

THE HIGH COURT

[2021] IEHC 716
[2019/893 JR]

BETWEEN

TOMÁS HENEGHAN

PLAINTIFF

AND

**THE MINISTER FOR HOUSING, PLANNING & LOCAL GOVERNMENT,
THE GOVERNMENT OF IRELAND,
THE ATTORNEY GENERAL
&
IRELAND**

DEFENDANTS

JUDGMENT of the Divisional Court delivered by Mr. Justice Brian O'Moore on the 17th day of November 2021

A. BACKGROUND

1. Bunreacht na hÉireann provides for an Upper House of the Oireachtas, Seanad Éireann, composed of sixty members. Eleven members of the Seanad are nominated by the incoming Taoiseach who in turn is elected by the members of Dáil Éireann after a general election.
2. The remaining forty nine senators are elected members of the Seanad. Six of these are to be elected by institutions of higher education. Importantly for the purpose of the current proceedings, three of the six are currently elected by the National University of Ireland, and the remaining three of the six are elected by the University of Dublin.
3. Forty three members of Seanad Éireann are elected from panels of candidates. There are five vocational panels, as set out in Article 18.7.1^o of the Constitution, namely:-
 - (i) National language and culture, literature, art, education and such professional interests as may be defined by law for the purpose of this panel;
 - (ii) Agriculture and allied interests, and fisheries;
 - (iii) Labour, whether organised or unorganised;
 - (iv) Industry and commerce, including banking, finance, accountancy, engineering and architecture;
 - (v) Public administration and social services, including voluntary social activities.
4. Again, importantly for the purpose of these proceedings, the electorate in respect of these forty three members of Seanad Éireann is composed of incoming members of Dáil Éireann, outgoing members of Seanad Éireann, and members of local authorities.
5. In essence, the claim made by the Plaintiff (Mr. Heneghan) in these proceedings is that he is entitled to be an elector in respect of the university panels and in respect of the vocational panels. Under current legislation, he is not entitled to vote in respect of either set of panels, and he says that the failure to facilitate his registration as an elector in

respect of these panels is unlawful. In alleging that his exclusion as an elector is unlawful, he relies upon the provisions of Bunreacht na hÉireann and the provisions of the European Convention on Human Rights.

6. In Mr. Heneghan's Amended Statement of Claim, he seeks over twenty substantive reliefs; these, in turn, are based upon a wide range of grounds (both factual and legal). Notwithstanding the breath of the claims made in the pleadings, it was possible for Mr. Heneghan's Counsel (in their written submissions) to reduce to three the essential issues in the case. These three issues are:-

"The *first issue* is whether section 44 of the Seanad Electoral (Panel Members) Act 1947 in excluding citizens such as the Plaintiff who are not members of the Oireachtas or local government from voting in Seanad general elections disproportionately interferes with his rights under the Constitution (Articles 18.4.2°, 5, 6, 40.1, 40.3.1°, 40.3.2° and 40.6.1°.i thereof) and is therefore unconstitutional.

The *second issue*, is whether section 6 (1) and (2) and section 7 of the Seanad Electoral (Universities Members) Act 1937 are unconstitutional in precluding graduates of University of Limerick from voting in elections to the university seats, whilst permitting graduates of two other universities, namely National University of Ireland and University of Dublin, to so vote.

The *third issue* is whether the said provisions of the 1937 Act are compatible with Article 3 of Protocol 1 (right to free elections), taken in conjunction with Article 14 (Prohibition on Discrimination) of the European Convention on Human Rights (the "Convention")."

7. In their pleadings and submissions, the Defendants (the State) do not dispute the accuracy of this summary of Mr. Heneghan's claim, but the State adds a fourth issue (itself foreshadowed in the written submissions on behalf of Mr. Heneghan). This fourth issue is:-

"Given that the making of provision for the election of the elected members of Seanad Éireann beyond that prescribed by the Constitution itself are expressly reserved to the Oireachtas by Articles 18.4.2° and 18.10.1° of the Constitution, and in consequence of and by reason of the separation of powers under the Constitution, the current claim is not a justiciable one."

8. In very general terms, these four issues are the ones in dispute between Mr. Heneghan and the State in these proceedings. This judgment approaches the resolution of these issues in the following order:-

- (i) Mr. Heneghan.
- (ii) The procedural history of the claim.

- (iii) The evidence.
- (iv) The Courts overall approach to the evidence.
- (v) The Vocational Panels.
- (vi) The University Panels.
- (vii) The European Convention on Human Rights.
- (viii) The Court's conclusions.

B. MR. HENEGHAN

9. Mr. Heneghan grew up in Galway. In 2010, he began studying at the University of Limerick. In January 2015, Mr. Heneghan graduated from the University of Limerick with a Bachelor of Arts (Joint Honours) degree. This was not the end of his studies and, in January 2018, he graduated from the University of Limerick with a Master of Arts in Journalism. At the time of the hearing of his claim, Mr. Heneghan worked as an executive officer in the public service.
10. In September 2013 Mr. Heneghan campaigned with a group called Democracy Matters "to retain and reform the Seanad" as he puts it in one of his four Affidavits. Democracy Matters had originally been called the "Seanad Reform Group". Its founders were Michael McDowell, Catherine Zappone, Joe O'Toole (all of whom were Senators or former Senators), the late Fergal Quinn (also a former Senator) and the late Noel Whelan described by Mr. Heneghan as "Fianna Fail activist and political pundit". The group had been set up to oppose the proposal of the Government in 2013 to abolish the Seanad.
11. Mr. Heneghan campaigned with this group for two reasons. Firstly, he believed that a second legislative chamber was good for democracy. Secondly, he had the "firm belief that should the referendum to abolish the Seanad fail to be passed by the electorate, reform in the Seanad would swiftly follow, especially in relation to expanding the electorate". He was therefore disappointed when no such reform occurred.
12. In March 2015, the Government published its "Programme for Government: Annual Report 2015". This stated, among other things that:-

"[...] a Bill to implement the 1979 Decision of the People to extend the franchise for the University panels is being prepared."
13. By this time, Mr. Heneghan had graduated from the University of Limerick and, because of the contents of the 2015 Report, he was hopeful that he, along with other graduates from third level institutions, would soon be able to vote in Seanad elections.
14. In February 2016, during his time as editor of the University of Limerick Student Newspaper, Mr. Heneghan reported on a vote by the students union to lobby the Government for Seanad voting rights for University of Limerick graduates. Due to the

importance of the issue, he chose to place that article on the front page of the newspaper.

15. In April 2016 he “engaged with” a campaign group called “Graduate Equality”. This group was established for the purpose of pursuing reform of the Seanad electoral system. Mr. Heneghan wrote about the group and its aims in the Student Hub section of the Irish Times on the 25th of April 2016.

16. In explaining his reasons for bringing these proceedings, Mr. Heneghan says (at paragraph seventeen of his fourth Affidavit):-

“[...] since I first graduated from the University of Limerick on the 21st of January 2015, there have been two separate private members bills, the 2015 Manning Report proposing legislative amendments and a draft bill accompany the 2018 [Seanad Reform Implementation Group] / McDowell Report. I believed, up to the initiation of the within proceedings, that legislation would be forthcoming to allow me to vote in Seanad elections. However, following almost 5 years of legislative inaction since my first graduation, and numerous efforts on my part to engage in various avenues to pursue the outcome I seek, when I realise that yet another general election for the Dáil was likely to be held without expansion of the Seanad electorate, I saw no other option but to initiate these proceedings.”

17. Consistent with this portion of his Affidavit evidence, Mr. Heneghan (in his witness statement) stated that he has initiated this action because he thinks it is wrong that he does not have a say in the formation of Seanad Éireann, given the very important role in the life of the State and the fact that it is “an integral part of the legislature”.

18. In his witness statement, Mr. Heneghan points to what he perceives to be anomalies in the way in which the university panels are elected. A primary one of these is, of course, that graduates of the National University of Ireland (the NUI) and the University of Dublin (TCD) have votes in university panels whereas graduates of other institutes of higher education (such as the University of Limerick) do not. He is unhappy that the NUI “can effectively decide who is entitled to vote in Seanad elections, depending on which institutions it recognises or permits to affiliate with it”. In that regard, he thinks it anomalous that graduates of the Burren College of Art and the Shannon College of Hotel Management receive their degrees from the NUI and are therefore able to vote in the relevant university panel, but that Mr. Heneghan cannot do so. Specifically in relation to Limerick, Mr. Heneghan states that graduates from Mary Immaculate College in Limerick (which he says is now academically linked with the University of Limerick) or Thomond College of Education (now integrated into the University of Limerick, according to Mr. Heneghan) have votes in as much as they graduated while these different institutions were recognised colleges of the NUI. At the same time, Mr. Heneghan says, graduates of Limerick Institute of Technology and University of Limerick graduates are excluded.

19. Commencing on the 16th of September 2019, Mr. Heneghan entered into correspondence with the Minister for Housing, Planning and Local Government requesting that he be

registered to vote in the next general election for seats in Seanad Éireann “on both the vocational panels and the institutions of higher education panels [...]”. While Mr. Heneghan’s correspondence with the Minister is described in detail in his first Affidavit, and the correspondence is exhibited with that Affidavit, it is sufficient to record here the fact that on 2nd December 2019 the private secretary to the Minister stated:-

“[I]f you meet the criteria set out in Section 7 of the 1937 Act and/or Section 44 of the 1947 Act [...] then you are entitled to be registered as an elector on the relevant register of electors or electoral roll.”

20. As we will see, the 1937 Act governs the electorate for the university panels and the 1947 Act governs the electorate for the vocational panels.
21. Given the fact that this correspondence, at least from Mr. Heneghan’s perspective, ended unsatisfactorily he commenced these proceedings on the 9th of December 2019, a week after the correspondence from the Minister’s private secretary to which we have just referred.

C. THE PROCEDURAL HISTORY OF THIS ACTION

22. These proceedings began as judicial review proceedings, with the statement required to ground his application for judicial review filed on the 9th of December 2019. Initially, Mr. Heneghan represented himself. On the 16th of December 2019 he applied for leave to seek judicial review. Leave was granted to Mr. Heneghan on the 16th of December 2019, and the matter was then returnable to the 25th of February 2020. On the 18th of December 2019 Mr. Heneghan contacted the Public Interest Law Alliance (PILA) of the Free Legal Advice Centre (FLAC). On the 14th of February 2020 Mr. Heneghan was informed that FLAC was interested in considering representing him in this action. On the 19th of February 2020 Mr. Heneghan met with Ms Sinead Lucey of FLAC and, some days later, Mr. Heneghan received advice from Counsel (including Senior Counsel). On the basis of these advices, Mr. Heneghan swore an Affidavit on the 24th of February 2020 exhibiting, among other things, a draft Amended Statement of Grounds.
23. As already noted, the proceedings were before the Court on 25th of February 2020 and, on that day, the State was granted a two week adjournment to consider its position in relation to the proposed amended pleadings. On the 10th of March 2020 this Court (Meenan J.) granted Mr. Heneghan liberty to file the Amended Statement of Grounds. While the Order of the 10th of March 2020 refers both to leave having been granted to Mr. Heneghan to apply for judicial review (on the 17th of December 2019) and peculiarly also providing for a telescoped hearing of the application for leave with a substantial judicial review application, what is plain from the Order is that the State would have filed opposition papers by the 30th of March 2020 and the matter was before the Court again on the following day.
24. On the 6th of July 2020 it was Ordered, by consent, that the action be treated as though it had been commenced by Plenary Summons and that, therefore, there would be a plenary hearing of the proceedings.

