

DÁIL ÉIREANN

MAOINIÚ AR SHEIRBHÍSÍ UISCE TÍ SA TODHCHAÍ: AN COMHCHOISTE UM

JOINT COMMITTEE ON FUTURE FUNDING OF DOMESTIC WATER SERVICES

Dé Céadaoin, 25 Eanáir 2017

Wednesday, 25 January 2017

The Joint Committee met at 1.30 p.m.

MEMBERS PRESENT:

Deputy Colm Brophy,	Senator Paudie Coffey,
Deputy Pat Casey,*	Senator Lorraine Clifford-Lee,
Deputy Shane Cassells,*	Senator Grace O'Sullivan.
Deputy Jim Daly,	
Deputy Alan Farrell,	
Deputy Noel Grealish,	
Deputy Seamus Healy,	
Deputy Martin Heydon,	
Deputy John Lahart,	
Deputy Paul Murphy,	
Deputy Eoin Ó Broin,	
Deputy Jonathan O'Brien,	
Deputy Kate O'Connell,	
Deputy Willie O'Dea,	
Deputy Jan O'Sullivan,	
Deputy Thomas Pringle,	

* In the absence of Deputy Mary Butler and Deputy Barry Cowen, respectively.

SENATOR PÁDRAIG Ó CÉIDIGH IN THE CHAIR.

Business of Joint Committee

Chairman: At the request of the broadcasting and recording services, members are requested to ensure that for the duration of the meeting their mobile phones are turned off completely or switched to aeroplane, safe or flight mode, depending on the device. It is not sufficient to leave them in silent mode as this will maintain the level of interference with the broadcasting system. In accordance with the standard procedures agreed by the Committee on Procedure for paperless committees, all documentation for the meeting has been circulated to members on the document database.

I propose that we go into private session. Is that agreed? Agreed.

The joint committee went into private session at 1.35 p.m. and resumed in public session at 1.40 p.m.

Department of Housing, Planning, Community and Local Government and Mr. Séamas Ó Tuathail, SC

Chairman: By virtue of section 17(2)(l) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to the joint committee. However, if they are directed by it to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person or an entity by name or in such a way as to make him, her or it identifiable. The opening statements submitted to the committee will be published on its website after the meeting.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official, either by name or in such a way as to make him or her identifiable.

At the request of the broadcasting and recording services, witnesses and those in the Gallery are requested to ensure that for the duration of the meeting their mobile phones are turned off completely or switched to aeroplane, safe or flight mode, depending on the device used, and not left in silent mode.

To commence our discussion on public ownership of the public water system, I welcome Mr. Séamas Ó Tuathail, Senior Counsel, and Ms Treasa Brannick O’Cillín. I also welcome Ms Maria Graham, Mr. Colm Lavery and Mr. Stephen Dineen from the Department of Housing, Planning, Community and Local Government.

Anois ba mhaith liom cuireadh a thabhairt don Uasal Ó Tuathail a chur i láthair a dhéanamh. He is very welcome.

Mr. Séamas Ó Tuathail: Tá áthas an cuireadh a fháil ón gcoiste a bheith anseo. Tá trí mhór-cheist le plé againn inniu. Oiriúnacht cosaint bunreachtúil a chur ar fáil i leith sho-láthar uisce. An leor an cosaint atá ann faoi láthair de bun na reachtaíochta reatha? Is é sin na hAchtanna um sheirbhísí uisce ó 2007 go dtí 2014 san áireamh, maidir le hUisce Éireann a

aistriú ó úinéarachta phoiblí-----

Chairman: Gabh mo leithscéal. Níl cuid de na baill in ann an aistriúchán a chloisteáil. Some members cannot hear the translation of this debate. Is that true? Nobody can hear the translation.

Mr. Séamas Ó Tuathail: Go bhfóire Dia orainn. Cad is féidir a dhéanamh faoi sin?

Chairman: An rud a mholfaínn ná, muna mhiste leis an bhfinné, agus ainneoin gur de bhunús na Gaeilge an bheirt againn, an mbeadh an finné sásta é a dhéanamh as Béarla mar nach bhfuil an córas aistriúcháin ag obair, ionas go dtuigfidh chuile dhuine? Ní bheadh chuile dhuine ar an toil chéanna Ghaeilge is a bheadh muide.

Mr. Séamas Ó Tuathail: Is aisteach é, a Chathaoirligh. Déanfaidh mé i mBéarla é, ach faoi agóid. Tharla sé seo cheana féin i gcás eile a raibh an-chaint faoi fadó. Is é sin nuair a tháinig an Coimisinéir Teanga anseo leis an tuairisc bhliantúil a phlé. Tharla an rud ceannann céanna. Dúradh liomsa sular tháinig mé anseo go mbeadh an córas aistriúcháin ar siúl. Táimid ag iarraidh labhairt sa phríomhtheanga oifigiúil. Sa chás eile sin, ní raibh sé ar fáil, agus sa chás seo arís, níl sé ar fáil. Tá ceist an-mhór faoi chúrsaí dáiríreachta ó thaobh dhátheangachais de sna Tithe. Ach, leanfaidh mé ar aghaidh i mBéarla.

Chairman: Go raibh maith agat. Tuigim an pointe atá tú tar éis a dhéanamh.

Deputy Paul Murphy: Can the Chairman fix it so that we can have the translation? People are entitled to present.

Chairman: Absolutely.

Deputy Paul Murphy: I need a translation and we should get one.

Clerk to the Committee: We can send for the minutes because Mr. Ó Tuathail spoke. That is what is supposed to be done.

