlighted above and ([Article 28.2 and also Article 5] 'subject to the provisions of this Constitution) and in this case it is abundantly clear that a Referendum is required to change the Constitution for the present method to be applied.

Why is the current method of legislation contradictory to the Constitution?

When the Dail is dissolved, it results in an election with the electorate given an opportunity to elect members to a new Dail. This new Dail membership is elected in compliance with

legislation and legislation must comply with the Constitution. Under the Constitution members must be elected complying with proportionality and PRSTV.

Article 16 -6° *No law shall be enacted whereby the number of members to be **returned** for any constituency shall be **less than three** (emphasis added)**

This provides for a maximum proportionality, so minority sections have an opportunity to be elected – So under article 16 -6 above the maximum percentage required is 25% of valid votes cast plus one vote for a nominee to be elected (including transfers etc if necessary). Under the current law **which is not in compliance with the Constitution**, if a Bye Election was held with just one vacancy, a nominee would require 50% of the vote plus one vote --.

(It also means that the outgoing presiding Officer cannot come from a three seat constituency)* **as 33% plus is required –max under the constitution is 25% plus one vote**

A -It also means that a different criteria was applied for election for the same Dail

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B- It could also mean that a segment of society was disenfranchised for example in a conservative constituency a socialist candidate would lose out and their representation lost and also the reverse –for example in the past FF wound up with three seats in a three seat constituency and in the much highlighted Doherty case in Donegal –this was a FF seat and FF supporters were disenfranchised not Pierce Doherty.

C- It also means that people voting in a current Bye Election are aware of how other people have voted –all voters must be treated equally under Legislation/Constitution/Human Rights. In some instances a Bye Election may mean changing the voters 's national choice of Government expressed for that Dail.

D-The worst discrimination of all and which contradicts Human Rights Worldwide is the breach of the following in Article 16

*'No voter may **exercise more than one vote at an election for Dáil Éireann, and the voting shall be by secret ballot.***

A voter who participates in the Bye Election and previous election has voted twice in the same Dail election **with the two votes counting and in many cases electing two candidates.**

The key Article involved is Article 16 -see also 15.2.1 'Sole and exclusive power' to make laws rests with the Oireachtas provided it is compliant with the Constitution (see Crotty v An Taoiseach above)

What is an alternative way of the filling a casual vacancy under Article 16 of the Constitution?

It is well documented that The EU and County Councils/Corporations have adopted a system where the voters' **wishes as far as practicable are not disenfranchised**, during the period of the said Parliament/Council.

Namely through a list system at EU level and a nominee at Council level which can replace the elected candidate. The local councils have gone one step further –if a candidate was elected under a registered party the seat will revert to the party –even if the elected candidate had left the party since been elected.

It could also be expected that when a list system is introduced –that candidates when/if elected through a political party system by the wish of the electorate would not be allowed to change parties during the reign of the Dail and accordingly if they resign or dismissed from a party, they would be replaced from a party list that was on the ballot paper list on election day.

In addition there is no provision in the 1937 Constitution for secret ballots in Dail Eireann in fact it's the opposite (using committee stage to try and avoid same does not comply) . Citizens are entitled to know how each TD votes in the chamber. **For the first time ever votes can potentially be secretly aquired/attained or even bought?**