25. These proceedings were then subject to case management by Simons J.. On the 7th of October 2020, a number of Orders were made in this respect, including the following:-

“The Affidavits and witness statements are to be admitted in evidence without any necessity for cross-examination, save for the witness statements of Dr. Laura Cahillane and Dr. Eoin O’Malley. These two witnesses will provide oral evidence to the Court and to be subject to cross-examination.”

26. The Order also provided for the substantive hearing to be listed for four days commencing on the 10th of November 2020. Because of the Covid 19 pandemic, a hearing of that length at that time was not possible. However, the matter was ultimately heard remotely on the 2nd and 3rd of March 2021, using the Pexip system.

D. THE EVIDENCE

27. There was a considerable amount of evidence before the Court at the hearing of these proceedings. As is clear from the Order of Simons J., the more important (and more controversial) witnesses were Dr. Cahillane (a witness called by Mr. Heneghan) and Dr. O’Malley (a State witness). The evidence of these two witnesses will be described in some detail later in the judgment. Designating these two witnesses as the most important should not in any way detract from the distinction of the other witnesses, and the care with which the Court has considered their evidence. It is nonetheless worth noting at this early stage in the consideration of the evidence of all of these witnesses that we have very serious reservations about the relevance of a very great deal of the testimony presented to us. We return to elaborate upon these reservations at paragraph 83 et seq. below. It is appropriate to deal first with the evidence filed on behalf of the State (other than the evidence of Dr. O’Malley). Given their significance, the evidence of Dr. Cahillane and Dr. O’Malley will be dealt with at the end of this section of the judgment.

a. Evidence of Mr. Barry Ryan

28. Mr. Ryan is a Principal Officer in the Department of Housing, Planning and Local Government. He swore an Affidavit on the 7th of August 2020. Apart from verifying the Statement of Opposition, this Affidavit addressed three topics. These were:-

- (i) An outline of the legislation relating to the election of members to Seanad Éireann;
- (ii) The Seanad Election 2020; and
- (iii) The 7th amendment of the Constitution.

29. The first of these topics related almost exclusively to details of the relevant legislation. It is difficult to see why there was any need for evidence as to the provisions of legislation, which took up the bulk of Mr. Ryan’s Affidavit. This is quintessentially a matter for legal submission. There was, however, some factual evidence of interest. In respect of the vocational panels, for example, Mr. Ryan gave evidence that the total electorate is 1,169 persons. In relation to the University panels, Mr. Ryan gave evidence that the electorate

of the NUI constituency is approximately 112,000 voters, and that the TCD constituency comprises approximately 65,000 voters.

30. The second topic on which Mr. Ryan gave evidence (the Seanad Election 2020) was of some historic relevance given the fact that Mr. Heneghan had begun these proceedings in December 2019 in the hope that they would be resolved before the Seanad general election of 2020. However these details in Mr. Ryan's Affidavit are of no real importance having regard to the issues which the Court has to decide.
31. The third topic addressed by Mr. Ryan sets out the statement contained on polling cards issued to electors in the 1979 referendum. A significant aspect of the case made by Mr. Heneghan was that the 7th amendment to the Constitution (providing, as it did, for the Oireachtas to legislate to expand the electorate for the university panels to graduates such as Mr. Heneghan) effectively placed an onus on the Oireachtas to give the vote to graduates of institutes of higher education as well as graduates of the NUI and TCD.
32. Among the details of the referendum leading to 7th amendment of the Constitution, therefore, provided to the Court was the wording of the polling card which read:-

"The 7th amendment of the Constitution (election of members of Seanad Éireann by institution of higher education), Bill, 1979, proposes the election by universities and other institutions of higher education specified by law of such number of members of Seanad Éireann, not exceeding six, as may be specified by law. Those so selected will be in substitution for an equal number of the members elected at present (three each) by the National University of Ireland and the University of Dublin. The bill also proposes that nothing in Article 18 of the Constitution shall prohibit the dissolution by law of those Universities."

33. Mr. Ryan also gives evidence that the votes in favour of the amendment were 552,600 and the total number against were 45,484.

b. Evidence of Ms. Sheila de Burca.

34. Ms. de Burca is an Assistant Principal Officer in the Department of the Taoiseach. In her evidence, she sets out "a timeline of the key initiatives taken in the matter of Seanad reform since the defeat of the Referendum to abolish the Seanad on the 4th of October 2013."
35. The timeline contains twenty three entries, and Ms. de Burca also refers to five "key documents on Seanad reform". These include the report of the working group on Seanad reform of April 2015, which is known as the Manning Report after its chairman, Dr. Maurice Manning. The documents also include the report of the Implementation Group on Seanad reform, relied upon by Mr. Heneghan, with an accompanying Seanad Bill of December 2018. The documents are also made up of three statements made either to the Dáil or the Seanad on the question of Seanad reform. On this last point, it is noteworthy

that in his witness statement Mr. Heneghan states (on the question of direct election of members of the Seanad):-

“While my personal preference is that at least half of the Seanad will be elected popularly, I accept that the precise number of seats to be so elected (if that were to become possible) is likely a matter of judgment on which reasonable people can disagree.”

36. There is therefore a level of consensus between Mr. Heneghan and the State. It was, in effect, agreed between them that the alternative to the current system with regard to the vocational panels was by no means clear and that a range of different possibilities could command the support of “reasonable people”. Equally, on the question of university panels, Counsel for Mr. Heneghan stopped short of saying that all graduates of institutes of higher education must be permitted to have a vote in order to create a constitutionally robust system for election of the occupants of the university seats. The furthest Counsel would go was to argue that graduates of the University of Limerick, such as Mr. Heneghan, should have a vote on the university panels. Of course, if that were the end result of these proceedings the resulting arrangements for the election of the six university senators would itself be subject to challenge of a very similar sort to that already launched by Mr. Heneghan.

c. Evidence of Ms. Sinead Lucey

37. Ms. Lucey is the managing solicitor of FLAC. She exhibited a submission made by TCD to the Department of the Environment, Community and Local Government (as it then was) to amend the electorate for the university seats. That submission supported reforming the way in which the Seanad was elected, welcomed the Government’s intention to legislate for the 7th amendment to the Constitution, but emphasised that there should be “a fairer more democratic way of electing all sixty senators, rather than just focusing on six university seats [...]”.

38. In correspondence with Ms. Lucey, Ms. Rose Gaynor of TCD (described as the Deputy College Solicitor and Information Compliance Officer) confirmed that the submission exhibited by Ms. Lucey remained the position of the University of Dublin. Ms. Gaynor, however, thought it unnecessary that TCD would provide a witness in this case “as there would be nothing to add to what is contained in the submission”.

d. Evidence of Mr. Aengus O’Corráin.

39. Apart from the Affidavits sworn by Mr. Heneghan, Mr. Ryan, Ms. de Burca and Ms. Lucey, there were seven witness statements. One of these is the witness statement of Mr. Heneghan, to which we have already referred. The next piece of evidence which we will describe is a statement of Mr. Aengus Ó’Corráin: -

(i) Mr. Ó’Corráin is a Barrister at Law, a graduate of UCC and a graduate of TCD.

- (ii) In his witness statement, Mr. Ó'Corráin says that in the 2020 Seanad General Election, he was issued with a ballot paper in respect of each of the two university constituencies.

e. *Evidence of Prof. Gary Murphy.*

40. Professor Murphy delivered a five page witness statement. He is Professor of politics in the School of Law and Government in Dublin City University. He was also chairperson of the "Democracy Matters" civil society group. It will be remembered that this is the group of which Mr. Heneghan himself was a member.
41. Professor Murphy describes the purpose of "Democracy Matters". He quotes extensively from a speech made by Senator Katherine Zappone (as she then was) in May 2013. In the quoted portion of her speech, Senator Zappone describes legislation proposed by her which would "broaden the pool of graduates who may vote in the university constituency", "enunciates the principle that every person should have a vote in a Seanad election", and provides "a chamber of our national Parliament made up of half women and half men [...]". Professor Murphy also quotes from a speech to the Seanad by the late Senator Fergal Quinn. Professor Murphy then sets out the basic tenet of "Democracy Matters" ("if the Seanad was to be retained it should be reformed [...]"), the other groups which campaigned against the proposal to abolish the Seanad, the registration of "Democracy Matters" with the standards in Public Office Commission, and the arguments deployed by "Democracy Matters" in the course of the campaign on the proposal of the Seanad to be abolished.
42. Professor Murphy concludes:-

"The somewhat surprising result in 2013 has to all intents and purposes been ignored by the political elites. In the immediate aftermath of the result the Taoiseach Enda Kenny stated that it was incumbent on his government to listen to what the people said. The result was the creation of another committee in 2014 chaired by the former Senator Maurice Manning. That committee reported in 2015 but it took over three years for an all-party Dáil committee chaired by Michael McDowell to issue its own report of the implementation of the Manning Report. When it finally reported in December 2018 it advocated allowing all Irish citizens in the State, Irish passport holders abroad, as well as people from Northern Ireland to vote in Seanad elections. Nothing has been done in the meantime to implement this all party report. These internal delays have had the result of making the Seanad referendum defeat seem like ancient history.

In that context there is a fundamental point which needs to be stated. Constitution should mean something in democratic societies. Decisions solemnly taken in a referendum should be legislated for pretty much straight away and not be simply left in abeyance which was the case of the 1979 referendum allowing for the extension of the Seanad franchise to include graduates from all third level educational institutions. The Seanad Electoral (University Members) (Amendment)

Bill 2014 was meant to address this issue but again was left to rot by an Oireachtas which seems, after this initial burst of enthusiasm, to have settled on a position of doing nothing about reforming the Seanad and how it is elected. This is contrary to everything that those advocating for retaining the Seanad campaigned for in the 2013 referendum and to what those who voted to retain the Seanad expected when they cast ballots."

f. Evidence of Dr. Attracta Halpin.

43. Dr. Halpin is the Registrar of the NUI, and has been in that position since 2004.
44. In her witness statement, Dr Halpin describes the parliamentary representation enjoyed by the graduates of the NUI since 1918. She sets out "the character of university representation since 1938" and in doing so sets out the contribution by the NUI Senate to the debate on the 2013 referendum where the abolition of the Seanad was proposed. The NUI Senate recognised that "the current manner of election to Seanad Éireann by university graduates was indefensible and outdated and did not argue for the maintenance of the status quo". Having said that, in the same contribution the NUI Senate expressed the view that the twenty one senators elected by NUI graduates to Seanad Éireann since 1938 "had made a distinguished contribution to Ireland's parliamentary democracy and public life". Having described the NUI structure, the current position with regard to Seanad elections, the admission of other institutions to the NUI constituency, the particular position of graduates of the National Institute of Higher Education in Limerick, and the 7th amendment, Dr Halpin concludes:-

"While proud to uphold the tradition of parliamentary representation of its graduates unbroken since the earliest days of the University, and while continuing to highlight the contribution to the State and the democratic process made by senators elected by graduates of NUI and the University of Dublin, NUI has no hesitation in supporting, and would welcome, the extension of this privilege to other higher education graduates."