Deputy Paul Murphy: I know he did but Mr. Ó Tuathail should be able to present in Irish if he so wishes.

Chairman: I agree with the Deputy. I propose that we suspend the meeting to resolve the issue. Is that agreed? Agreed.

The joint committee went into private session at 1.44 p.m. and resumed in public session at 1.50 p.m.

Chairman: I apologise for the delay. For translation purposes, we made people aware that at least some of the presentation would be made as Gaeilge. Technical hitches of this nature are way beyond my competency. However, the issue has been sorted. I invite Ms Maria Graham to make her presentation.

Ms Maria Graham: As the Chairman stated, I am accompanied by Mr. Colm Lavery, principal officer, and Mr. Stephen Dineen, assistant principal officer, from the water division of the Department.

In the context of the committee's consideration of the issue of providing constitutional protection for the public ownership of the public water system, it may be useful if I set out both the current legislative safeguards to prohibit the privatisation of Irish Water and the current sta-

tus of work, from the Department's perspective, on proposals for a constitutional amendment. There are a number of features of the water sector in Ireland that are relevant in this context. The nature of our topography and population dispersal means we have an extensive number of small, mainly surface water sources, rather than single large aquifers which can be the case in other countries. The evolution of water services in rural areas has been largely dependent on private or group water investment. Thus, the public water utility, Irish Water, is not the exclusive provider of water services but provides drinking water to 83% of the population and wastewater services to 64% of the population. Therefore, from a broader perspective, water policy seeks to ensure the appropriate stewardship of all of the nation's water resources and that all citizens have access to quality drinking water across a sector that has multiple stakeholders and varying ownership and delivery structures. That being said, the majority of citizens receive water services from Irish Water, the State's public water utility, and the concerns raised regarding potential privatisation of water services are focused on Irish Water.

A key principle in addressing the fragmentation within the system and bringing delivery and strategic planning into a single water utility was that this would be a public utility, that is, a State body in public ownership. The objective of moving from a system of water services delivery by 34 water services authorities towards a single utility approach was to achieve economies of scale, greater efficiency and more effective long-term strategic planning. This approach is further underpinned by the confidence and supply agreement agreed between the Government and Fianna Fáil in the context of supporting a minority Government, which reflects a commitment to retain Irish Water as a single national water utility in public ownership, responsible for the delivery of water and wastewater services.

In my experience, having worked in this area for a number of years, the strong policy intent has always been to maintain public water services in public ownership. This was already reflected in the Water Services Act 2007 and in transferring functions from local authorities to Irish Water in 2013, the protections in that Act against the alienation of public water assets were carried forward into the new arrangements. Nonetheless, concerns have been raised that the reform process initiated in 2011 could lead to the future privatisation of water services. Recognising these concerns, the previous Government twice legislated on the issue of public ownership of water services to give further protections. The Water Services Act 2013 places a clear prohibition on the shareholders of Irish Water, namely, the Ministers for Housing, Planning, Community and Local Government and Finance as well as the board of Ervia, from alienating their shares in the utility.

Subsequently, in 2014, the Government introduced a further safeguard through the Water Services Act 2014. Arising from this Act, were a situation ever to arise where any privatisation or part-privatisation of Irish Water was to be contemplated through alienation of any share in Irish Water to anyone other than another Minister, this could not occur without three specific actions. First, both Houses of the Oireachtas would have to pass a resolution approving such a proposal. Second, a majority of voters in a plebiscite would have to give their approval to the proposal. Third, the Minister would then have to initiate legislation to privatise Irish Water or alienate any share held by the Government. Existing legislation, therefore, already provides a statutory prohibition on the privatisation of Irish Water and sets out a range of steps that would need to be taken in the event that the statutory prohibition involved was to be removed.

The provisions on the plebiscite reflected in the 2014 legislation were brought forward as an alternative to a constitutional provision in the light of concerns at the time regarding potential unintended consequences of such a provision. They also reflected the fact that the operations

of State structures are usually described in legislation approved by the Oireachtas, rather than in the fundamental legal document of the State. However, in the intervening period, Opposition Deputies published four similar Bills proposing a constitutional amendment to enshrine public ownership of the water system in the Constitution. The Minister for Housing, Planning, Community and Local Government has informed the Dáil that he is open to considering workable proposals that provide the necessary certainty regarding the future public ownership of Irish Water.

On 9 November 2016, the Dáil debated one of these Bills, the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016. The Bill passed Second Stage in the Dáil on 9 November 2016 and has been referred to the Joint Committee on Housing, Planning, Community and Local Government for Committee Stage. While the Government did not oppose the Bill, the Minister indicated that, due to the complexity of issues involved in any potential constitutional protection, he reserves his position to propose a Government amendment to the wording on Committee Stage.

The Minister has stressed the need for the legal and technical issues to be carefully teased out during the pre-legislative scrutiny of the Bill. He and the Department are fully committed to assisting the Joint Committee on Housing, Planning, Community and Local Government in this endeavour. Among the issues to be considered in drafting a constitutional amendment are wording challenges arising owing to the range of categories of infrastructural ownership, achieving balance between principles reflected in the Constitution and the more detailed policy to be reflected in legislation, and addressing the risk of unintended consequences. Issues around the wording of any amendment also arise from the plurality of water infrastructure ownership categories. These include private bore holes, private group water schemes, private group schemes that are sourcing water from the public network and water infrastructure located on privately owned land. There are also issues to be considered around the potential for unintended consequences that could impinge on individuals' rights to private property.

