

Oireachtas Joint Committee on Housing, Planning, Community and Local Government

An Bille um an gCúigiú Leasú is Tríocha ar an mBunreacht (Uisce faoi Úinéireacht Phoiblí)
(Uimh. 2), 2016

Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016

4th May 2017

Opening Statement by Mr. Seamás O'Tuahail AS

Chairperson, Committee Members,

I would like to thank the Committee for inviting me to appear before it today to discuss the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 and the proposed constitutional amendment contained therein.

1. The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016

The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 proposes *that the following subsection be inserted after subsection 2 of Article 28.4 of the Constitution:*

3° Beidh an Rialtas go léir le chéile freagrach as an gcóras uisce poiblí a chosaint, a bhainistí agus a chothabháil. Cuirfidh an Rialtas in áirithe, ar mhaithe le leas an phobail, gur faoi úinéireacht phoiblí agus faoi bhainistí phoiblí a fhanfaidh an acmhainn sin.

3° The Government shall be collectively responsible for the protection, management and maintenance of the public water system. The Government shall ensure in the public interest that this resource remains in public ownership and management."

The Bill completed second stage in Dáil Éireann without division on 9 November 2016. It is this proposed amendment that is now the subject to scrutiny from this Committee.

2. Recommendations of the Expert Commission on Public Domestic Water Services on Public Ownership

The Expert Commission on Public Domestic Water Services [hereafter known as the Expert Commission] made it clear in its report that it was of the opinion that there is '*considerable merit in the approach of*'...'*making the alienation of Irish Water constitutionally impermissible*' thus providing '*clarity and certainty*' on this issue¹.

The Expert Commission formed the view that further measures to the existing legislative safeguards on public ownership were required to '*alleviate*' the significant concerns in relation to the possibility of privatisation of water services. The Expert Commission also formed the opinion

¹ Expert Commission on Domestic Public Water Services, November 2016, Report on the Funding of Domestic Public Water Services in Ireland, Recommendation 5.1.2 Public Ownership, pg. 31

that once these concerns were adequately addressed there was a far greater likelihood that progress could be made ‘on important issues such as addressing the serious infrastructural deficit’². In light of this the Expert Commission made the following recommendation:

*The Expert Commission recommends that the adoption of a suitable constitutional provision on public ownership of water services be more fully addressed by the Special Oireachtas Committee in its deliberations on this report*³

3. Recommendation of the Joint Committee on the Future Funding of Domestic Water Services

The Joint Committee on the Future Funding of Domestic Water Services was established to consider the Report of the Expert Commission on the Future Funding of Domestic Water Services and report with recommendations to both Houses of the Oireachtas.

The Report of this Committee contains the following recommendation:

*The Joint Committee on the Future Funding of Domestic Water Services (‘the Committee’) supports the concept of a referendum on the issue of water services continuing in public ownership and believes that public ownership should be enshrined in the Constitution as an extra measure of protection against any privatisation*⁴.

The Report sets out the proposed Constitutional amendment contained in the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 in and noted its progress to this Committee for scrutiny⁵.

4. Constitutional Protection for the Public Water System

The existing statutory protections do not give adequate protection in the terms sought by the general public, this has been reflected in the reports of both the Expert Commission and the Committee charged with examining the recommendations of the former. The current protections are only statutory in nature, lacking certainty and clarity and are subject to unilateral change by subsequent governments. This makes the existing protections susceptible to short-term political and fiscal pressures, which may prompt or dictate their removal.

There is no impediment to the proposed amendment under European Union law. This is confirmed by the Letter issued by the European Commission to the Chairman of the Expert Commission⁶.

The Irish Constitution as our fundamental legal document can provide the necessary level of protection sought by the public to ensure water and access to same remains in public ownership, management and maintenance. Thus ensuring the public interest can remain at the heart of decision making.