45. It should be noted that, in coming to this conclusion, and in particular in describing the 7th amendment to the Constitution, Dr. Halpin is of the view that this amendment "signalled a clear government intention to extend the right to vote in Seanad Éireann elections and represented a first step towards achieving this".

g. Evidence of Senator Gerard Craughwell.

46. Senator Craughwell describes, at the start of his witness statement, the evidence he has been asked to provide. He says:-

"I have been asked to give evidence of my experience of standing for election as an independent to the Senate in 2014 and in subsequent elections, and on my observations experience of the composition and functioning of the Senate since then, particularly in the light of current system of electing the forty three panel member."

47. Senator Craughwell's ten page witness statement covers topics such as his background and his first election to the Seanad, his work for Seanad reform, his description of the current method of electing the forty three vocational members, and other aspects of the panel member voting system that exacerbate the problem which he identifies (namely that the system of electing panel members is unfairly weighted towards party politicians).
48. We will set out in full the conclusion to Senator Craughwell witness statement: -

"Having sat in the Upper House for six years, I am firmly of the view that restricting the electorate for the forty three panel seats to politicians has ceded the effective control of the house to political parties. The extent to which party politics influences the outcome of Senate elections is unhealthy and is not consistent, I believe, with the Senate envisaged by the people who adopted the Constitution in 1937; nor it is consistent with the views of those who voted to retain the Seanad seven years ago on the basis that it would be performed.

As I said publicly, it is high time the Seanad became less about political parties and more about the five vocational panels on which it is structured; the present college system is not working as the mandate for vocational representation has been subordinated to party politics.

A Seanad must be a place where legislation is fully debated with significant numbers of Senators present and where bad or poorly drafted legislation is returned to the Dáil for its consideration.

Over the last six years I have witnessed the system of electing panel members seriously undermine what I understand is envisaged by Article 18 as the function of the Seanad as a second chamber, subordinate to the Dáil, but with a very special, distinct and independent role in the legislative and political process, particularly when it comes to the representation of the various vocational interests and services referred to in Article 18 itself.

The traditional practice of filling Seanad seats with aspiring or failed political party members whose eye is often on a different prize is the real elephant in the room when we speak of Seanad reform. Sadly, but unsurprisingly, the 2015 Manning Report is already gathering dust as the political will to implement it is lacking – Seanad reform is not even included in the current programme for government. Why? Because the report challenges well established political practice. It recommends that thirty of the panel seats be filled by popular vote on the principle of one person one vote while retaining thirteen seats to be elected exclusively by 1,100 or so Oireachtas members and City / County Councillors. Moreover, section 44 of the Seanad Bill 2016 proposed that the electorate would be expanded to include all those entitled to vote at Dáil, EU and local elections and that each voter would have one and only one vote in Seanad general elections. In the current Seanad the Taoiseach eleven nominees were allocated on a party political basis as outlined in the programme for government with four each for FG and FF, two for the Greens

and one independent agreed by all three parties. It is notable that unlike previous Seanad's, ten of the nominees were political party members thereby deluding the vocational input into the Seanad even further.

I believe the Seanad electorate must be widened to include all registered voters. Only then will the current system of creche, resting place and retirement home be replaced by one which is popular legitimacy and full support. Only then will we have the Seanad that I believe the citizens of Ireland both want and deserve, namely a Seanad which can act independently of the Dáil, and where Senators with political credentials work alongside those with vocational expertise to critically examine government legislation and carry out the other functions conferred on it by the Constitution."

h. Evidence of Dr. Laura Cahillane.

49. Dr. Laura Cahillane is a lecturer in constitutional administrative law at the University of Limerick. She is the author of *Drafting the Irish Free State Constitution* (2016) and co-author of *Constitutional Law in Ireland* (2020) and *The Irish Legal System* (2020). It is fair to describe her as a distinguished legal academic. Including its appendices, her witness statement runs to twenty seven pages.
50. Dr. Cahillane's witness statement is divided into four sections. The first section deals with historical material on the relevant provisions from 1922. That in turn has three subsections, relating respectively to functional or vocational councils, the Seanad, and university representation in 1922. The second section of Dr. Cahillane's witness statement deals with the drafting of 1937 Seanad provisions. The third section deals with the 7th amendment to the Constitution. The fourth section deals with the current Seanad. The fifth and final section provides Dr. Cahillane's conclusions.
51. There are two appendices to the witness statement. One deals with the history of universities in Ireland. The second constitutes "a personal observation" on Dr. Cahillane's part. The personal observation is to the effect that the students to whom Dr. Cahillane teaches constitutional law in the University of Limerick are perplexed as to why it is they do not have a vote for representatives in the Seanad whereas Dr. Cahillane herself (as an NUI graduate) is able to exercise such a franchise. They regard this as an inequality of representation, which is completely arbitrary, and some have told Dr. Cahillane that "they feel like second class citizens as a result".
52. In her section on the current Seanad, Dr. Cahillane emphasises the potential powers of the upper chamber. Dr. Cahillane identifies the following powers:-
 - "(i) For the removal of a Judge, the Seanad must join the Dáil in resolving that this be done;
 - (ii) Equally, for the impeachment of a President of Ireland a resolution of the Seanad is required;

- (iii) The Seanad could initiate “an Article 27 referendum”;
 - (iv) There is an “obvious duty on the Seanad [...] to properly scrutinise legislation”.
53. Dr. Cahillane relies upon the experience of the Seanad of the Irish Free State which “became a thorn in the side of De Valera in attempting to implement his reform programme [...]”. However, Dr. Cahillane does recognise that this very resistance led to the abolition of the Free State Seanad. The Court would also observe the Constitution permits eleven members of the Seanad to be nominated by the Taoiseach, a personal power granted to the head of government with both the intention and effect of limiting the extent to which the Seanad can frustrate government initiatives.
54. Dr. Cahillane’s evidence confirms that there was only ever one direct popular election for the Seanad. This occurred on the 17th September 1925. There was a single constituency, comprising the twenty-six counties of the Irish State. There were a total seventy-six candidates competing for nineteen seats which had been vacated by senators whose term of office had expired.
55. Dr. Cahillane explains that critics considered this method of election to be impractical, and that a Joint Committee of both Houses was set up which recommended the abolition of the system. A number of amendments were made to the 1922 Constitution with the result that, by 1928, direct elections for the Seanad had been removed from the 1922 Constitution; it was provided that the number of nominees would be equal to twice the number of seats to be filled and that half would be elected by the Dáil and the other half by the Seanad.
56. The Seanad was ultimately abolished in May 1936. Given the reliance placed by counsel on the historical backdrop to the adoption of the 1937 Constitution, it is appropriate to set out Dr. Cahillane’s analysis of the abolition verbatim:-
- “History has shown how the Irish Free State Seanad became a thorn in the side of de Valera in attempting to implement his reform programme – he could use his powerful majority in the Dáil to push through the reforms quite easily but he came up against resistance in the mostly independent Seanad, which questioned the plans. This is what led to the abolition of the institution.”
57. In response to a direct question from counsel for the respondent, Dr. Cahillane accepted that, given the history of relations between particularly Mr. De Valera and the Free State Senate, it was highly unlikely that a directly elected Senate would be provided for in 1937. Dr. Cahillane had earlier stated that it is “obviously” permitted within the Constitution to have an indirect franchise for the vocational panel seats, and had expressly agreed that a restricted franchise is consistent with bicameralism and the avoidance of replicating Dáil Éireann.
58. Dr. Cahillane charts the evolution of proposals for the composition of the electorate in the lead up to the 1937 Constitution. A Commission to examine the matter had been set up in

June 1936 and it reported in September of that year, producing a majority and two minority reports. The majority report recommended that one-third of forty-five members should be nominated by the President of the Executive Council and that two-thirds should be selected from panels, the electors of which would be every candidate of the preceding election.

59. Earlier drafts followed the recommendations of the majority report in terms of the electoral college – every candidate at the preceding election who polled over 1,000 first preference votes was to be entitled to one vote for every 1,000 first preference votes or fraction exceeding 500 votes. During the Dáil debates, an amendment was moved to make all of this subject to law, and eventually the amendment was accepted.
60. Dr. Cahillane offers the opinion that there was no general consensus in terms of the appropriate composition for the electorate of the Seanad. This opinion was elaborated upon in her oral evidence: Dr. Cahillane agreed that there had been a significant retooling of the Upper House for the purpose of the 1937 Constitution. The witness explained that the direct elections were considered too complicated because of the massive electorate involved. The drafters of the 1937 Constitution were in agreement with the idea of functional or vocational representation but simply could not decide how they would do that. It was further stated it presented too many problems to put a very clear method of Seanad elections into the 1937 Constitution and they decided to do so by legislation.
61. In her written witness statement, Dr. Cahillane suggested that what was clear was that it was not intended to compete with the Dáil in terms of composition or representation; it was intended to be a diverse House representing various aspects of the life of the Nation.
62. The principal criticism is that the existing mechanism is said to have resulted in “mostly party-affiliated members” of the Seanad. In her conclusions, Dr. Cahillane puts forward the following evidence. This is set out in full in light of the enormous importance placed by Counsel for Mr. Heneghan on Dr. Cahillane’s testimony:-

“It is clear the 7th amendment had a dual purpose. While the necessity for the amendment arose in the first place because of the planned dissolution of the NUI, it is evident from the debate in the Oireachtas at the time, as well as the newspaper coverage that the necessity to provide a quality representation for all third level graduates was an equal purpose of the Amendment. The people clearly expected legislation to follow through with this after the referendum.

The Seanad was always intended to be an independent House with diversity of representation, quite distinct from that of the Dáil. The inclusion of University seats on the panel system in the Seanad provisions of the Constitution was intended to ensure this independence and diversity of representation. The inferences came from the Ancient Gaelic State as well as the corporatist or vocational ideas from Europe, which were also hugely influential during the 1930s and were a major influence on John Hearne and the others who contributed to drafting the Constitution. The idea was to have expertise in these various areas, representatives

who could contribute to debates and advise the Oireachtas generally and on the matters specifically related to those areas. However, the current system does not fulfil that original intention and it is clear that confining the electorate of the fourth three panel members to elected politicians hasn't worked. The existing mechanism has resulted in mostly party affiliated members, which goes against the original intention of the article in relation to vocational representation. In fact, it could be argued that the current system subverts the intention of the Constitution. The more restricted franchise envisage for the Seanad should be properly managed so as to ensure it is fulfilling its obligations to create a diverse and independent second chamber. The current system is failing here.