As I indicated, the Bill has been referred to the Joint Committee on Housing, Planning, Community and Local Government. In parallel, the Department is working with the Office of the Attorney General on the issues arising to provide advice to the Minister and Government as the Bill progresses through the Oireachtas and possibly bringing forward amendments to address some of the issues I have outlined. I trust this clarifies the position and I will be pleased to respond to questions.

Chairman: Ba mhaith liom deis a thabhairt don Uasal Ó Tuathail an cur i láthair a dhéanamh as Gaeilge, más féidir. Munar féidir, we may have to go directly into English. An bhféadfadh an tUasal Ó Tuathail tús a chur leis an gcur i láthair? It is not working. I apologise for that problem. We will ask for the presentation as Béarla, le do thoil.

Mr. Séamas Ó Tuathail: I am very disappointed at the outcome so far. My function is to deal with the constitutional amendment which is in the Committee Stage phase. I am here to explain the reasons the amendment is necessary in view of public concern about the possible privatisation of water and to give such detail, as is appropriate, on the placing of the particular amendment to the Constitution in the article in which it is proposed to insert it. This is the article dealing with the Government position on possible privatisation. I will read the amendment into the record, in both languages. The proposed amendment is to the Schedule to the Bill which as pointed out by Ms Graham is awaiting Committee Stage consideration. I note Ms Graham has also said that the Minister may want to bring forward other amendments on Committee Stage, which I appreciate. I am grateful to Ms Graham for alerting us to that possibility. However, any

such proposals could only be a watering down of the existing proposal. The amendment is to be inserted into Article 28 as Article 28.4.3 of the Constitution, which will displace two of the existing Articles. The text of the proposed amendment to the Constitution reads:

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 Right2Water campaign has obtained legal advice, mainly from myself, on the adequacy and correctness of the proposed amendment. As a proposal, I stand over it.

With the permission of the Chairman, I would like to comment briefly on Ms Graham's submission, but in my concluding remarks if that is helpful.

Chairman: That is fine.

Mr. Séamas Ó Tuathail: I am grateful to Ms Graham for her presentation but there are one or two comments I would like to make on it which may be of assistance.

As members of the committee will have already seen my submission to the committee, I do not propose to read it in its entirety into the record, although I stand over it. There are three issues which I would like to address: the appropriateness of providing constitutional protection, which has been a motivating factor in the campaign to include this amendment in the Constitution; the adequacy of the protections currently provided by existing legislation, including the Water Services Act 2013 and the Water Services Act 2014, in regard to the possible disposal of Irish Water, which Ms Graham has addressed, and the risk of unintended consequences of any constitutional protection, including in regard to water supplies owned by individuals and groups. I come from a part of the country where people's water is obtained from wells or a group water scheme. B'fhéidir go bhfuil an Cathaoirleach sa chás céanna sa Spidéal. I am aware that neither private wells nor group water schemes were discussed much during the political campaign which preceded the imposition of Irish Water some years ago.

I will deal first with the importance of access to water, which is covered in paragraph 1 of my submission. Different parts of the world have had experience of water shortage and with privatisation of water. In this regard, I mentioned the recent experiences of the city of Detroit and the State of Michigan. In regard to privatisation, the adequacy of existing protection is provided for in the Water Services Act 2007, the Water Services Act 2013, the Water Services (No. 2) Act 2013 and the Water Services Act 2014. There have been changes to all those Acts, as people familiar with them will know. The Water Services Act 2013 created the vessel to which functions created for water authorities - the local authorities - under the Water Services Act 2007 could transfer. This vessel was established in the form of a company, now a designated purpose company limited by shares under the Companies Act 2014. This new company would be a subsidiary of Bord Gáis Éireann, now Ervia, and would be called Irish Water. It was prescribed that the memorandum and articles of Irish Water would comply with this Act. The legislation also provides the legal basis for Irish Water to install and maintain water meters in dwellings.

The Water Services (No. 2) Act 2013 provides primarily for the transfer of functions and property from the water authorities which were provided for in the 2007 Act to Irish Water under sections 7 and 10, respectively. Provision was also made under that Act that Irish Water would be empowered to charge for water. The Water Services Act 2014 was enacted to provide for the statutory requirement of a plebiscite on any proposal to go before either House of the Oireachtas under which the shareholding of Ervia would be transferred from the Minister for the Environment, Community and Local Government and the Minister for Finance. The Act also provides for a cap on water charges, a grant and, *inter alia*, the establishment of a public forum on water.

I would like now to deal with the statutory prohibition on the alienation of the shareholding in Irish Water derived from the aforementioned Acts. The share capital of Irish Water is valued at €1 million, divided into 50,000 A shares of 0.1 cent each and 50,000 B shares of 0.01 cent each. Section 5 of the 2013 Act provides that the shareholding of Irish Water will be divided among Ervia, the Minister for the Environment, Community and Local Government and the Minister for Finance, with one share with voting rights going to Ervia and the remainder being divided between the two Ministers, with no voting rights. Initially, there was no prohibition on the alienation of the shares only. In other words, Ervia could not alienate its share without the consent of the two Ministers. This was changed by way of amendment of section 46 of the Water Services (No. 2) Act 2013 to provide that neither Ervia nor the two Ministers could alienate their shareholding. Section 2 of the 2014 Act provides that a public plebiscite must be passed in favour of selling the shareholding of Irish Water before a Bill allowing for such could be enacted into law. The constitution of Irish Water - the memorandum and articles of association - under the Companies Act 2014 reflects the statutory prohibition on the alienation of shares and plebiscite requirement, as it must be in keeping with water services legislation. However, and this is the point I want the committee to note, both the requirement of non-alienation of shares - the ministerial shares - and the requirement of a plebiscite can be removed by subsequent amending legislation of the Dáil. This means that statutory protection of the shareholding can be undone by the consent of current or future Governments by way of support for a vote in that regard by the Dáil. Hence, the concern of the Right2Water campaign that the privatisation of what are now public water supplies could proceed at some future time. Of greater concern are the wide powers given to Irish Water under its own memorandum of association in terms of disposing of assets via the transfer of assets under contract to private interests. Also, borrowing against the asset means that the assets can be taken legally in satisfaction of a debt. Only ministerial approval is required for the exercise of some, though not all, of those powers. I will depart slightly from the point to mention that we already have a history in this respect. We have seen the privatisation of Telecom Éireann. We have seen, with European law, the removal of waste services from public councils around the country, and we have seen sky-high bills going out to people for the collection of the bin on the side of the road. This is a real fear. This is what the water campaign wishes to stress.