The Preamble of the Irish Constitution professes that the people gave themselves the Constitution and Article 6 provides that:

² Expert Commission on Domestic Public Water Services, November 2016, Report on the Funding of Domestic Public Water Services in Ireland, Recommendation 5.1.2 Public Ownership, pg. 31

³ Expert Commission on Domestic Public Water Services, November 2016, Report on the Funding of Domestic Public Water Services in Ireland, Recommendation 5.1.4 Public Ownership, pg. 31

⁴ Joint Committee on the Future Funding of Domestic Water Services Report, April 2017, Recommendation 1.1. pg. 5

⁵ Supra, Recommendation 1.2 pg. 5

⁶ Issued on behalf of the Directorate General, Environment, The European Commission, dated 14 November 2016, Appendix 14, Report on the Funding of Domestic Public Water Services in Ireland

'all powers of the government, legislative, executive and judicial derive under God from the people, whose right it is to designate the rulers of the State and, in final appeal to decide all questions of national policy, according to the requirement of the common good'.

This provides for an *'overarching constitutional structure'*⁷ that the people are themselves the final arbiters. The people have made it clear that they wish to decide the issue of public importance and the means of providing for this is by way of Constitutional referendum.

A constitutional amendment is a *'particularly solemn legislative process'* where the people and the Oireachtas take part⁸. It is clear the public wish to take part in such a process to decide policy in the area of water. In the last analysis it is the people themselves who are the guardians of the Constitution⁹.

It should also be noted that in terms of international practice it is not legally unconventional to provide for the protection of certain assets and resources in the public interest, such a concept is often referred to as the Public Trust Doctrine (PTD). PTD is a public law principle which provides *'that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use'*¹⁰. While being recognised as a corner stone of modern environmental law especially within the United States; its dates back to Roman law and English law¹¹. It has been observed that the most significant expansion in recent times of the Doctrine has been in the area of water rights¹².

5. Rationale for Remuneration

The key aim of the proposed amendment is to provide constitutional protection for the public water system by clarifying and 'copper fastening' the Government's ownership on behalf of the Irish people and responsibilities in this regard. By preventing these responsibilities from being re-assigned, devolved or delegated to private interests it is preventative and protective in nature.

It aims to confer certain responsibilities clearly on the government in terms of retaining ownership of the public water system, and ensuring the asset is protected, managed and maintained in the public interest. This can be most clearly and effectively achieved through Article 28 deals with the Executive arm of the State and provides that it is collectively responsible to Dáil Éireann. The powers and responsibilities of central and local government as set out within Article 28.

Article 28 of the Constitution provides that the Government is collectively responsible for the Departments of State. It is also not unprecedented for the Constitution to assign specific responsibilities on the Government; Art 29.4.1o assigns the Government with the responsibility for the external affairs of the State.

⁷ Rossa Phelan, Dr., Can the State Sell the Nation, E. Hobbs, Own Our Oil - The Fight for Irish Economic Freedom, Liberty Press, 2014, 129

⁸ Carroll. J in Roche v Ireland, The High Court, June 17 1983

⁹ Rossa Phelan, Dr., Can the State Sell the Nation, Own Our Oil - The Fight for Irish Economic Freedom, Liberty Press, 2014, 12

¹⁰ Cornell University Law School, Legal Information Institute, Public Trust Doctrine available at https://www.law.cornell.edu/wex/public_trust_doctrine.

¹¹ Sax. J, Professor of Law, University of Michigan. A.B. 1957, Harvard University; J.D. 1959, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, Michigan Law Review, (1970). Pg. 475

¹² Frank, R. Professor of Environmental Practice and Director, California Environmental Law & Policy Center, UC Davis School of Law, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, UC Davis Law Review (2012) citing The California Supreme Court's landmark decision in *National Audubon Society v. Superior Court*, pg. 675

Conferring responsibilities on the Executive is more effective and precise than using a rights-based approach by inserting rights into Article 40.

6. Group Water Schemes (GWS) and Private Wells/Boreholes

6.1 Private Wells

A private well is a well that is privately owned and provides water to a single house and does not provide water to the public through a commercial or social activity¹³. Private wells are also not regulated by the Government under the European Communities (Drinking Water) Regulations 2014¹⁴.