When the people voted to accept the 1937 Constitution, they had experienced a Seanad which was fiercely independent for the most part and provided for representation of many strands of life within the State. Given the manner in which the provisions in Articles 15, 18 and 19 are set up, we can assume the people expected something very similar from the new Seanad. We can say with some degree of certainty that what was not intended, and what was not expected, was that the Seanad would be used as "creche and retirement home" for politicians. As the authors of Kelly note above, it is not the Constitution which has resulted in the current dissatisfactory position but rather the legislative decisions which have been made around those provisions."

63. As already noted, Dr. Cahillane was cross-examined on her witness statement. One of the lines of cross examination, in respect of an issue which loomed large in the submissions made to the Court, was whether or not an amendment to the Constitution (and in particular the 7th amendment to the Constitution) places a legal obligation on the Oireachtas to legislate in accordance with such amendment. Dr. Cahillane was firmly of the view that such an obligation arises in those circumstances. She gave evidence (on day 1, page 38) as follows:-

"I certainly think that if the Oireachtas does not act upon something that the sovereign people have voted to do in a referendum, then I think it is in dereliction of its Constitutional duty. And I think, as [Counsel for Mr. Heneghan] has stated, if similar had happened in relation to other referendums, for example the recent referendum on abortion, if the Oireachtas had failed to pass the necessary legislation after that, I think you would have seen uproar amongst the people, and I think the people would certainly have felt that the Oireachtas had a duty to pass legislation in order to give effect to what it was that the people were voting on, and I think you can apply the same idea to the 1979 Amendment as well."

64. Dr. Cahillane's evidence was that she agreed with examples given by Counsel for Mr. Heneghan. These examples were later comprehensively set out by Counsel (at the end of the first day of hearing, from page 130 onwards of the transcript) as including the following:-

- “(a) The 15th Amendment to the Constitution, providing that ‘a Court designated by law may grant a dissolution of marriage [...]’
- (b) The 16th Amendment to the Constitution, providing a ‘provision may be made by the law for refusal of bail by a Court to a person charged with a serious offence [...]’.
- (c) The 23rd Amendment to the Constitution, providing that ‘the State may ratify the Rome Statute of the International Criminal Court [...]’.
- (d) The 28th Amendment to the Constitution, providing that ‘the State may ratify the Treaty of Lisbon [...]’.
- (e) The 30th Amendment to the Constitution, providing that ‘the State may ratify the Treaty on stability coordination and governance in the EMO [...]’.
- (f) The 34th Amendment to the Constitution, providing that ‘a marriage may contracted in accordance with law by two persons without distinction as to their sex [...]’.
- (g) The 36th Amendment to the Constitution, which provided that ‘provision may be made by law for the regulation of termination of pregnancy [...]’.
- (h) The 38th Amendment to the Constitution, providing that ‘provision may be made by law for the recognition of divorces granted by other States [...]’.”

65. On the vocational seats, Dr. Cahillane gave important evidence to the Court (as a legal historian) in respect of the possibility of indirect representation (as opposed to direct election) as follows (day 1 of the transcript, at page 56):-

“Mr. Justice Simons: I had understood that your area of expertise was in relation to history of the two Constitutions with a particular emphasis, I understand, on the 1922 Constitution, but leaving aside whether its legal or permitted to do or not, if we were entitled to look at the intention as of 1937, it would certainly have been envisaged at that stage, that would have a form of indirect electorate or indirect representation, so it didn’t come out of a clear blue sky?

Dr. Cahillane: Oh yes.

Mr. Justice Simons: You do accept that, that as of 1937, it was already contemplated that you might have the details to be filled in, but you might have a situation where rather than universal suffrage, you would have persons who had been elected to other posts including local authorities would be entitled to. I just wanted to clarify that.

Dr. Cahillane: Yeah, yeah.

Mr. Callanan: And in fact one might go further and say that given the history of relations between particularly Mr. De Valera and the Free State Senate, that it was highly unlikely to provide for a directly elected Senate in 1937.

Dr. Cahillane: Yeah, so ... yeah. He was not in favour of direct elections."

66. Indeed, Dr. Cahillane in her cross examination (day 1 of the transcript, page 66) accepted the proposition that "second chambers are notoriously difficult to reform".
67. In the main Dr. Cahillane was scrupulously and properly conscious of the need not to answer questions which were really issues for the Court to decide. In her cross examination, on a number of occasions she drew the attention of Counsel for the State to that limitation. While it might be suggested that her evidence (summarised here) of the legal obligation imposed on the Oireachtas to legislate for the results of amendments to the Constitution could have crossed that line, Dr. Cahillane on this very topic made it plain that she was offering a view rather than evidence. This was, however, a view which formed a seminal part of the submissions made on behalf of Mr. Heneghan. We wish to add that is extremely undesirable that an expert witness (in any type of action) would supplement their actual evidence with views or opinions which are simply inadmissible.
 - i. *Evidence of Dr. Eoin O'Malley.*
68. Dr. Eoin O'Malley is Associate Professor of Politics in the School of Law and Government, Dublin City University. His witness statement runs to four pages. In it, he addresses four issues, relating mainly (but not exclusively) to the University panels.
69. The first issue addressed by Dr. O'Malley, is whether the 1979 referendum constituted "a mandate by the Irish people to extend the franchise to all graduates?"
70. Dr. O'Malley's evidence is that it did not involve such a mandate. Dr. O'Malley makes the point (ultimately accepted by Dr. Cahillane in her cross examination) that the initial motivation for the 7th amendment to the Constitution was the need to accommodate the potential dissolution of the NUI and the establishment of independent colleges. Dr. O'Malley based this view on the fact that the sponsoring Minister was the Minister for Education (and not the Minister for the Environment, which is what one would have expected had it been a political reform), the official advertising, and the fact that only one Deputy (Mr. John M. Kelly TD) spoke in favour of the proposition that the university franchise would be extended to NIHE Limerick or the regional technical colleges which existed at the time.
71. The second issue addressed by Dr. O'Malley was whether or not there was consensus as to "what reform to the Seanad should entail?" His view is that there no such consensus.
72. The third issue on which Dr. O'Malley provided a witness statement was whether there was consensus "as to what reforms there should be to the university seats?" He felt there was no such consensus, pointing out that Sinn Fein "would remove them altogether". The Manning Report "called for their effective abolition", TCD had suggested the retention of

the six seats “to be supplemented by another four graduate seats”, three Fianna Fail parliamentarians had sponsored a recent bill seeking “the extension of the Seanad seats to all graduates”, and that the interests campaigning in 2013 to retain the Seanad did not have any “agreement as to how the university seats would be addressed”.

73. Finally, in the event that there was a unitary Seanad university constituency, Dr. O’Malley was asked how this would be organised. He felt this would create difficulties, and would involve significant resources, a legislative basis for the collection and storage of data, and significant cooperation among the higher education institutions.
74. Under cross-examination, Dr. O’Malley maintained the position that the main purpose of the 7th amendment to the Constitution was “to effect the breakup of the NUI” but that there was discussion at the time of the possibility that subsequent legislation would lead to an extension of the franchise in respect of the university seats. Dr. O’Malley also accepted that the polling card (referred to by Mr. Ryan in his Affidavit) supports the proposition that one purpose of the Amendment was the proposal that there may be participation by “universities and other institutions of higher education specified by law” in the election of the University Senators. He maintained, nonetheless, that the government’s advertising set out as the primary purpose of the proposed Amendment to the Constitution the need to accommodate the potential dissolution of the NUI.
75. While cross examined closely on his contention that there was no consensus about Seanad reform, Dr. O’Malley maintained his position. He did, however, add to the statement in his report about the current structure of electing Senators. In his report, Dr. O’Malley had said “there is a general consensus that the current structure of electing senators is undemocratic and elitist”.
76. He also accepted, under cross-examination, that in a 2013 academic paper he had written:-

“In Ireland, the Seanad is a mechanism through which parties create professional politicians as a place for training would-be candidates and a soft landing for those defeated candidate. It gives the government significant patronage, allowing the party to build up and control parliamentarians, so even if it doesn’t matter much in terms of policy outputs, the Seanad is deleterious to the separation of powers between the executive and legislature. Party leaders use the promise of a Senate seat as a way of building up the cadre of party loyalists.”

E. THE COURT’S OVERALL APPROACH TO THE EVIDENCE

77. The evidence put before us can be divided into three types. The first of these is the historical, either in terms of legal history or political history. This is the evidence, respectively, of Dr. Cahillane and Dr. O’Malley. The second of these is the evidence of the politics of the Seanad (and Seanad reform) over the last decade or so. The third is evidence of the attitude taken by the NUI and TCD in respect of potential reform of the electorate for the university seats.

78. The role of historical or contextual evidence in the context of the interpretation of the Constitution is well settled. The most recent authority is the decision of this Court (Irvine P., McDonald and Hyland JJ.) in *Bacik v. An Taoiseach* [2020] IEHC 313; [2020] 2 I.L.R.M. 110. In that case, the Court at paragraph 80, put forward the following approach to the interpretation of the provisions of the Constitution:-

“The following principles flow from the approach taken in [*Curtin v. Dáil Éireann* [2006] 2 I.R. 556] and from the case law cited by Murray C.J. in that case:-

- (a) The starting point is to carefully consider the words used in a Constitutional provision with a view to identifying their meaning.
- (b) While not specifically addressed in *Curtin*, it may also be necessary to consider the meaning of the words in the Irish language version of the text which, in accordance with Article 25.4 of the Constitution, takes priority in the event of any conflict of the English language version.
- (c) Where the words used are clear and unambiguous, they are to be construed in their literal sense. Thus, for example, words denoting numbers, places or identified persons admit of no debate.
- (d) The words used in the provision and issue cannot be construed in isolation. They must be construed in the context of the Constitution as a whole.
- (e) If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency. In this context, while Murray C.J. in *Curtin* did not expressly say that the harmonious interpretation favoured by Henchy J. in *O’Shea* should be applied, he did not dissent from the observations of Henchy J. to that effect in the passage quoted by him. It was interesting to note that, although [*Tormey v. Ireland* [1985] I.R. 289] was cited in Counsel in *Curtin*, the judgment of the Court does not refer to it. Having regard to the emphasis placed by the Supreme Court in *Curtin* on the principle of the words of the Constitutional provision in issue should be the first port of call, it seems to us that the harmonious approach will only be taken in cases of apparent inconsistency. It will not be necessary to go beyond a literal interpretation of a Constitutional provision unless such an interpretation gives rise to an apparent conflict with some other provision of the Constitution.
- (f) In case of doubt, ambiguity, inconsistency or silence, it is legitimate to have regard to factors such as the historical context. Although the issue did not arise in *Curtin*, this would appear to include, for example, a relevant amendment to the Constitution, something which was considered for example in [*M v. Minister for Justice* [2018] 1 IR 417] [...].”