I agree that existing protections in terms of possible events are wholly inadequate. The only act that is prohibited under statute and in the memorandum of association of Irish Water is the alienation of the share capital, which is only valued at €1 million in total. The requirement of a plebiscite is a statutory requirement. These requirements can be undone by the consent of a Government with a majority in Dáil Éireann using statutory amendments to remove them. This is not to say that we are in any fear of a Dáil vote in that direction, but the possibility is there as an issue of simple legality and laws of the Oireachtas.

I mentioned that previous Governments have sold shareholdings in various former public

sector companies, which have in certain cases resulted in detrimental consequences for the public. I give the example there of the Eircom sale. That sale gave rise to a serious lack of investment in key technological infrastructure, and hindered greatly investment by industry into areas of the country not supported by broadband, but in dire need of job creation. I could add, perhaps, Aer Lingus to that list. I have mentioned Telecom Éireann and the privatisation of bin collection. I will go ahead from that to deal with the appropriateness of constitutional protection, which is one of the main excuses that I have to be here today.

Chairman: Noiméad amháin, le do thoil. If Mr. Ó Tuathail could tighten it up as much as he can, because I want to give people an opportunity to ask questions.

Mr. Séamas Ó Tuathail: Táim ag iarraidh é sin a dhéanamh.

Chairman: Tuigim é sin.

Mr. Séamas Ó Tuathail: Tá mé tar éis dhá leathanach a fhágáil ar lár.

Chairman: Tuigim é sin ach tá fadhb ama agam agus tá mé ag iarraidh deis a thabhairt do chuile dhuine.

Mr. Séamas Ó Tuathail: I will jump to the conclusion, which is the appropriateness of constitutional protection. I say that the Constitution is the appropriate mechanism to ensure that provision of water is protected from privatisation into the future. It is clear that it is for the people, who are sovereign under the Constitution, to decide whether they wish to amend their Constitution in this manner, on a critical matter of public policy, which is of grave public concern.

I would like to say a few words on the issue of private wells and group water schemes. Private wells and group water schemes are clearly distinguishable from the public water system. If group water schemes were part of the public water system, there would be no need for a provision for the transfer of ownership, in order for them to become part of the public system, by being taken in charge, voluntarily or otherwise. Their privately held assets and associated rights are also protected under Articles 40 and 43 of the Constitution, dealing with property rights, and the same principles apply to private water infrastructure in dwellings and commercial buildings as they are equally privately owned.

Finally, I will come back to Ms Graham's point as I read and heard it. I have the highest regard for Ms Graham's contribution. She has said that the nature of our topography and population dispersal means that we have an extensive number of small, mainly surface water sources, rather than single large aquifers, which can be the case in other countries. The Geological Survey of Ireland is a State body. I can recall some years ago being told that there is a huge aquifer on the border between Dublin and Kildare which could supply Dublin's industrial and domestic needs for 30 years. That is my own sense and experience of this matter. The aquifers and that position should be examined and the Irish Geological Survey should readily and probably have already published that information.

Ms Graham is pointing out in terms of privatisation that both Houses of the Oireachtas would have to pass a resolution approving such a proposal. I agree with Ms Graham on that, but again point to the concerns of people who are worried about their domestic water supply being taken into private ownership. A majority of voters in a plebiscite would have to give their approval to the proposal. The Minister would then have to initiate legislation to privatise Irish Water or alienate any share held by the Government. I do not entirely agree with that, given the

structure that exists at the minute, but the way to deal with that fear is to support the constitutional amendment proposed by Deputy Joan Collins.

Finally, Ms Graham has quite honestly pointed out that the Minister reserves his position to propose a Government amendment to the wording on Committee Stage. That threat is there. I should perhaps not call it a threat, but that possibility is there. It would not be mentioned by Ms Graham if there was not some reality to it. Finally, issues around the wording of an amendment also arise with water infrastructure ownership categories. These include private boreholes, private group water schemes, private group schemes that are sourcing water from the public network and water infrastructure located on privately owned land. None of those four categories, in my submission, would be affected by the proposed amendment to the Constitution. That amendment - and I will use a phrase borrowed from the recent swearing in of the newly elected American President - is aimed at preserving, protecting and defending the public right to water, as heretofore we have enjoyed it. Má tá ceist ar bith, a Chathaoirleach-----

Chairman: Go raibh míle maith agat. I very much appreciate Ms Graham and an tUasal Ó Tuathail's contribution. Thank you very much. I have a list of 14 Deputies and principals who want to ask questions, so please be as quick and as tight as possible. More important, be to the point. If an answer can be given in 30 seconds, the one giving it is an A-student. I would really appreciate it. I want to keep it tight because I want to give everybody a fair crack of the whip. I call Deputy Farrell.

