



Irish Council for
Civil Liberties

FREEDOM OF ARTISTIC EXPRESSION AND THE REFERENDUM ON THE 8TH AMENDMENT

18th MAY 2018

1. BACKGROUND TO CENSORSHIP OF WOMEN'S EXPERIENCES IN IRELAND

Censorship has been a central feature of the Irish State's treatment of women throughout our almost 100-year history: censorship of literature discussing women's sexuality, censorship of information about contraception and abortion, and even censorship of statistical data revealing the levels of violence and abuse suffered by girls and women.

In 1931, for example, the Irish State decided not to publish a report that it had commissioned (known as the Carrigan Report), which described an "alarming amount of sexual crime" in Ireland. The censored report itself omitted evidence given by female doctors and social workers stressing the need to provide sex education and to address the stigmatisation of single mothers and their children.¹

Advising the Government to keep the material hidden, the Department of Justice opined at the time: "The obvious conclusion to be drawn is that the ordinary feelings of decency and the influence of religion have failed in this country ... It is clearly undesirable that such a view of conditions in the Saorstát should be given wide circulation".²

This exemplifies the State's determination from its very foundation to "contain" information and discussion that might reveal the reality of Irish women's lives. As we know, its efforts to censor reality extended to the physical incarceration and extreme punishment of women and children in Mother and Baby Homes, County Homes, Industrial Schools, Magdalene Laundries, psychiatric institutions and elsewhere.

Unfortunately the past few weeks have shown that censorship, and the fear of censorship, regarding women's experiences is still alive and well in Ireland. The difference between "then" and now, however, is that State bodies are relying on laws and policies which are not as clear in their censoring aims or processes as 20th century legislation directly concerned with censorship. These new laws and policies are potentially even more harmful in their impact because their lack of clarity makes them difficult to understand and fight against.

CENSORSHIP, AND THE FEAR OF CENSORSHIP, REGARDING WOMEN'S EXPERIENCES IS STILL ALIVE AND WELL IN IRELAND

¹ See James M Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (University of Notre Dame Press 2007) 14-15.

² *ibid*, 7.

2. CENSORSHIP OF ART CONCERNING THE 8TH AMENDMENT OF THE IRISH CONSTITUTION IN 2018

Over the past few weeks the Irish Council for Civil Liberties (ICCL) has received numerous reports of arts organisations and charities cancelling or scaling back events which were intended to focus on and spark discussion of the issue of abortion in Ireland. This self-censoring is a direct result of the actions of State bodies against a number of artists and artistic events focusing on women's experiences of the 8th Amendment to the Irish Constitution.

Since the Charities Regulator ordered the removal of street artist Maser's mural featuring the words "Repeal the 8th" at the Project Arts Centre in Dublin last month, many arts charities have become fearful that they will lose their charitable status for putting on events that make "political" statements about, or simply portray, women's experiences under the 8th Amendment to the Irish Constitution.

Following Dublin City Council's recent cancellation of an event at Dublin's International Literature Festival which was to feature several artists discussing Una Mullally's anthology of writing about the movement to repeal the 8th Amendment, many arts organisations and exhibition spaces appear worried that they will lose their public funding if they programme or allow the exhibition or discussion of art that focuses on the "political" issue of women's reproductive lives.

Award-winning theatre makers Grace Dyas and Emma Fraser have found their plans for a nationwide tour of *Not At Home* disrupted as over the past few weeks numerous arts organisations and exhibition spaces have cancelled their arrangements to show the artwork. Since 2016, Dyas and Fraser have been compiling testimonies of women who have travelled abroad for abortions in order to create their installation. The purpose of *Not At Home* is to enable visitors to the exhibition to see, listen and feel the experiences of these women. It provides a space for people to gather information that is relevant to the upcoming Referendum without advocating for either a "Yes" or "No" vote. *Not At Home* was performed to critical acclaim in 2017, winning the Best Production award at the Dublin Fringe Festival last Autumn.

By way of further example, the Artists' Campaign to Repeal the Eighth Amendment has had to scale back events at which they intended to facilitate public discussion about the Eighth Amendment at the same time as screening *Witness*: a collection of short films and filmed readings of women's stories. The calibre of the art produced by the Artists' Campaign to Repeal the Eighth Amendment has been recognised by their inclusion in the 2018 EVA International Biennial in Limerick and in the reviews of their work in international publications such as *The Art Newspaper*.

A view is clearly forming among State bodies and the arts sector in response that, during the referendum period, artistic expression that was previously recognised as art and deemed worthy of funding or charitable status is now "too political" to be allowed. The change in attitude based on the referendum can be seen from the fact that, in 2016, the Charities Regulator took no issue with the response it received from the Project Arts Centre when it asked the charity for information as to how it had reached the view that Maser's mural featuring the words "Repeal the 8th" related directly to its charitable purpose of advancing public education in the arts. Meanwhile, the Dublin City Council official behind the decision to cancel the event discussing Una Mullally's anthology at the International Literature Festival acknowledges that he has "never interfered on taste or any other matter in seven years".

