



**Tithe an
Oireachtais**
**Houses of the
Oireachtas**

Tithe an Oireachtais

An Comhchoiste um Thithíocht, Pleanáil agus Rialtas Áitiúil

Tuarascáil maidir le Grinnscrúdú ar an mBille um an gCúigiú Leasú is Tríocha ar an mBunreacht (Uisce faoi Úinéireacht Phoiblí) (Uimh. 2), 2016 [BCP]

Eanáir 2018

Houses of the Oireachtas

Joint Committee on Housing, Planning & Local Government

Report on Scrutiny of the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016 [PMB]

January 2018

32/HPLG/07

Contents

Introduction -	2
Procedural basis for scrutiny -	2
Main provisions of the Bill -	2
Pre-Committee scrutiny -	3
Briefing from the Office of the Parliamentary Legal Adviser	5
Observations and conclusions of the Joint Committee -	6
Conclusion -	6
Appendix 1 – Committee Membership	7
Appendix 2 – Terms of Reference of Committee	8
Appendix 3 – Link to Meeting Transcript	12

Introduction -

This is the report of the Joint Committee on Housing, Planning and Local Government's detailed scrutiny of the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 (the Bill).

The Bill was referred to the Select Committee on Housing, Planning, Community and Local Government by order of the Dáil of 9th November 2016.

The Minister for Housing, Planning and Local Government was included in the circulation of a draft of this report, in accordance with Standing Order 141(2), as an *ex officio* Committee Member.

Procedural basis for scrutiny -

At its meeting of 18th January, the Committee agreed to undertake scrutiny of the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 prior to formal consideration of the Bill at Committee Stage. Private Members Bills referred to Select Committee are subject to the provisions of Standing Order 141(2) [Dáil], which provides that a Select Committee "*shall undertake detailed scrutiny of the provisions of such Bills ... and shall report thereon to the Dáil prior to Committee Stage consideration ...*" unless the Committee decides in relation to a particular Bill that detailed scrutiny is not necessary.

Paragraph (3) of Standing Order 141 permits scrutiny of the Bill in Joint Committee, viz. "*Nothing in this Standing Order shall preclude a Joint Committee from undertaking detailed scrutiny as set out in paragraph (2) and reporting thereon to both Houses prior to Committee Stage consideration of the Bill by the Select Committee*".

Main provisions of the Bill -

The purpose of the Bill is to expressly provide that the public water system remain in public ownership and the Government as the Executive Arm of the State shall be collectively responsible to Dáil Éireann in that regard. The Bill seeks to insert Article 28.4.3 as a new Article after Article 28.4.2 of the Constitution.

In particular the Bill provides for -

- a prohibition on the alienation of the public water system;
- the protection of the public water system from privatisation while continuing to respect and preserve the private property rights of private water systems such as Group Water Schemes and privately owned wells and boreholes;
- greater clarity on the Government's role to protect, manage and maintain the public water system;
- the achievement of greater levels of accountability and transparency as the Government shall be collectively responsible to Dáil Éireann for the public water system;
- the public interest to remain at the centre of decision making in relation to the public water system into the future.

Pre-Committee scrutiny -

On the 4th of May 2017, the Joint Committee held two sessions scrutinising the Bill. In the first session, the sponsor of the Bill, Joan Collins T.D., along with Mr Séamas Ó Tuathail S.C. and Ms Treasa Brannick O'Cillín briefed the Committee on the main provisions of the Bill.

Deputy Collins informed the Committee that the proposed constitutional amendment seeks to address concerns raised about the possible privatisation of public water services. Deputy Collins added that both the expert commission on domestic public water services and the Joint Committee on the Future Funding of Domestic Water Services noted that the appropriate means of addressing this issue was through a constitutional amendment.

Deputy Collins stated that *"the proposed amendment is designed to clarify and copper-fasten State ownership of the public water system as distinct from privately owned and operated water systems in the form of group water schemes and private wells and boreholes"*. Deputy Collins outlined to the Committee that she believes there to be no issue between private wells and boreholes and what is protected under the public water system. Mr Séamas Ó Tuathail also addressed the issue of public versus private ownership, explaining that the courts have a history of making this distinction and that he sees no difference for this particular Bill. Mr Ó Tuathail stated that *"...I do not see any*

public-private issue arising from the proposed amendment. If anybody has an issue, the legislation passed on foot of the amendment coming into place in the Constitution would either deal with the issue or it would become a matter for the court and the court would then deal with that issue".

Deputy Collins explained that *"the proposed 35th amendment of the Constitution simply ensures the resource remains in public ownership and that the Government is responsible for its maintenance and management"*.

The Minister for Housing, Planning, Community and Local Government, Simon Coveney T.D., briefed the Committee during the second session in relation to the scrutiny of the Bill.

Minister Coveney set out the position of the Government in relation to the Bill and the broader issue of the public ownership of Irish Water, particularly in relation to the current safeguards in place to prevent privatisation. Minister Coveney explained to the Committee that the Water Services Act 2013 places a prohibition on the stakeholders of Irish Water, that is, the Minister for Housing, Planning & Local Government, the Minister for Finance, and the board of Ervia from alienating their shares in the utility. Following this, the Water Services Act 2014 established a 'triple lock' system to prevent the privatisation of Irish Water. The 'triple lock' system comprises of three provisions; firstly, that were a situation to arise where part or full privatisation of Irish Water was being contemplated, that specific conditions would need to be met. These provisions are that both Houses of the Oireachtas would have to pass a resolution approving such a proposal; secondly, a majority of voters in a plebiscite¹ would have to give their approval to the proposal; and thirdly, the Minister would then have to initiate legislation to privatise Irish Water or alienate any share held by the Government.