Deputy Alan Farrell: I thank the Chairman, and I thank our guests for coming in and making their presentations. I too am disappointed that Mr. Ó Tuathail is not able to deliver his contribution in Irish, but such is the technical nature of this room, with the equipment that is in it. I appreciate the commentary that he and Ms Graham provided. I want to make one point which has been made already, but I believe that it should be given an airing, and that is that the committee is currently engaged in replication of another committee's work and I would imagine that the witnesses here will be invited before that committee as well. It is a replication of all of our work and I want to make that point from the start. I appreciate the legal opinion expressed, particularly given that it has come from someone with such extensive experience as Mr. Ó Tuathail. The wording of the Bill presented by Deputy Joan Collins appears to be very straightforward. However, one must always bear in mind the unintended consequence of good intentions in terms of what has occurred in the past, particularly regarding other amendments to the Constitution. Our legal guest has rightly pointed out two clear and obvious issues regarding the existing legislative protections for the protection of ownership of water infrastructure. The first is that in the event of this country becoming bankrupt at a given point in the future with off-balance sheet lending versus Irish Water, as he rightly pointed out, there would have to be an asset transfer in order to repay the debt. I fully accept that point, which is fairly obvious to everybody concerned. The second concerns the whim of a Government, but it has been expressed by every political party and none that there is no desire to privatise the utility of Irish Water or the assets of that utility because they are in the ownership of the State. The Minister has reserved the right to amend and that is appropriate. Does Mr. Ó Tuathail agree that if some unintended consequence is discovered in the course of this process, particularly when it goes to the Attorney General's office at some point in the future, this provision is important? Does he accept that a constitutional issue could arise as a result of the deliberations that take place in the Houses of the Oireachtas and the Department?

Mr. Séamas Ó Tuathail: The Deputy said that it is a straightforward amendment in respect of the issue it is intended to carry home. I will not go into any other controversies but unin-

tended consequences can be dealt with through subsequent referenda. Here we have a public that has been battered by the bank crisis and various privatisations that have gone wrong for them in many respects. The public is simply asking for the reassurance of being allowed to vote on the matter. The referendum must be carried under Article 47 if it is to be successful. We are not dealing with the whim of a future Government. We are dealing with the worries of the current population.

Deputy Alan Farrell: That is not really my question. My question related to the prospect of an unintended consequence arising. In Mr. Ó Tuathail's legal opinion, is it not appropriate that the Minister would reserve the right to amend a proposed amendment to the Constitution before it is put to the people?

Mr. Séamas Ó Tuathail: If the Minister has a problem regarding an unintended consequence, presumably he will come in and explain it to the Dáil and the people who want this referendum to be put to the public. I cannot answer *in vacuo*. If the Minister comes forward with some realistic difficulty, I agree that it must be debated and can be dealt with. That would be a matter for the Dáil.

Deputy Alan Farrell: My question arises from a comment Mr. Ó Tuathail made in respect of the inclusion of the statement in the Minister's position paper on this matter. I want to make sure that this is known.

Chairman: I apologise for interrupting but does Ms Graham wish to come in?

Ms Maria Graham: The Minister was being helpful and recognised the sincerity of the intention behind the amendment when he spoke in the Dáil about the need for legislative scrutiny to test the wording against unintended consequences. It would be appropriate to do this on Committee Stage of any legislation. We have had experience in the transfer of assets and sometimes it is not as clear as it might seem on the face of it in terms of what is the public water system and what is not. This is a matter for debate. Obviously, there are other groups such as the National Federation of Group Water Schemes that would also have a view on that aspect.

I draw members' attention to section 31(12)(a) of the 2007 Act which basically states that a water services authority shall not enter into any agreement or arrangement with another person for the provision of water services which involves the transfer of the assets or infrastructure. That was the protection I spoke about. I know the later ones tend to refer to shares but this is the one that concerns the protection of the assets. I just wanted to clarify that point.

Chairman: I thank Ms Graham for clarifying that.

Deputy Alan Farrell: I thank Ms Graham for that response. The only other question I have concerns the potential for impact on private schemes or private water supplies. One of the nuggets of information derived from Irish Water, the Department and others has been that there are a number of privately owned water supply systems that are sourced from the public supply. As far as I am aware, they are part of group schemes they are paying into, but I am not aware of there being any payments to the State. From a legal perspective, in terms of the continued supply, is it possible for the State to continue to supply water to a private scheme that, as far as I am aware, is not paying for its water other than for the provision of the pipes it has put in because the source is from the State but the scheme is private?

Ms Maria Graham: The Deputy is correct. There are two types of schemes - those with their own private source and their own private network and those which purchase the public

water from the public utility, having previously done so from the local authority and then owned the network. They would also receive capital funding and subsidy from the State but at a lesser level which reflects the fact that they have a different cost structure. There are provisions for the takeover of such schemes but as this reform has gone on, and we are looking at the rural water sector, some of these would have fallen into abeyance. What we have found is that some schemes that were group water schemes no longer have committees. The landscape is complicated.

Deputy Willie O’Dea: I note that during his submission, Mr. Ó Tuathail referred to the fears of Right2Water that Irish Water would be privatised. Those fears are not exclusive to Right2Water. I think everybody around this table from all parties and none all agree that Irish Water should be kept in public ownership. Fianna Fáil certainly agrees that this should be the case, which is why we were prepared to support Deputy Joan Collins’s Bill with the amendment that has been read out. We would have supported it had it been opposed. It is also reflected in the supply and confidence agreement.