3. THE STATE'S OBLIGATION TO RESPECT FREEDOM OF EXPRESSION

The ICCL believes that there is an urgent need for discussion about the right to freedom of expression in an election period in particular. In the ICCL's view, Irish Constitutional case law and the case law of the European Court of Human Rights make clear that freedom of "political" expression is more important than ever during a referendum period, and that State bodies must be particularly careful during this time not to interfere unnecessarily or disproportionately with it.

As a result, the ICCL believes that the use or potential use of the Charities Act 2009 to censor artistic expression containing "political" content during a referendum period, where that content and discussion of it would ordinarily be acceptable to the State body because it is integral to the art, is highly questionable from a legal perspective. As explained below, "political" ideas are frequently central to artistic expression, and this is ordinarily accepted in Ireland by the Charities Regulator, the Arts Council, local authorities and other funding bodies.

The ICCL also believes that the judgments of the Irish Supreme Court in *McKenna* and *McCrystal*, which establish the rule that the Government may not use public funds to campaign for either a "Yes" or "No" vote in a referendum, do not require public bodies to withdraw funding from events which provide space for artistic expression, and reaction to that expression, concerning the issue being voted upon in the referendum. Our understanding of the *McKenna* and *McCrystal* principles is explained in more detail below.

The need for the State to refrain from censoring artistic expression concerning the 8th Amendment is all the more pressing in light of the State's facilitation of freedom of expression by many other sectors of society during the referendum period – including the religious sector – which the ICCL welcomes. The State has not prohibited the teachers it pays to teach in Church-owned and -managed schools from speaking about the 8th Amendment, nor has it censored other Church-managed, State-funded organisations or individuals during the referendum period. Charities concerned with the advancement of religion are at liberty to express their position on the 8th Amendment because they can link their "political" expression directly to their charitable purpose. The State's facilitation of free expression by other sectors stands to make its interference with artistic expression all the more disproportionate, especially when – as is the case with the arts – those sectors can also link their "political" expression directly to their charitable purpose.

THE STATE'S FACILITATION OF FREE EXPRESSION BY OTHER SECTORS STANDS TO MAKE ITS INTERFERENCE WITH ARTISTIC EXPRESSION ALL THE MORE DISPROPORTIONATE

4. THE RELEVANT LAW

THE PARTICULAR IMPORTANCE OF FREEDOM OF “POLITICAL” EXPRESSION PRIOR TO AN ELECTION

Article 40.6.1 of the Irish Constitution protects the right to freedom of expression, as does Article 10 of the European Convention on Human Rights (ECHR). The right is not absolute, but interferences with it must be both necessary for the pursuit of a legitimate aim and proportionate (including that there is no less intrusive measure that could achieve the aim being pursued).

In the 1976 *Handyside v UK* judgment, the European Court of Human Rights (ECtHR) made its famous statement that:

“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”³

The ECtHR has held that freedom of “political” expression is particularly important to democracy, and that the State has a heightened obligation to allow free political debate in the period preceding an election.

In the case of *Bowman v United Kingdom*, the ECtHR held that a legislative ban on campaign spending, which led to the prosecution of a member of the Society for the Protection of the Unborn Child (SPUC) for handing out leaflets prior to a general election discussing candidates’ positions on abortion, violated Article 10 ECHR. The European Court stated that:

“Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other...For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.”⁴

The Irish Supreme Court has also acknowledged the importance that citizens’ constitutional rights are respected in the period prior to a referendum. In *McKenna v An Taoiseach*, the Supreme Court held that “[t]he constitutional process to be followed in the amendment of the Constitution [requires] that regard be had for the constitutional rights of the citizens and the adoption of fair procedures”.⁵ In this case, the Supreme Court found that the Government had acted unconstitutionally by using public funds to campaign for a “Yes” vote. The Supreme Court stated:

“As the guardians of the Constitution and in taking a direct role in Government either by amending the Constitution or by refusing to amend the people by virtue of the democratic nature of the State enshrined in the Constitution are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.”

³ A 24 (1976); 1 EHRR 737 para 49.

⁴ See *Bowman v United Kingdom* (1998) 26 EHRR 1 para 42.

⁵ *McKenna v An Taoiseach (No 2)* [1995] IESC 11.

4. THE RELEVANT LAW (CONTINUED)

CHARITIES ACT 2009

The Charities Act 2009 requires registered charities to use all of their property in furtherance of their charitable purpose. An organisation cannot be registered as a charity if it is a “body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body”. However, the advancement of the arts, and the education of the public in relation to the arts, are permissible charitable purposes and charities all around Ireland are registered and operating on this basis. Through the Charities Act 2009, the Irish State has demonstrated its recognition of the importance of fostering artistic expression in society.