79. This comprehensive and recent statement of the principles to be applied in construing provisions of the Constitution was accepted by both sides as the relevant approach.
80. It will immediately be seen that the Court will have regard to factors such as a relevant amendment or the historical context only in cases of doubt, ambiguity, inconsistency or silence. When the Court refers to historical context, this means facts that may (in appropriate circumstances) help to inform the Court as to the meaning of a constitutional provision by reference to the circumstances of its enactment. Consideration of historical context does not afford a *carte blanche* permitting witnesses to give their views about what the electorate expected in enacting the Constitution or in approving its amendment. For example, it is one thing for a witness to give evidence of the chain of events leading up to the rejection of the proposal to abolish the Seanad, but quite another for a witness to give evidence as to what the people expected would flow from the failure of that proposed amendment. Too much of the evidence in this case fell foul of this distinction, and was inadmissible for this reason.
81. Counsel for Mr. Heneghan has emphasised that the Constitution is, in their view, silent when it comes to the question of the electorate who choose the forty three vocational members of the Seanad. There is no such silence in respect of the electorate for the university seats, as is acknowledged by Mr. Heneghan's Counsel.
82. We do not believe that, in respect of either the university or the vocational panels, there is the required level of doubt, ambiguity, inconsistency or silence to require consideration of historical context or the outcome of any referenda in respect of amendments to the Constitution in relation to the Seanad.
83. We will explain why this is so in the next section of the judgment. However, even if we had come to a different view, the evidence available to us is equivocal. We have considered all of this evidence notwithstanding our view that it is, in large measure inadmissible as it goes beyond the factual and into the speculative.
84. A centrepiece of the evidence of Dr. Cahillane, for example, was that in 1937 the people, in voting to accept the new Constitution, "had experienced a Seanad which was fiercely independent for the most part and provided for representation of many strands of life within the State". Dr. Cahillane extrapolates from that that "we can assume the people expected something very similar from the new Seanad". This assumption goes beyond any expertise on the part of Dr. Cahillane and, for that reason alone, is not admissible. This analysis also ignores the facts, also brought up by Dr. Cahillane in her evidence, that the fiercely independent Senate of the Irish Free State had been abolished by a government led by Mr. Eamon de Valera precisely because of its fierce independence, that the new Constitution was very much the work of Mr. Eamon de Valera and seen as such, and that the new Constitution provided an unusual (if not unique) power on the part of the Taoiseach to nominate directly almost 20% of the members of Seanad Éireann. These factors are by no means consistent with a universal or even widespread understanding among the Irish people that, in voting for the new Constitution, they were going to see

the effect of reinstatement of the body abolished by the same political interests only the previous year.

85. From this evidence of Dr. Cahillane, Counsel for Mr. Heneghan submit (at paragraph 81 of their written submissions) that Dr. Cahillane's evidence "if accepted by the Court, tends to support the Plaintiff's argument that the people did not – and do not – intend the forty three panel seats to be elected solely by politicians". In fact, as noted earlier in this judgment, Dr. Cahillane accepted that indirect election of these Senate members was anticipated by the electorate in enacting the Constitution in 1937.
86. In contrast to the exhaustive references made to the Manning Report, the press surrounding the 7th Amendment to the Constitution in respect of the university seats, and the description of issues in the 2013 referendum in which the abolition of the Seanad was mooted, there is no detailed evidence whatsoever, indicating that there was any public resentment or outcry in response to the 1947 legislation which was now challenged. That is the legislation fixing the electorate for the vocational seats. That electorate is, in the main, politicians (either independent or party). If there was historical evidence to back up this submission it would certainly have been put before us. Dr. Cahillane's evidence does not, in fact, go as far as the submissions made on behalf of Mr. Heneghan would suggest that it should.
87. To take a second example, this time with regard to the university seats, great emphasis was placed by Counsel for Mr. Heneghan on the Manning Report. In this context, reliance is placed on the Manning Report because it states (at page four of the Report) that:-

"In July 1979 the electorate voted to extend the franchise in Seanad elections to graduates of other universities."
88. From that, and other material, Counsel for Mr. Heneghan conclude (at paragraph 142 of their written submission):-

"It is now a 'given' that the 7th amendment mandated the Oireachtas to expand the university franchise; that is the only logical conclusion to be drawn from the repeated references to "implementing" it, language which, Dr. Cahillane observes, could suggest this was a duty which had not yet been completed."
89. In as much as this passage suggests that there was an obligation on the Oireachtas to vary the university franchise in light of the 7th amendment to the Constitution, this is incorrect. It is certainly not a "given" that this is so. However of more relevance at this point in the judgment is the use of materials (in the case of Manning, generated almost forty years after 1979 Amendment) to give meaning to the legal effect of that Amendment or the legal effect of the failure of the 2013 Amendment. At the end of the first day of the hearing, Counsel for Mr. Heneghan asked how it could be said that, given its point in time, Manning could be of any relevance to the Court in deciding the before it. Counsel gave a lengthy answer (beginning at page 125 of the transcript). Part of Counsel's response included (at page 127):-

"[...] I am saying that since we have – since the Court has very clear evidence, accepted by both sides, from, what we say are eminent people, including academic experts, that their interpretation of what the 2013 vote meant, may – I am not saying any more than that, I am saying that the Court may take account of that, and it would be urging you to, but that it would be open to you, in the light of what the Supreme Court has said about looking at the outcome of referenda, that the 2013 one is – there is a lot of material there about it. Professor Murphy gives very clear evidence of the campaign that he ran, and they were the main group opposing the referendum, and Manning makes it very clear that they were interpreting the result and the national conversation that took place during the referendum campaign when coming to its conclusions [...] there is no doubt, in my submission, but that the two bookends of the constitutional text are the historical aspect and the current understanding of it."

90. We will come shortly to the evidence of Professor Murphy. However, this passage illustrates the extent to which Mr. Heneghan's case was based around the views of distinguished and eminent people as to what and whether or not the current situation is an acceptable one (mainly in political terms). None of this is of assistance in determining the legal arguments put to us. In addition, the extent of the reliance by Mr. Heneghan on historical context, reports and political commentary has had the effect of obscuring the real issues in the case. We see this most strikingly when one considers the argument over the university electorate and, especially, the fact that, while the 7th amendment created the potential for the Oireachtas to widen the electorate in that regard, it nevertheless left intact the provision whereby the six university members could be elected solely by the NUI and TCD.
91. In concluding, as we do, that the historical evidence is inadmissible (inasmuch as it constitutes the subjective views of the witnesses) and of little assistance in the decisions we have to make in this action, we do not in any way understate the qualifications and expertise of Dr. Cahillane and Dr. O'Malley. The evidence they gave was nonetheless interesting, and obviously designed to be of assistance to the Court. In emphasising certain elements of the evidence of Dr. Cahillane, we do so simply because she was the witness put forward by Mr. Heneghan, who argued that this form of evidence was relevant. The position taken by the State was that this form of evidence was of no assistance. Dr. O'Malley was simply put up as a counterweight to Dr. Cahillane in the event that the Court took a different view on the fundamental issue of the relevance of the historical evidence.
92. With regard to the political evidence, again this was given by distinguished individuals, but essentially involved their personal view as to the desirability of Seanad reform. Professor Murphy, a member of the same campaigning group as Mr. Heneghan, gave evidence in particular about the 2013 referendum to abolish the Seanad. From that experience, he concludes that all of the groups advocating the retention of the Seanad did so on the basis that the Seanad would be reformed. Even if this is factually correct, and the Court makes no finding that it is for this evidence to be meaningful it would be

expected that some material (such as polling results, for example) would at the very least be put forward to indicate what the people intended (rather than what campaigning groups expected). It is possible that the motivation of the people and "Democracy Matters" were not entirely aligned. Equally, while Senator Craughwell's witness statement gives a lively account of his experience in securing election to the Seanad and operating as a Senator, the conclusion which he reaches (and which we have set out in full earlier in this judgment) is of little or no assistance in deciding the legal issues posed by these proceedings.

93. Finally, there is the position taken by TCD and the NUI in respect of potential reform. The position taken by the NUI Senate, set out in the witness statement of Dr. Halpin and summarised in this judgment, is of no assistance in deciding whether the 1937 legislation is unconstitutional. It may well be that both the NUI and, indeed TCD are of the view that reform should occur or are of the view that the current situation is unfair and discriminatory. As is pointed out by Counsel for Mr. Heneghan in opening the case, the State has not even attempted to justify the apparent discrimination that can be seen in a graduate of the NUI being able to vote and a graduate of the University of Limerick not having that facility. In addition, that can be many reasons why either TCD or the NUI may consider it appropriate to take the position that they have adopted. It is not necessarily the case that these positions are taken because of concerns about constitutional propriety. Even if they were, the fact that these institutions have come to a particular view about the fairness, lawfulness, or constitutionality of the existing voting arrangements is of scant relevance to the issues that we have to consider in deciding Mr. Heneghan's challenge to the current legislation.
94. We have therefore decided that none of the evidence provided to us is of assistance in determining the issues before us. We will now turn to those issues.

F. THE VOCATIONAL PANELS

95. Mr. Heneghan makes four submissions to Court in support of his case that the system of election of members of the Seanad in respect of the forty three vocational seats is repugnant to the provisions of the Constitution.
96. These are:-
- (a) The system for election of these forty three Senators is not democratic, involving as it does a very confined electorate of voters as opposed to an electorate that includes Mr. Heneghan;
 - (b) This system of election is perceived to be undemocratic by the Irish people, and therefore cannot be consistent with the provisions of the Constitution;
 - (c) As the Seanad is not performing its function of acting as an independent check to Dáil Éireann, or as constituting a chamber of vocational expertise, the method of election to the Seanad must be inconsistent with the provisions of the Constitution; and

- (d) When rejecting the proposal in the 2013 referendum that the Seanad be abolished, the people, in essence, voted for reform of Seanad; the failure to reform the system of election of the vocational panels therefore constitutes a failure to comply with the will of the people.

97. We will deal with each of the submissions in turn.

(a) *The System of Election is Not Democratic.*

98. The electorate for the seats on the vocational panel is a small one. It is made up of persons directly elected by the Irish people (in the form of TDs and local authority members), persons indirectly elected by the people (in the form of 43 of the outgoing senators), persons elected by a group of graduates (the 6 senators elected by institutions of higher education, currently confined to graduates of the NUI and TCD) and the eleven outgoing senators who were initially nominated by An Taoiseach. The following exchange with the Court is of significance (at day 1, page 21 of the transcript):-

“Mr. Justice Simons: [...] Are you saying that the only thing that would be Constitutional is one person, one vote?”

Ms. Boyle: I am not. What I am saying is that it is not proportionate to exclude every – exclude the public completely from that process.

Mr. Justice Simons: So you do accept that universal suffrage is not required for the Seanad?

Ms. Boyle: Absolutely. Yes, I do, I do.”

99. This concession was sensibly made. It is also consistent with the approach of the principal witness on behalf of the plaintiff, Dr. Cahillane.

100. In accepting that universal suffrage is not required for the election of the 43 vocational members of the Seanad, it follows that it is further accepted that some form of indirect election is permissible. It follows that Mr. Heneghan accepts that indirect election is inherently democratic. If he did not accept that proposition, then he would be arguing for universal suffrage for the election of the 43 vocational seats in Seanad Éireann.