Irish Water has no role to play in abstractions relating to private water supplies. Water charges do not apply to private well owners so long as they are not also connected to a public water supply¹⁵.

Private wells are provided for as part of the planning application process for both domestic and commercial buildings. The question of private supplies or Group Water Schemes generally arises where it is not economically or technically feasible to expand the public network to the area concerned consideration has to be given to the appropriate arrangements for water services and is generally addressed as a condition of planning permission¹⁶.

6.2 Group Water Schemes

A Group Water Scheme (GWS) is defined as:

“A scheme providing a private supply of water to two or more houses by means of a common or shared source of supply and distribution system”¹⁷

Private water schemes exist by virtue of the fact that the public water system was not extended into certain rural areas¹⁸. Supporting local communities to set up their own privately owned schemes was considered to be a much more viable alternative to the extension of the public water scheme¹⁹

The Department of Environment, Community and Local Government has identified that due to rural living patterns with low population density water services in Ireland can be divided into three main categories:

- (a) *Public systems covering the majority of the population;*

¹³ Environmental Protection Agency, 2017, Protecting your Private Well, available at <https://www.epa.ie/water/dw/hhinfo/protprivwell/>

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Department of the Environment, Community and Local Government, 2015, Paper 1- Overview of the Water Sector in Ireland, Submission requested by the Central Statistics Office, pg. 3

¹⁷ Department of the Environment, Community and Local Government, May 2015, *Explanatory Memorandum Subsidy towards the Operational Costs of Group Water Schemes* available at www.housing.gov.ie/sites/default/files/migrated.../Water/FileDownload,42412,en.do

¹⁸ National Federation of Group Water Schemes (NFGWS), *Background to the GWS Sector*, available at <http://www.nfgws.ie/About-the-NFGWS/Background-to-the-GWS-sector>

¹⁹ Ibid

- (b) *Co-operative groups delivering mainly drinking water services in rural areas (Group Water Schemes) largely in areas, where the topography and rural location has historically made provision of public infrastructure unviable; and*
- (c) *Individuals who are remote from public or group systems, reliant on their own wells and single house waste water treatment systems (e.g. septic tanks)²⁰.*

In order to establish a GWS an application to the local authority for permission/approval must be made.

GWS's are distinguishable from the public water system in terms of their ownership. They are required to be a co-operative, a trust or a company but are usually a co-operative as a separate legal entity to members who receive a water supply. The infrastructure, which can include only a distribution systems where a GWS receives water from the public system, or additional treatment facilities where the water is from a private source, are privately owned assets by a distinctly private legal entity with an identifiable membership. The membership agreement between those being supplied and the legal entity is governed by private contract law²¹.

GWSs do receive grant subsidies generally provided through the local authorities. GWS must meet certain requirements to qualify for subsidies including and in particular that it must be:

.....properly constituted (i.e. it must be a trust, co-operative or limited company. Co-operatives and limited companies must be constituted in a way that recognises the Group Water Scheme members as the owners of the group water scheme²²)

GWS can apply for grant aid to establish and upgrade necessary infrastructure including as part of Design, Build and Operate contracts. The provision of such grant aid enables the government to meet its responsibilities in terms of ensuring that water supplies from private water systems are safe for public consumption and environmental protection obligations are achieved. The receipt of grant aid by GWS is subject to written agreements which outline roles, responsibilities and the terms and conditions under which the grant aid is administered.

It should be noted that there is provision under Statute for the State to take in charge Group Water Schemes.

Group Water Schemes can request that Irish Water take over their assets, from which point Irish Water's tariffs structure, as set out by the CER [Commission for Energy Regulation], would apply to the customers of that Scheme³⁵.