The Minister did however acknowledge that concerns in relation to the privatisation of Irish Water persist; *"however, despite these legislative barriers to privatisation, people continue to have genuine concerns and I accept that. The Government respects and acknowledges these concerns and the efforts made by the authors of the Bill to address them"*.

¹ A vote by all voters on a topic or question – for example, in a referendum; or a vote by members of a party to decide on a candidate. Source: www.nala.ie. Link - https://www.nala.ie/sites/default/files/publications/a_plain_english_guide_to_political_terms_0.pdf

The Minister outlined how it was agreed between Deputy Collins and the Minister that this Bill would be the Bill to amend the Constitution, in order to resolve the concerns about any possible future privatisation of Irish Water, but that this is legislation into which the Government needed to have an input and that the advice from the Attorney General will be of vital importance in this regard.

Minister Coveney outlined some potential areas of difficulty with the proposed constitutional amendment. One of the main concerns of the Minister is in relation to the ownership of water infrastructure, particularly bore holes, private group water schemes and public infrastructure located on private lands. The Minister stated that there are *"also issues to be considered in the context of the potential for unintended consequences that could impinge on individuals' rights to private property, which are strongly protected in the Constitution"*.

Minister Coveney outlined that he has sent a brief to the Attorney General in relation to the Bill and that he is still awaiting a response from the Attorney General. The Minister further stated that until that advice is received from the Attorney General he cannot add a significant amount to the conversation or to the scrutiny of the Bill as he lacks the legal clarity on whether the Bill should proceed with its current wording. Minister Coveney indicated that he would return to the Committee upon receipt of the legal advice from the Attorney General, *"I will happily return to the Committee to have the type of discussion mentioned when we have that advice. I cannot publish the advice but I can talk it through in respect of some of the issues that are being raised"*.

Briefing from the Office of the Parliamentary Legal Adviser

The Joint Committee agreed to ask the Office of the Parliamentary Legal Adviser (OPLA) to undertake scrutiny of the Bill. On 14 December 2017, the Committee received a briefing from the OPLA on their analysis of the Bill. The OPLA highlighted to the Committee some concerns around the wording of the Bill and that the Bill, in its current form, may require further consideration.

At the next stage of the legislative process (Third Stage consideration) the OPLA have outlined that the following matters are deserving of consideration;

- greater certainty is required around the definitions and remit of the matters described in the text, specifically how to quantify and restrict the scope of 'public system' as envisaged in the proposal;
- clarification is required as to how the present private elements of the water system will be affected, should the amendment pass.

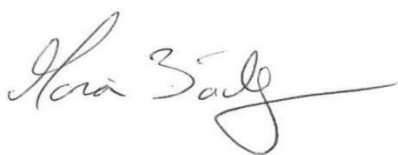
Observations and conclusions of the Joint Committee -

The Committee in its scrutiny of the Bill and pursuant to Standing Orders, agreed to report to the Houses of the Oireachtas that it has undertaken and completed detailed scrutiny of the Bill. The Committee has made the following observations and conclusions:-

- the Committee notes the broad support expressed for the principle of the Bill and notes also that the Bill passed Second Stage reading;
- in view of the passage of time since scrutiny of the Bill was undertaken, the Committee is disappointed that the Minister has not provided legal clarity on the issues which were raised during the scrutiny meeting;
- the Committee recommends that the Bill now progress to Third Stage consideration;
- and in that context, that the sponsor of the Bill take account of the legal analysis on the need to address certain drafting issues arising in the Bill and that any ambiguity with the wording of the Bill be clarified through amendments at Third Stage.

Conclusion –

The Committee concluded that that the Bill proceed to Third Stage consideration and that the proposer of the Bill take account of the observations of the Committee in framing their respective amendments to the Bill, in particular in relation to the need to address certain drafting issues arising in the Bill.



Maria Bailey T.D.
Chair
January 2018

Appendix 1 – Committee Membership

Joint Committee on Housing, Planning & Local Government

Deputies

Committee Membership:

Chairperson: Maria Bailey (Fine Gael)

Deputies

Pat Casey (Fianna Fáil) (Vice Chair)

Ruth Coppinger (Solidarity-PBP)

Barry Cowen (Fianna Fáil)

Mattie McGrath (Rural Independent Group)

Eoin O Broin (Sinn Féin)

Fergus O'Dowd (Fine Gael)

Senators

Victor Boyhan (Independent)

Paudie Coffey (Fine Gael)

Jennifer Murnane O'Connor (Fianna Fáil)

Grace O'Sullivan (Green Party)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil of 16 June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 21 July 2016.
3. Elected Vice Chair on 24 May 2017

Appendix 2 – Terms of Reference of Committee

COMMITTEE ON HOUSING, PLANNING AND LOCAL GOVERNMENT

TERMS OF REFERENCE

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
- (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
- (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
 - (c) Estimates for Public Services, and
 - (d) other matters
- as shall be referred to the Select Committee by the Dáil, and
- (e) Annual Output Statements including performance, efficiency and

effectiveness in the use of public monies, and

(f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

(a) matters of policy and governance for which the Minister is officially responsible,

(b) public affairs administered by the Department,

(c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,

(d) Government policy and governance in respect of bodies under the aegis of the Department,

(e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

(f) the general scheme or draft heads of any Bill,

(g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,

(h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

(i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,

(j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

(k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the

relevant Department or Departments—

- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
 - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
 - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) The Chairman of the Joint Committee appointed pursuant to this Standing Order, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee.
- (7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
 - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (c) at the invitation of the Committee, other Members of the European Parliament.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (4) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.
- (5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

Appendix 3 – Link to Meeting Transcript

Meeting of Thursday 4th May 2017 –

➤ [Meeting Transcript](#)