101. In addition, it is notable that the people, in enacting the Constitution, provide a very specific direction as to the electorate for Dáil Éireann, the membership of Dáil Éireann, the ratio between the membership of Dáil Éireann and the population, and the frequency for the revision of the constituencies represented in Dáil Éireann. In particular, Article 16(1)(2) provides that all citizens (and others, as determined by law) shall be entitled to vote for the election of members of Dáil Éireann. No such entitlement is vested in the citizenry in respect of elections to Seanad Éireann. It is clear therefore that, from the outset, the people have determined that it was consistent with the democratic nature of the state that a different form of electorate would exist for election of the 43 vocational members of Seanad Éireann. The fact that the electorate for Seanad Éireann’s vocational

panels is made up in the main of people themselves elected (either directly or indirectly) by the people simply confirms the democratic nature of that arrangement.

102. Mr. Heneghan's argument on this point was therefore transformed into a more unusual one, which is that the "complete exclusion" of citizens, such as the plaintiff, is not consistent with the notion of a modern liberal republican democracy where the People are sovereign in relation to all powers of government. It is submitted that the People did not—and do not—intend that the vocational panel be elected solely by politicians. Repeated reference is made in the written submissions to the fact that the electorate consists of a mere 1,169 voters.
103. No attempt was made in oral submission to put forward any analysis as to why the form of indirect franchise provided under the existing legislation is unconstitutional. Each of the persons entitled to vote elect the panel members has been directly elected by a popular vote, whether as a member of Dáil Éireann or a local party authority. No argument has been advanced as to why this form of indirect election is not permissible under the Constitution. The evidence adduced on behalf of the plaintiff indicates that, at the time of the adoption of the Constitution, the People would not have anticipated that there would be direct elections for the Seanad. Other than repeatedly referencing the size of the electorate, at approximately 1,169 voters, no analysis has been offered. With respect, reference to the number is no more than a rhetorical flourish.
104. Of course, the public are not excluded "*completely*" from the process of electing the vocational members of Seanad Éireann. Indirect election of representatives or officials by the people is not unusual, and is not undemocratic. Indeed, one of the most significant elections to office by the Irish people is the election of An Taoiseach by the members of the Dáil.
105. An indirect election nonetheless permits Mr. Heneghan to vote for his local authority representatives and his representatives in Dáil Éireann who, in turn, help to elect the forty three relevant members of Seanad Éireann. This allows Mr. Heneghan to participate, albeit at one remove, in the election of the relevant members of the Upper House of the Oireachtas. This form of indirect election therefore has the required democratic legitimacy.
106. Apart altogether from this point, however, the argument that the exclusion of the public is not proportionate, and that therefore the existing method of electing the forty three vocational members is repugnant to the provisions of the Constitution, is not sustainable. Ordinarily, a rule will fail a proportionality test because it constitutes an incursion into the rights of the individual which is not justified by the purpose of such incursion. In this case, Mr. Heneghan accepts that indirect election of Seanad members is legitimate. The Court agrees. There is therefore no invasion of Mr. Heneghan's rights or entitlements to be justified as being proportionate. Unfortunately, this revised argument is fundamentally flawed.

107. The Court therefore does not uphold the submission made on behalf of Mr. Heneghan that the method of election of the 43 vocational members of Seanad Éireann is undemocratic.

(b) This system of Election is Perceived to be Undemocratic.

108. In mounting this argument, Counsel for Mr. Heneghan placed a great deal of stress on evidence that suggested a “public perception” that the method of election of the vocational members of Seanad Éireann was undemocratic. This is different from an argument that the form of election is in fact undemocratic. The question was posed in this way by Counsel for Mr. Heneghan, in opening the case (transcript day 1, page 10):-

“How can a statutory provision that is regarded by the people as undemocratic in its results be compatible with the Constitution that, according to the Superior Courts, has the concept of democracy at its heart? That is one of the issues that, in our submission, this Court will have to decide.”

109. Counsel was asked to identify any authority which would assist the Court in understanding whether or not an act of the Oireachtas could be found to be repugnant to the provisions of the Constitution “simply because of the way either the constitutional provision is perceived by the public or the legislation is perceived by the public?” (transcript, day 1, page 15).

110. In the Court’s view, no such authority was identified by Counsel for Mr. Heneghan. At the end of her submission, Counsel for Mr. Heneghan was asked again to identify “a single authority, in Ireland or elsewhere, that establishes that the perception by the people of a legislative measure can render it unconstitutional [...]” (transcript, day 2, page 64). No such authority was identified. Much more importantly, Counsel described as “a rhetorical flourish” her submission that any perception by the people that the Seanad is not democratic means that the House does not have that quality, and in turn that the constitutional requirement that it be democratically elected is therefore not met.

111. As with the first submission on the vocational seats which we have described at (a), this second submission transformed itself. This time, the submission became one that a perception by the people that the election of the vocational senators is undemocratic in itself reflected a changing view as to what was meant by “democracy”. In the view of the Court, no such change in definition of democracy was established on behalf of Mr. Heneghan. This is notwithstanding the fact that the current method of election of the vocational senators has been described by a number of sources (including Dr. O’Malley, the State witness) as undemocratic. The principles of democracy have not fundamentally altered since the people enacted the Constitution in 1937. As already observed, it is the Court’s view (one not disputed by Mr. Heneghan) that the form of indirect election currently provided for in respect of the vocational senators is one which preserves democratic values, has democratic legitimacy, and is in accordance with the provisions of the Constitution.

(c) Seanad Éireann Does Not Carry Out Certain Essential Functions.

112. This submission was summarised in the following way by Counsel for Mr. Heneghan, in her opening (transcript, day 1, page 7):-

“Evidence before the Court will establish that, historically, the Seanad was always meant to operate independent and as a check on the more powerful Dáil. That evidence will also establish that it was – that the Seanad was to contain diverse voices, different from those of the Dáil, which was always a House of Representatives of its members representing local constituencies. The Seanad, set up under the 1922 Constitution, took this duty of independence seriously; that is why Eamonn de Valera abolished it in 1936.”

113. This is the historical dimension of the submission. The modern aspect of the submissions is put in the following way:-

“The Plaintiff argues that it’s clear for other provisions of the Constitution that the Seanad has a dual mandate. The first of these to be independent and act as a check on the Dáil [...]

On the other hand, there will be evidence before the Court which, if accepted, will establish that the Seanad, as currently elected, is a subservient to the Dáil as the second house as can be. If that is the case, then how can it possibly carry out its Constitutional mandate to be a check on the powers of the Dáil and the executive?

The second mandate given to it under the Constitution is to be a house containing elements of experience, expertise and diversity which are not necessarily present in members of the Dáil. In that context, there will also be evidence before the Court that this Constitutional mandate for vocational representation has also been subordinated to party politics. The working group set up under Dr. Manning concluded that the concept of a house of expert and specialist Senators has been lost.”

114. The historical approach towards the interpretation of Article 18 (the first of the linked submissions which we have described here) does not support the contention that, in enacting the 1937 Constitution, the people were necessarily or even probably voting for a Seanad with the characteristics described. As noted earlier in this judgment, the Seanad had been abolished under the initiative of Mr. de Valera in 1936. On Mr. Heneghan’s own case, this was because of unhappiness on Mr. de Valera’s part about the independence and diversity of the Seanad. Given this undisputed historical fact, inasmuch as the historical dimension is relevant, it is singularly unlikely that the people believed that they were being invited by Mr. de Valera to enact a Constitution which included a Seanad with characteristics of independence and diversity, themselves the very attributes which had led Mr. de Valera to abolish the Seanad the previous year. Secondly, if Mr. Heneghan is right in arguing that the people in 1937 anticipated a Seanad of diversity and independence, achieving an assembly with these characteristics would not have been seen by the people as being inconsistent with indirect election. As the evidence before the

Court showed, for the last nine years of its existence members of the Free State Seanad had been chosen by indirect election rather than by popular suffrage.

115. A further argument advanced in support of the challenge to the composition of the electorate for the vocational panels is that, in order to be effective, the Seanad must not be based on party lines. It is then said that the practical effect of the legislative scheme for the nomination of, and election of, members to the vocational panel is that the panel is dominated by political parties. Again, reliance is placed on rhetorical flourishes—such as the Seanad not having been intended as a crèche or retirement home for members of Dáil Éireann—rather than on any substantive legal argument.
116. No convincing argument has been advanced as to why the Constitution must be interpreted as intended to exclude members of political parties from participation on the vocational panels. It is apparent from the Article 18 that what the Constitution envisages is that persons elected to the vocational panel will have the requisite qualifications and experience in one of the fields of endeavour prescribed. This constitutional requirement is given effect to by the legislative provisions which lay down the qualifications. Importantly, there is an mechanism put in place whereby the qualifications of a potential candidate may be challenged by application to the President of the High Court. The validity of these legible provisions has not been attacked in these proceedings.
117. It is not apparent from the text of the Constitution that political parties are to be excluded. There is nothing in the evidence of the historical context which bears out such an exclusion. As appears, at the time the Constitution was adopted the previous Seanad had been abolished precisely because it had been seen to frustrate Dáil Éireann.
118. The fact that the Constitution expressly provides that An Taoiseach is to nominate eleven of the sixty members also tends to undermine the argument that the Seanad was intended to be independent of political parties.
119. It is contended, in the written legal submissions, that by confining the electorate for panel members to what is described pejoratively as “the political classes”, the impugned legislation has nullified the following two important constitutional characteristics of the Seanad. First, that it be a place where expert and specialist voices would be heard; and, secondly, that it scrutinise legislation and hold Dáil Éireann to account. With respect, it is a non sequitur to suggest that the involvement of political parties has an adverse effect on either of these supposed characteristics. The requirement for expertise is insured by the legislative provisions in relation to qualifications. An ability to scrutinise legislation is not adversely affected by membership of a political party.
120. Insofar as the relationship between the two houses of the Oireachtas is concerned, the use of the phrase “holding to account” does not necessarily accurately reflect the role of the second house. Whereas the Constitution does state that the government is accountable and responsible to Dáil Éireann, the use of such a phrase is inapt to describe the relationship between the two Houses of the Oireachtas. At all events, membership of a political party does not adversely affect this ability.