In order for a GWS to become part of the public system they have to be taken in charge, which provides for the transfer of ownership. This can be done on voluntary basis under Section 95(1) of the Water Services Act 2007 which provides:

²⁰ Department of the Environment, Community and Local Government, 2015, Paper 1- Overview of the Water Sector in Ireland, Submission requested by the Central Statistics Office, pg. 2

²¹ Supra, pg. 3

²² National Federation of Group Water Schemes (NFGWS) , *Charter of Rights and Responsibilities*, available at [http://www.nfgws.ie/kfmgetfull/fckeditor/File/Charter%20of%20Rights%20\(revised%202010\).pdf](http://www.nfgws.ie/kfmgetfull/fckeditor/File/Charter%20of%20Rights%20(revised%202010).pdf)

A water services authority may by agreement take into public charge or acquire all or part of a waterworks or waste water works, or any rights connected to it, whether or not it is situated in its functional area, where not fewer than two thirds of those persons entitled to dispose of it agree to such transfer.

In the interests of public health a GWS can be taken into charge without consent on a temporary basis under Section 91 of the 2007 Act or on a permanent basis under a compulsory purchase order under Section 96. The determination of compensation is also provided for under Section 96 of the 2007 Act. These provisions recognise the private property rights of Group Water Schemes as protected under Articles 40 and 43 of the Constitution.

7. The State's Regulatory Role as distinct from Public Resource Ownership and Management

It is not uncommon for public and private bodies and even private individuals to be subject to the same regulatory regime, without interference with the nature of the ownership of the bodies or private individuals or their property rights. Being subject of the same regulatory regime does not in of itself make a public body private or a private body public.

Take for example the regulatory regime in Ireland in terms of road safety:

The government has a regulatory role in the public interest to regulate the behavior of vehicle owners who use our roads. This is achieved by the use of speed limits and other safety measures such as the licensing of drivers to ensure they are competent and the safety of vehicles by way of national car testing. These are all regulatory functions and in general apply to all road users. That the State has a regulatory role in terms of how a vehicle is used and whether it is roadworthy does not decide the question of vehicle ownership.

In the *Commission v Ireland* 316/00 – the European Court of Justice found that the Irish State had breached responsibilities as part of its regulatory role in relation to Group Water Schemes (GWSs). It was found that the Irish State was responsible to monitor and regulate water quality of group water schemes in the interests of public health. The case was decided on whether private GWSs constituted '*real distribution networks*' or not. It was found they did, and therefore the Irish State had a responsibility to regulate to ensure sufficient water quality in interests of public health within the parameters of the relevant Directive.

The proposed amendment does not seek to enshrine the full extent of the regulatory responsibilities of the State in relation to water. It does, however, seek to enshrine the key principles and parameters of the State's duty and responsibilities in relation to the public water system. This is permissible under EU Law, as nothing in it undermines or interferes with the full extent of the State's responsibilities provided thereunder.

The State has the key role and responsibility in law in terms of the protection and monitoring of water as a natural resource and public health in relation to both public and private water systems. The extensive work being carried out in this regard by the Government and their department officials is recognised and valued.

The proposed amendment does not deal with the State's relationship with private water systems; this is a matter for the Department, the local authorities, the Environmental Protection Agency and other relevant agencies to deal with in the most appropriate way under existing legal provisions and in consultation with the relevant stakeholders including the Group Water Scheme sector.

8. Conclusion

Private wells/holes and GWSs as private water systems are distinguishable from the public water system. There is no reference to private water systems in the proposed amendment. It is clear that certain assets are owned by owned by Group Water Schemes which are established as either Trusts, Co-operatives or Limited Companies. These privately held assets are clearly definable and are defined by the schemes. It is also clear what is privately owned by individuals as part of their title or interests in land and property.

The legal provisions for the transfer of ownership in order for GWSs to become part of the public system by being taken in charge voluntarily or otherwise recognises that such schemes are not part of the public water system. The privately held assets of GWSs and associated property rights are also protected under Articles 40 and 43 of the Constitution.

The proposed amendment seeks only to clarify and copper-fasten the State's and in particular the Government's role and responsibilities in terms of retaining the public water system in public ownership and flowing from that to ensure it is protected, managed and maintained in the public interest. It does not provide for an ownership and operational role for the State in Group Water Schemes or Private wells/bore holes.