It is uncontroversial to point out that the purpose of art, more often than not, is to send a message. Artists aim to tell people something. They aim to provoke responses to the messages that their art is conveying. What one might call “political” ideas – a notion that is not defined by the Charities Act 2009 – are frequently central to artistic expression.

Fortunately, in general in Ireland, State authorities appear to understand that “political” ideas and messages are often integral to art.

Take for example the Irish representation at the Venice Biennale in 2017: an installation by Dublin artist Jesse Jones entitled *Tremble Tremble*, which will go on show at Project Arts Centre in Dublin later this year. Jones’ representation at the Venice Biennale, as with Irish representations in previous years, was funded by Culture Ireland and the Arts Council of Ireland who state that they “consider the Venice Biennale a key international platform for the presentation of work and an important opportunity for artists’ development and Irish curators to work in an international context.” *Tremble Tremble* calls for a transformation of the historic relationship between the church and the state in Ireland, and it focuses on the relationship between women and the law not least in terms of abortion legislation in Ireland.

Because art frequently contains “political” ideas, and because the State is under a heightened obligation to allow free exchange of “political” ideas in the period prior to a referendum, the ICCL believes that the use or potential use of the Charities Act 2009 to censor artistic expression containing “political” content that is relevant to a referendum is highly questionable and extremely worrying.

THE ICCL BELIEVES THAT THE USE OR POTENTIAL USE OF THE CHARITIES ACT 2009 TO CENSOR ARTISTIC EXPRESSION CONTAINING “POLITICAL” CONTENT THAT IS RELEVANT TO A REFERENDUM IS HIGHLY QUESTIONABLE AND EXTREMELY WORRYING.

4. THE RELEVANT LAW (CONTINUED)

PUBLIC FUNDING IN RELATION TO A REFERENDUM

In the 1995 case of *McKenna v An Taoiseach (No 2)*, the Irish Supreme Court held that the Constitution prohibits the Government from “expending public monies in the promotion of a particular result in [a] Referendum”. A later Supreme Court case, *McCrystal v The Minister for Children and Youth Affairs & Ors*, also described the McKenna decision in these terms: “that the Government in expending public moneys in the promotion of a particular result in a Referendum process was in breach of the Constitution.”

In *McKenna*, the Supreme Court described the Government as “requesting or advising the voters to vote ‘Yes’” to the proposal to remove the Constitutional ban on divorce, and as “expend[ing] public funds for the purpose of promoting a campaign for a ‘Yes’ vote in the proposed Referendum to amend the terms of the Constitution”. The Government argued (unsuccessfully) that it should “maintain the right to urge the electorate in favour of a particular outcome to the said or any proposed referendum”.

The ICCL believes that the *McKenna* decision does not prohibit public bodies from funding events at which pieces of art containing “political” ideas or messages relevant to the question to be decided in a referendum are exhibited and/or discussed.

In our view, the *McKenna* decision relates to situations where State bodies are using public funds directly to campaign for a particular outcome in a referendum. We believe that the use of public funds to support the Government’s own campaign for a “Yes” or “No” vote – which was outlawed in *McKenna* – is not the same as using public funds to support free discussion of artistic work containing “political” ideas that are relevant to a referendum.

If anything, the right to freedom of expression under the Irish Constitution and ECHR requires the State to facilitate open discussion of the ideas contained in and inspired by art during a pre-referendum period. The ICCL believes that the correct response to a situation where State bodies propose to spend money in support of the expression and discussion of “political” art that is of relevance to a referendum is to ensure that the choice of art for exhibition and discussion is subject to selection criteria that are non-discriminating and that the exhibition and discussion is open to the public on a non-discriminating basis. Ideally, a State body would also make support available for further exhibition and discussion of art that contains and provokes messages relevant to the referendum question.

In *McCrystal*, the Supreme Court noted that the *McKenna* principles are “consistent with standards recognised both nationally and internationally for a Referendum process, such as the European Commission for Democracy through Law (Venice Commission) Code for Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th Meeting (Venice, 16 December, 2006) and the Venice Commission at its 70th Plenary Session (Venice, 16 – 17 March 2007)”.

The ICCL believes that the Venice Commission Code for Good Practice on Referendums also draws a distinction between the prohibited use of public funding in support of the Government’s own campaign, and the use of public funding to support the arts or other forms of expression by non-State actors during a pre-referendum period. Regarding the latter, the ICCL acknowledges the requirement for “neutrality” by State bodies. However, the ICCL maintains that “neutrality” is not achieved by censorship of artistic expression and the discussion inspired by it. Rather, “neutrality” can be achieved by ensuring that the selection criteria for exhibitions and events are non-discriminating, that such exhibitions and events are open to the public, and that support for further artistic expression containing “political” ideas is made available.



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