121. The associated argument, based as it is on an analysis of the behaviour of Seanad Éireann in modern times, involves an analysis which the Court cannot comfortably undertake. It requires the Court to decide that, as it currently operates, Seanad Éireann is utterly subservient to Dáil Éireann. It is important to understand what Mr. Heneghan is saying in this regard. It is the case that Seanad Éireann has powers that are, in some cases, less wide ranging than those possessed by Dáil Éireann. Mr. Heneghan wants the Court to go further, and to determine that (in exercising the powers it actually has under the Constitution) the Seanad is in thrall to the Dáil and slavishly follows the direction of the lower house. It also requires this Court to decide that the current forty three vocational Senators (or, indeed, their equivalents for the last ten or twenty years) do not have the qualifications to represent the vocational panels for which they were elected. The Court is further invited, having considered and decided in favour of Mr. Heneghan on these two issues, then to determine that the subservience of Seanad Éireann and the inadequacy of Senators as persons qualified to represent the relevant vocational groups, is a consequence of the means of election of the vocational members to the Upper House. Finally, the Court is invited to make all of these wide-ranging and essentially political determinations on the basis of evidence forwarded by Professor Murphy and the contents of the Manning Report. In that regard it is notable that Professor Murphy, an undoubtedly distinguished commentator, is by his own account a campaigner with a specific agenda; the Manning Report is, as the Court has noted, the report of a group under the chairmanship of a distinguished politician who has, no doubt, his own political views.
122. The Court does not believe that Mr. Heneghan has laid the evidential basis which will enable the Court to decide either as to the subservience of Seanad Éireann or the ability of the vocational members to represent the relevant groupings in society. In large measure, the evidence relied upon by Mr. Heneghan involves assertion, anecdote or argument. It does not achieve anything close to the forensic requirements needed to establish either of these two propositions. For example, on the question of subservience one would expect a comparison between the proportion of government measures rejected by the "fiercely independent" Free State Seanad as opposed to the "subservient" Seanad established by Bunreacht na hÉireann. In the absence of evidence of this quality, the Court will not make the findings sought by Mr. Heneghan.
123. Apart altogether from the absence of sufficient evidence, a decision by this Court that Seanad Éireann is "subservient" to Dáil Éireann, or a finding about the nature of the representation provided by vocational Senators over the years, appear to us to be fundamentally political assessments. Indeed, the very way in which Mr. Heneghan's Counsel have framed this issue smacks inevitably of the political. In the Court's view, it would not be appropriate for us essentially to form a political view in the course of determining Mr. Heneghan's legal claim.
124. Even if the Court was prepared to decide these issues, and found sufficient evidence to decide in Mr. Heneghan's favour, it does not appear to us to follow that the relevant provisions of the 1947 Act (providing for the election of the vocational members to the Seanad) are invalid. There is simply no evidence of any weight before the Court to

establish that the election of the forty three vocational Senators by universal franchise (or whatever hybrid scheme is favoured by Mr. Heneghan) would lead to a less subservient Seanad, or one which displays greater depth of vocational representation, or is more free of party political influence. While Mr. Heneghan relies upon certain expressions of view from persons of distinction that independence and diversity will result from a different form of election of the vocational Senators, an equally valid position might be that a broader electorate could be dominated by political parties given that they are likely to have the resources and the electoral machinery to campaign most effectively among a broader electoral pool.

125. The Court therefore does not accept this submission as supporting or justifying a finding that the relevant provisions of the 1947 Act are invalid.

(d) *The 2013 Referendum.*

126. This argument can be summarised as follows. In 2013, the people rejected a proposal (put to them by referendum) to abolish the Seanad. It is said that as many people campaigned not only to retain the Seanad but also to reform it, the provisions of the Constitution should be interpreted in a way that either facilitates or requires such reform.

127. With respect, this argument purports to draw inferences from the outcome of the referendum which are contrary to the principles of constitutional interpretation, and, in any event, entirely unsupported by admissible evidence.

128. The starting point for any constitutional analysis must be the wording of the Constitution itself. It is necessary to make the obvious point that the 2013 referendum did not result in any change to the wording of the Constitution, precisely because the proposal was rejected. It is impermissible, at the level of principle, to rely on a failed referendum to support an argument that the meaning of the text of the Constitution has somehow changed.

129. The case of *I.R.M. v. Minister for Justice* [2018] 1 I.R. 417 cited by the plaintiff relates to a different point, namely whether the making of an amendment, following a successful referendum, can indicate what the People understood the Constitution to mean. It is of no assistance to the argument being made by the plaintiff. It is not suggested that the rejection of the proposal to abolish the Seanad was informed by a particular understanding of the meaning of the Constitution.

130. Turning next to the evidential basis for the plaintiff's argument, it is almost inevitable that people who campaigned to retain the Seanad on the basis it would be reformed would say that is what the people voted for. A number of the witness on behalf of Mr. Heneghan are of that view. However, apart from this understandably impressionistic evidence, there is nothing more scientific offered to the Court as to why it was the people voted as they did. For example, despite all its flaws, some form of opinion poll evidence might have been of assistance on this topic; none is proffered. The starting point (and often the end point) for interpreting the legal effect of the acceptance or rejection by the people of an amendment

to the Constitution is the wording of the amendment itself. Thus simple proposition was in large measure overlooked in the submissions made on behalf of Mr. Heneghan in respect of the university seats. As far as the 2013 referendum is concerned, it is difficult to look beyond the fact that the people rejected, in all likelihood for a range of different and possibly contradictory reasons, a straightforward proposal that the Seanad be abolished.

131. Even if the Court were to accept that the will of the people in 2013 was that the Seanad be retained so that it could be reformed, there is no clarity about the type of reform that the people had in mind. There is agreement between Mr. Heneghan and the State that there is in fact no consensus as to how the Seanad might be reformed. It could be that members of the electorate voting on a "retain to reform" approach were concerned only about the reform of the electorate for the six seats reserved to graduates of the institutes of higher education. It could be that voters, keen to see the Seanad retained so it could be reformed, have views about the eleven seats reserved to nominees of An Taoiseach. It could be that voters, with a similar broad approach to the referendum, felt that a small number of seats in the Seanad should be reserved for Irish citizens (or persons entitled to Irish citizenship) living abroad. All of these possibilities exist. What the Court does not have is any clear evidence that the will of the people, in rejecting the abolition of the Seanad in 2013, was that the system for the election of vocational members would be reformed, still less reformed in any particular way.
132. The Court is of view, therefore, that on the evidence before it the defeat of the 2013 referendum does not assist Mr. Heneghan in his case that the relevant provisions of the 1947 Act are repugnant to the Constitution.

G. THE UNIVERSITY SEATS

133. At this point, it is worth setting out in full provisions of Article 18.4 of the Constitution. They read:-

"4 1° The elected members of Seanad Éireann shall be elected as follows:—

- i Three shall be elected by the National University of Ireland.
- ii Three shall be elected by the University of Dublin.
- iii Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

2° Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely:

- i the universities mentioned in subsection 1° of this section,
- ii any other institutions of higher education in the State,

of so many members of Seanad Éireann as may be fixed by law in substitution for an equal number of the members to be elected pursuant to paragraphs i and ii of the said subsection 1°.

A member or members of Seanad Éireann may be elected under this subsection by institutions grouped together or by a single institution.

3° Nothing in this Article shall be invoked to prohibit the dissolution by law of a university mentioned in subsection 1° of this section.”

134. Until 1979, article 18.4 was confined to what is now Article 18.4.1°. This original provision required the election of three senators by the NUI and the election of three senators by the University of Dublin. This form of election was consistent with the other provisions of the Constitution, as it was expressly mandated by it. No other form of election in respect of these six seats was permitted.
135. In 1979 there were two issues addressed by means of the inclusion in Article 18.4 of what is now Article 18.4.2° and 18.4.3°.
136. One of the live issues at the time, which required the enactment of the 7th Amendment to the Constitution, was a proposal that the constituent colleges of NUI would become independent universities. Ultimately, that did not happen. However, in order to facilitate this proposal the 7th Amendment was required. The second issue requiring the 7th Amendment was a possible expansion of the franchise for the six “University seats”. Like the breaking up of the NUI, this was facilitated by the 7th amendment but ultimately no such extension of the franchise occurred.
137. In the evidence, and at the hearing, there was some dispute between the parties about which of these two issues constituted the primary reason why Article 18.4 was amended. As the Court has noted, this debate descended to an analysis of the polling card notifying voters of the referendum. It is not necessary for the Court to decide this issue. The critical issue, in the Court’s view, is what the electorate did in enacting the 7th Amendment.
138. It will be immediately plain that, while the people added a provision - in Article 18.4.2° - which allowed six senators to be elected by the NUI, by TCD, by any other institution of higher education in the State, or any combination of these, the people also left in place the original express provision mandating three Senators to be elected by the NUI and three Senators elected by TCD to the exclusion of any other institution of higher education in Ireland.
139. From the Court’s perspective, it is difficult to overstate the significance of these plain provisions of Article 18.4 in its amended form. The people did not vote to replace the original electorate for the six university seats with an electorate (drawn from institutes of higher education) to be fixed by the Oireachtas. Instead, the people decided that it was constitutionally permissible for the six seats to remain the shared preserve of the NUI and TCD. This would only change if and when the Oireachtas were to enact further legislation. It is plain that the decision as to whether or not such legislation was to be enacted (and, if it was, in what form) is exclusively within the discretion of the Oireachtas; the word “may” in this context can have no other meaning.

140. The case made by Mr. Heneghan, therefore, involves asking the Court to decide that a form of election in respect of these six seats expressly permitted by the Constitution is itself unconstitutional.
141. Counsel for Mr. Heneghan makes three submissions which, she contends, establish that the current form of election to these six Seanad seats is invalid. They are:-
- (i) The enactment of the 7th amendment to the Constitution supports Mr. Heneghan's case.
 - (ii) Article 18 must be read in conjunction with the equality provisions of the Constitution (in particular Article 40.1).
 - (iii) Article 18.4.1^o is in the nature of a transitional provision.
142. Given the intimate connection between these three submissions, we will deal with these together.
143. The Court has already observed that, in its amended form, Article 18.4 appears expressly to permit the form of election to the six seats which Mr. Heneghan challenges. His Counsel submits that the evidence surrounding the 1979 poll suggests that the people voted for an extension of the franchise in respect of the seats. She also submits that the proper reading of the first four words of Article 18.4.2^o is that "Provisions shall be made [...]" as opposed to "provision may be made [...]."
144. The argument that "may" should be read as "shall" was grounded upon a contention that, in respect of a range of other amendments to the Constitution, the amendments were promptly followed by legislation which the relevant amendment had permission. These are set out earlier in this judgment at paragraph 64.
145. When one considers all of the specific examples provided in support of this claim, it is clear that this submission confuses when one considers all of the specific examples provided on behalf of Mr. Heneghan and endorsed in the evidence of Dr. Cahillane. It is clear that this submission confuses a legal obligation to legislate in accordance with an amendment to the Constitution with the practical reality that an amendment to the Constitution necessarily expresses the will of the majority of those who trouble themselves to vote and will therefore ordinarily lead to legislation consistent with that majority opinion. For an amendment even to be put to the people, it must command majority support in both the Dáil and the Seanad. Of course, this requires a certain public pressure (and a certain political will) in itself. For an amendment to the Constitution to be passed by the people, it goes without saying that a level of public support must be achieved. Having gone to this effort, it is very likely that the Government will follow through by proposing legislation which will put into effect the proposal which the amendment to the Constitution has allowed. To take, almost at random, some of the examples put up by Mr. Heneghan it was always likely that the enactment of the 15th amendment to the Constitution would lead to legislation permitting divorce, that the

enactment of the 16th amendment to the Constitution would lead to legislation changing the basis upon which bail could be refused, and that the 23rd amendment to the Constitution would lead to the ratification by the State of the Rome Statute of the International Criminal Court. Sometimes, the subject matter of a referendum has so caught the imagination of the people as a whole that subsequent legislation becomes not just likely, but inevitable; for example, the public mood made following passage of the 34th amendment to the Constitution providing for marriage between two persons “without distinction as to their sex [...]”.