I want to clarify one or two points. I agree that legislation can be changed by any future Government so legislative protection is not the level of protection we envisage for Irish Water. A constitutional amendment is appropriate and is the right direction to go. Ms Graham referred to the alienation of assets, which the 2007 Act prevented. My understanding of some of the information I read - perhaps I did not read it slowly enough or did not give enough time to it - is that this Act was overruled by the later legislation which does not prevent the alienation of assets. If that is the case, the legislative protection is a joke because all that is prevented is the alienation of shares - about €100 million - whereas the valuable assets can be freely transferred. Irish Water was set up in certain way with the intention that it would be able to pass the EURO-STAT test and be able to borrow off balance sheet so that the borrowings of Irish Water would not be reflected in the State’s debts. It has failed the EUROSTAT test and, in my opinion, there is no possibility in the foreseeable future that it will pass it. Would it not be a better solution to remove Irish Water from the status of semi-State company and turn it into some sort of agency of the State? That would obviate the need for a constitutional referendum and all of the unintended consequences that might ensue therefrom. If we pass a constitutional referendum along the lines Mr. Ó Tuathail outlined, will that in any way prevent Irish Water entering into public private partnership arrangements or hiring private contractors to do some of its work?

Mr. Séamas Ó Tuathail: Ms Graham will take the first question and then we will move on.

Ms Maria Graham: I thank Deputy O’Dea. The provisions of the 2007 Act were carried forward. As such, the functions of water services authorities, which had been local authorities, became the functions of Irish Water under the No. 2 Act of 2013. The provision on the protection of assets remains in place except that one reads “Irish Water” instead of “local authority” into the legislation. The ownership structure and funding model for Irish Water are two different issues. It is a State company. It was set up to be a wholly-owned State company and there are many examples of State companies getting State funding notwithstanding their establishment as companies. As such, that issue is not related to how it was to be funded. It is set up as a company but that establishment is under statute. All of the protections under statute are associated with its accountability to the Oireachtas and the Minister and it is covered by the code of practice applying to all State bodies irrespective of their statutory form. That is the point I make in response to the question. Obviously, Irish Water is accountable to the State for any State funding it gets in whatever form it takes and whichever Minister is accountable for it.

Mr. Séamas Ó Tuathail: I may have dealt with the query raised by Deputy O’Dea at para-

graph 2.3 of my submission but I will go through it very briefly. I am not disagreeing totally with Ms Graham in this matter either. The powers which had been provided under statute for the water authorities under section 31 of the 2007 Act would not seem to have been transferred and were deleted. Section 7(2) of the Water Services (No. 2) Act 2013 provides that references to a water services authority under the 2007 Act in so far as they relate to functions transferred under the No. 2 Act would be construed as references to Irish Water. I concluded from that that references to a water services authority in section 31 of the 2007 Act remain as references to local authorities.

Chairman: I thank Mr. Ó Tuathail for the clarification. That was helpful. Next up is Deputy Pringle and then Senator Coffey.

Deputy Thomas Pringle: Private group water schemes are constituted either through trusts, co-operatives or companies. Can the Department say whether they own their infrastructure when they are set up in that way? Does that infrastructure then amount to private assets?

Ms Maria Graham: Yes. They are usually set up as co-operatives owned by the members and they are private. If they want to become part of the public water system, there is a process in place under the Water Services Act which provides for a vote of the members in respect of a takeover.

Deputy Thomas Pringle: Is it the view of the Department that the public water system is a public asset in the pure sense of the phrase because of the importance of providing water to the public?

Ms Maria Graham: Yes.

Deputy Thomas Pringle: Is the Department aware of any other legal means, other than the Constitution, which could prohibit sale or transfer to or the operation of the public water system by a private interest where the protection could not unilaterally be removed by the Government?

Ms Maria Graham: The choice is between a constitutional protection and legislation. We have sought in all of the legislation to make that as watertight, to use that phrase, as possible in terms of prohibiting the privatisation of Irish Water. Any documents in place, including as Mr. Ó Tuathail has mentioned, the memorandum and articles of association, are subsidiary documents to the Acts of the Oireachtas which have a primary role at the moment. There is nothing in the water framework directive from a European perspective, for example, that would impact on that in terms of ownership either.

Deputy Thomas Pringle: As such, there is no option other than a constitutional amendment to prevent a unilateral action by the Government in disposing of the assets.

Ms Maria Graham: Not that I can think of, no.

Deputy Thomas Pringle: No bother, that is dead on.

Senator Paudie Coffey: I will be brief as some of the areas I wanted to ask about have already been covered. I reiterate the point I heard from Deputy O’Dea that I am not aware of any political party or Independent, elected or otherwise, that is in favour of the privatisation of Irish Water or its resources. It is important to record that. I look forward to debating Deputy Collins’s Bill. Many colleagues here are members of the Joint Committee on Housing, Planning and Local Government and I urge this committee to provide that one with a remit to do the

heavy lifting and technical analysis on the Bill before reporting back here. It could be helpful to this committee in its work. I ask for permission on that.

With regard to the contribution of Mr. Ó Tuathail, it seemed to me that a lot of it was based on fear, concern and lack of trust and he even mentioned the word “threat” as well. That is fair enough from his perspective, but it is important to state the following. Mr. Ó Tuathail mentioned the sale of a lot of semi-States including Telecom Éireann and others where lessons have been learned. The previous Government did not sell ESB Networks, which may be the most profitable semi-State in the country, during Ireland’s worst economic crisis. If it did not sell that then, there was clearly no privatisation agenda. I ask Mr. Ó Tuathail if his fears are really that legitimate given the experience of the previous Government.

While the legislation introducing the triple lock mechanism to protect the public ownership of Irish Water went far enough as far as I am concerned, it is obvious that others do not agree. I ask Mr. Ó Tuathail for further information and views on that. The triple lock mechanism requires any change in respect of shares in water resources to be approved by both Houses of the Oireachtas, a majority plebiscite of the people require legislation. To me that seems strong but obviously it is not strong enough for Mr. Ó Tuathail and the Right2Water network. I would like to hear an expansion of his view in that regard.

I agree with Deputy Alan Farrell. Irrespective of how qualified he or she may be, no one legislates perfectly. That is why we have an Oireachtas to analyse and scrutinise legislation. While I understand Mr. Ó Tuathail’s cynicism towards the Minister where he said that he might water down the legislation Deputy Collins has brought forward, I ask him whether he recognises that any Minister of the day reserves the right to amend legislation to ensure first and foremost that it is constitutional and that Ministers must take advice from the Office of the Attorney General. He might clarify his position on that. It is a function of all Deputies and Senators as legislators and policy makers to scrutinise legislation to ensure as far as possible that it is constitutional. No matter how perfect we feel we are, none of us can claim at all times that our legislation is perfect.

Mr. Séamas Ó Tuathail: The answer to that in part is that of course the Oireachtas and legislation have their functions under the Constitution, but when the people in the Dáil look up, they see the sovereign people. It is the people who have given the Constitution to themselves. There is widespread concern about the possible privatisation of water. Then the question is, and I do not know the answer, why not test that concern by holding a referendum and seeing whether a simple majority are in favour of that view, or for any other view, under Article 47. Unfortunately, in terms of the language used about fear, concern and even possible threats, anybody living in Ireland has seen the marches and campaigns by people worried about the cost of this measure, and they are dealing with other costs coming down the track from the recent past.

Senator Paudie Coffey: I want to focus on the protections of existing legislation. Yes, fear exists but it may not always be legitimate. It may be stoked up. I recognise that there may be an element of scaremongering. It is fair where people have a genuine fear. The work of this committee is to get to the facts of the matter. We want to see what legislation protects and reassures people with these fears. That is what I am trying to get at, Mr. Ó Tuathail.

Mr. Séamas Ó Tuathail: Yes. There is a consensus that the Constitution overbears statutory requirements and that statutory requirements in the various Acts can be altered in the Dáil. Therefore, the general public possibly have a right, certainly in a constitutional referendum campaign, to make the decision. The people who are for or against the privatisation of water

services do not make the decision. The general public do so when they vote in a referendum. That is the purpose of the amendment tabled by Deputy Joan Collins.

Senator Paudie Coffey: I thank Mr. Ó Tuathail for his answers. Given what he has said, does he not recognise that a majority in a plebiscite of the people would be required, under present legislation, to denude ourselves of shares in public water sources? Is it not enough to have a plebiscite of the Irish people where they would have their say and vote?

Mr. Séamas Ó Tuathail: Yes.

Senator Paudie Coffey: Does he not recognise the mandate of an elected Dáil or future Dáil? Does he not recognise that Deputies are elected by the people to legislate on their behalf?

Mr. Séamas Ó Tuathail: Without being severely alarmist about this matter, the majority of voters in a plebiscite is a matter laid down by statute law. That right can be removed as well and, therefore, there is no obstacle to privatisation. The far more superior plebiscite is a referendum.

Senator Paudie Coffey: What about the mandate of the Dáil?

Mr. Séamas Ó Tuathail: The Dáil, the courts and the Executive are the three bodies that operate in the Constitution. If there is a majority in the Dáil to carry a vote for a referendum then so be it and if there is not then so be it. The plebiscite, in the sense that I have heard it mentioned by the Department present, is a moveable obstacle, if it is an obstacle.

Deputy Paul Murphy: For those who say they do not know anyone who favours the privatisation of water services and that all of the political parties are against it, I ask them to consider which political parties favoured a cut in the minimum wage in advance of the 2007 general election, the privatisation of Coillte and bringing in the IMF, etc. Those things have changed and, therefore, if people want protection then they must put it beyond politics and into the Constitution.

Deputy Farrell was correct when he identified the two potential mechanisms for privatisation. Whether one agrees, disagrees or wonders if it is possible, identifying them is useful. The first mechanism is to sell the share capital of Irish Water as an entity. The second mechanism is to prevent the assets underneath the share capital being transferred or borrowed against and leading to Irish Water ending up as a shell company. We need to establish here that there is inadequate protection, as things currently stand, for either of those vehicles of privatisation.

My questions are for Ms Graham. She said: “The Water Services Act 2013 places a clear prohibition on the shareholders of Irish Water from alienating their shares in the utility.” Can a simple majority in the Dáil remove the prohibition by amending the legislation?

Ms Maria Graham: Does the Deputy mean the legislation that was set out around the plebiscite accepted in 2014?

Deputy Paul Murphy: No. I mean 2013, as opposed to 2014, which says the shareholders cannot alienate their shared utility.

Ms Maria Graham: Obviously it was amended once to strengthen it. The Oireachtas has the right to change legislation.

Deputy Paul Murphy: Can the prohibition be removed by simply having a majority in the

Dáil?

Ms Maria Graham: It is a fact that legislation can be changed. The whole approach of underpinning reflected what members have said, that the general view was that the people wanted protection.

Deputy Paul Murphy: Can I have a “Yes” or “No” answer? Is it the case that a simple majority in the Dáil can amend the prohibition?

Ms Maria Graham: Legislation can be changed.

Deputy Paul Murphy: Can I get a “Yes” or “No” answer, please?

Ms Maria Graham: Sorry, Deputy. Yes.