146. The Court feels it is vital to draw a distinction between two things. One is the fact that, after the machinery of the Oireachtas has been successfully employed to pass legislation proposing an amendment to the Constitution, and after that proposed amendment has itself been carried by popular vote, it is likely that there will be a political will or a popular desire to enact legislation in accordance with the amendment. The other is the argument that there is a *legal obligation* on the Oireachtas to legislate in accordance with a power granted to it by a Constitutional amendment.
147. These are radically different things. There is no basis, either as a general rule or in the circumstances of the current case, to suggest that an amendment to the Constitution *permitting* the Oireachtas to enact legislation requires it to do so.
148. The Court is satisfied that the facts of this case themselves illustrate precisely why a discretion should not be turned into an obligation. There is a large number of different institutes of higher education that could be included in an expanded franchise for the six seats. There is therefore a kaleidoscopic range of different possibilities available to the Oireachtas, should it decide to expand the franchise beyond the NUI and TCD. The Oireachtas is thus said to be under a legal obligation to legislate, but no guidance is given by Counsel for Mr. Heneghan as to what level of extension of the franchise (or what level of consideration of extension of the franchise) by the Oireachtas is sufficient to discharge this alleged legal duty.
149. There have been instances where the Government, in proposing a particular amendment to the Constitution, has published intended legislation which, it says, will follow the passing of any amendment. This was not the case in respect of any of the proposed amendments involving the Seanad. While we are therefore not asked to decide on the legal significance of any such intended legislation, we do feel that the Constitution must be interpreted by reference to the wording which the people have approved by way of amendment. Unless the wording of any proposed legislation is incorporated in the Constitution, it has no legal or constitutional significance. Such proposed legislation merely expresses, albeit in precise terms, the intention of the legislature (or, to be more precise, the intention of the Government). It does not mean that the Government is obliged to introduce such legislation or that the Oireachtas is obliged to enact it. In the current circumstances it is clear that the 7th Amendment to the Constitution did not place any legal obligation on the Oireachtas to exercise its power to legislate to vary the franchise for the six seats.

150. Even if Mr. Heneghan's submissions on this point are correct, and Article 18.4.2° now requires the Oireachtas to make provision by law for election on a franchise of the type contemplated by that clause, there remains the fact that Article 18.4.1° remains in situ. Subject to what is submitted on behalf of Mr. Heneghan about Article 18.4.1° being rendered a transitional provision, on the face of it his submission about the meaning of Article 18.4.2°, would, if correct, lead to a direct conflict between it and 18.4.1°. This would not involve a harmonious reading of the Constitution; rather, it would set two sequential provisions at loggerheads with each other, which is not a desirable interpretation of the basic law of the State.
151. The Court therefore finds that "may" means "may" and not "shall" in the wording at the start of Article 18.4.2°. With regards the evidence, such as it was, to the effect that the people may have understood it likely that there would be some expansion of the franchise for the six seats following the enactment of the 7th Amendment such evidence is undermined by the lack of any agitation for legislation of this type in the subsequent decades. Questioned by the Court, Dr. Cahillane accepted that there was no "concern or agitation" about the failure to expand the franchise in the 1980s, the 1990s, the 2000s or the 2010s; while Dr. Cahillane expressed the view that this possible extension of the franchise for the six seats involved "a very small proportion of the electorate in general [...]" she went on to agree that graduates of institutions of higher education tend to be articulate people who, presumably, will be well placed to highlight that the will of the people in 1979 (as they saw it) had not been acted on; (transcript, day 1, pages 74 and 75).
152. An associated argument made on behalf of Mr. Heneghan, is that, in construing the provisions of Article 18, the equality provisions of Article 40.1 should be taken into account. This argument, if successful, again leads to a construction of the Constitution which is not a harmonious one. It would lead to a situation where Article 18.4.1° is ignored as (on Mr. Heneghan's case) the confining of the electorate to the NUI and TCD results in unequal treatment. Not only does this construction lead to an interpretation of Bunreacht na Éireann which is not harmonious, it also involves taking the general principle of equality and using it to override a specific provision which very precisely permits graduates of the NUI and TCD to be preferred over graduate of other institutes of higher education. The Court cannot read Article 18 and Article 40.1 in this way. It cannot, under any circumstances draw a blue pencil through a provision of the Constitution. The Court is even less inclined to do so in circumstances will the people have ratified the continued operation of that provision when enacting the 7th Amendment in 1979 at the very time when they permitted the Oireachtas to extend the relevant franchise should it choose to do so.
153. Finally, Counsel for Mr. Heneghan submitted that the retention of Article 18.4.1° was solely for the purpose of allowing it to constitute a transitional provision. This submission was not the subject of any significant elaboration. There is also nothing in the text of Article 18.4 to support the proposition that the original provision relating to the franchise for election of the six third level Senators was retained solely in order to avoid any doubt

being cast on the legitimacy of the six Senators elected in the previous general election (in 1977). If anything, the natural reading of Article 18.4 is quite inconsistent of this suggestion that the first portion of it is now of transitional or temporary application alone. Article 18.4.1° continues to state that the elected members of the Seanad “shall be elected as follows [...]” and includes reference to the three Senators from NUI, the three Senators from TCD. Were this a transitional provision, it would have been worded very differently when the 7th Amendment was introduced. There is no reason whatsoever to believe that Article 18.4.1° has been, since 1979, merely a transitional provision.

154. The Court therefore concludes that the challenge to the constitutionality of the relevant portions of the 1937 Act, providing for the election of six university Senators, does not succeed.

H. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

155. While a broader case is made in his pleadings, Mr. Heneghan has expressly limited this part of his claim to a challenge to the legality of the six “university seats”. The argument is pithily put in his written submissions, in this way (at paragraph 150):-

“Accordingly, while there is no obligation under the Convention to hold direct elections for both chambers in a bicameral legislature, where a right to vote is advanced to one group of persons (in this case, graduates), that right may not be advanced to persons in a manner which constitutes discrimination.”

156. The essential relief sought by Mr. Heneghan in this regard is set out at paragraph 157 of his written submissions:-

“The Plaintiff seeks declarations, pursuant to section 5 of the European Convention on Human Rights Act 2003, that Irish law is inconsistent with the State’s obligations under the Convention.”

157. Ironically, the State accepted in both written and oral submissions that defending the position with regard to the vocational seats presented greater difficulties than defending the electorate for the university seats; as noted, the challenge is now confined to the latter. On this third aspect of Mr. Heneghan’s case, the State relied heavily on the status in Irish law of the 2003 Act in contradistinction to the supremacy of the Constitution to which, it was argued, any Act of the Oireachtas was subordinate.

158. In their written submissions, the State Defendants supported this *in limine* argument by reference to the judgment of McKechnie J. in *Foy v. An tArd-Chlaraitheoir* [2012] 2 I.R. 1:-

“It is a misleading metaphor to say that the Convention was incorporated into domestic law. It was not. The rights contained in the Convention are now part of Irish law. They are so by reason of the Act of 2003. That is their source. Not the Convention. So, it is only correct to say, as understood in this way, that the Convention forms part of our law.”

159. The State also relies on the judgment of Murray C.J. in *McD (J) v. L (P) & M (B)* [2009] IESC 81, where the following analysis is set out:-

“The relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism the effect of which finds expression in Article 29.6 of the Constitution. According to the concept of dualism, at national level national law always takes precedence over international law. At international level, as regards a state’s obligations, international law takes precedence over its national or internal law which is why a state cannot generally rely on their own constitutional provisions for not fulfilling international obligations which they have undertaken. Coming back to the national level the dualist approach means that international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies.”

160. Murray C.J. draws a distinction between the dualist approach applied in Ireland and the monist approach common in “many countries who are party to the European Convention on Human Rights”.

161. Finally, the State Defendants rely upon the text of the 2003 Act itself, notably the Long Title (which emphasises the purpose of the legislation is to give effect to the Convention “subject to the Constitution”) and section 2(1), which reads:-

“(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

162. The State goes on to argue that the Act is subordinate to the Constitution, that the Court is not obliged to interpret the Constitution in a manner compatible the State’s obligations under the Convention, and that the 2003 Act does not apply inasmuch as the 1937 Act reflects what is prescribed in the Constitution.

163. These are weighty issues. While of course it would not have been expected that the written submissions of Mr. Heneghan would necessarily anticipate this line of argument, we did anticipate that these submissions would be dealt with in some detail in the oral presentation made on Mr. Heneghan’s behalf. However, the State’s position on this critical aspect of the claim was not mentioned in the opening speech of Counsel for Mr. Heneghan. In her reply, Counsel dealt with this part of the State’s case in this way:-

“In relation to the Convention, [Counsel for the State] said that the 1937 Act replicates the constitutional provision. But, in my submission, it doesn’t do so because the constitutional provision providing for the election of senators by Trinity and NUI also contains a permissive clause permitting, at a minimum a permissive clause permitting the legislature to vote on, or to choose from among the other institutions of higher education.

And, in any event, it is a piece of legislation and it is subject to the provisions of the 2003 Act.”

164. The fact that there was no detailed rebuttal of the State’s submission on this point does not, of course, mean that the State is correct. However, the Court has decided that the State’s threshold objection to Mr. Heneghan’s case on the Convention is well made. This is because:-

- (i) As we have already found, the Constitution expressly sanctions the current franchise for the election of the six senators provided for by Article 18.4.1°;
- (ii) The 2003 Act cannot override the constitutional mandate that the six senators may be elected by the NUI and TCD;
- (iii) Inasmuch as the 1937 Act is challenged, the extent of that challenge is to an electorate which the Constitution expressly permits.
- (iv) The argument that the 1937 Act must be interpreted by reference to the provisions of the 2003 Act, leading to a finding that the composition of an electorate (itself in accordance with the provisions of the Constitution) is nonetheless unlawful, is fundamentally wrong. It entirely ignores the basic legal reality that domestic legislation is inferior, rather than superior, to the provisions of Bunreacht na hÉireann.
- (v) In inviting the Court to declare the relevant portions of the 1937 Act incompatible with the provisions of the Convention, Mr. Heneghan is in fact asking the Court to declare Article 18.4.1° (i) and (ii) incompatible with the provisions of the Convention. This is not what is contemplated by section 5 of the 2003 Act, which is confined to declarations concerning statutory provisions and rules of law.

165. Given these findings it is unnecessary and probably unhelpful to consider the balance of the case made on behalf of Mr. Heneghan under this rubric.

I. CONCLUSIONS

166. The Court therefore concludes that:-

- (i) The system for the election of the 43 vocational panel senators, as provided for in the Seanad Electoral (Panel Members) Act 1947 is not invalid having regard to the provisions of the Constitution.
- (ii) The system for the election of the six university panel senators, as provided for in the Seanad Electoral (University Members) Act 1937 is not invalid having regard to the provisions of the Constitution.
- (iii) Mr. Heneghan is not entitled to a declaration that the relevant Irish law is inconsistent with the State’s obligations under the European Convention on Human Rights.

(iv) In light of these conclusions, and for the reasons given in this judgment, Mr. Heneghan has not established an entitlement to any of the reliefs sought by him in these proceedings.

167. This matter will be listed on Wednesday the 8th December at 10.30am to deal with any outstanding matters.