Deputy Paul Murphy: I thank Ms Graham. My next question is on the next protection that provides a further safeguard and was introduced in 2014. First, the legislation says the Houses of the Oireachtas must pass a resolution. Second, it refers to the majority of members in a plebiscite. Third, the Minister would have to initiate legislation. Is it the case that the requirement for a plebiscite can be removed by a simply having a majority in the Dáil through amending legislation?

Ms Maria Graham: Amending legislation can change any legislation.

Deputy Paul Murphy: So that can simply be removed. I thank Ms Graham. What is the value of the share capital in Irish Water?

Ms Maria Graham: I ask the Deputy to bear with me as I look for the information. Mr. Ó Tuathail identified it when he read the memorandum and articles-----

Deputy Paul Murphy: Is the share capital worth €1 million?

Chairman: That is correct.

Ms Maria Graham: The share capital is unrelated to the value of the underlying assets. It is just a split between the value of the company between the two Ministers.

Deputy Paul Murphy: Yes. The share capital is worth €1 million. Are the underlying assets worth many multiples of that sum?

Ms Maria Graham: Yes.

Deputy Paul Murphy: Is that the case at the moment?

Ms Maria Graham: Yes. According to the 2015 accounts the share capital is worth €1 million. The assets from local authorities did not transfer at their historical cost. The asset values that are reflected in Irish Water are outside the assets that it has built.

Deputy Paul Murphy: Yes. Are they worth many multiples of €1 million?

Ms Maria Graham: Yes.

Chairman: That is fair to say.

Ms Maria Graham: Yes.

Deputy Paul Murphy: Can Ms Graham confirm the value of the share capital owned by Ervia? As far as I know, it is worth 1 cent.

Ms Maria Graham: I shall outline the way Ervia was established. Ervia has voting rights but not a right in terms of the economic value of the shares. The shareholder expectation is that there will be no dividends but if there were they would be reinvested. They would not go to Ervia but to the two Ministers.

Deputy Paul Murphy: Yes.

Ms Maria Graham: The construct that was in place reflected the fact that at the time Bord Gáis set up Irish Water there was an employee shareholder trust. Bord Gáis was 97% State-owned and the employees owned 3%. The share structure has been set up to ensure that Irish Water was 100% owned. It looks somewhat unusual but that is the reason.

Deputy Paul Murphy: I have a final question and perhaps other members can follow up this matter. The Department has claimed that it is not possible for Irish Water, as things currently stand, to dispose of assets, transfer them or borrow against them in such a way that the assets held by Irish Water would be reduced. Is that correct?

Ms Maria Graham: Yes. Irish Water is not permitted to enter into an arrangement for the provision of water services that would involve the transfer of assets.

Deputy Paul Murphy: That seems contrary to the memorandum and constitution of Irish Water.

Ms Maria Graham: I refer the Deputy to the first part of the memorandum. Article 2(a) refers to the plebiscite and State ownership. There are also a number of provisions on disposal, which are standard provisions in memorandums and articles of association. When I mentioned things like our topography and our having lots of small schemes, there is a process over a number of years of doing regionalised schemes so there may be assets that become disused, which we would dispose of over time.

Deputy Paul Murphy: I will let others take it up but it is -----

Ms Maria Graham: If one has an active asset, however, one cannot transfer that to another entity.

Deputy Paul Murphy: It seems to me that there are multiple articles within the constitution of Irish Water that enable it to transfer, with ministerial permission but I will leave it there for the moment.

Chairman: I thank the Deputy for his contribution.

Ms Maria Graham: Sorry, the relevant section is 31. I may have said section 35 earlier. Section 31 of the 2007 Act refers to the assets.

Chairman: Senator Grace O'Sullivan is next.

Senator Grace O'Sullivan: I have a far easier question for Ms Graham. As Mr. Ó Tuathail said, there is still genuine public concern about Irish Water. I believe a referendum would be appropriate to deal with the question of Irish Water and to engage with the concerns of the public. In terms of a timeline, what would be involved? How would that process take place and

how long would it take?

Ms Maria Graham: My understanding is that Committee Stage of the Bill is before the other relevant Oireachtas committee so the timing would be a matter for that committee. From the Department's perspective, we are engaging with the Office of the Attorney General in an effort to tease out the wording and deal with some of the issues to which we referred earlier, like how we define the public water system, for example. We are working with the Attorney General's office on those kinds of issues in preparation for the beginning of scrutiny by the other Oireachtas committee. I am afraid I am not privy to what the timeline might be.

Chairman: Ms Graham is referring to the Committee on Housing, Planning, Community and Local Government. That committee has been referred to by a number of members of this committee already in the context of its processes and work programme. Deputy Eoin Ó Broin referred to it at our last meeting also. We do not have an exact timeframe on that but that committee is in charge of that issue. That is its brief, as things stand, unless we want to make a recommendation.

Is Senator O'Sullivan finished?

Senator Grace O'Sullivan: Yes.

Chairman: Thanks. Deputy Eoin Ó Broin is next.

Deputy Eoin Ó Broin: First, we must remember that the single largest issue raised in submissions to the expert group on the future funding of water was that of public ownership. Even though ownership was not part of the group's original terms of reference it has made a recommendation for us to consider. It is in that context that we are having this discussion. I agree with Deputy Alan Farrell and Senator Paudie Coffey that our job is not to get into the detail of the legislation but to deal with the principle of whether there should be constitutional protection. That is what we have been asked to consider.

It is also important to remember that significant parts of the public water service delivery system have already been privatised. We already have a very significant number of design-build and design-build-operate treatment plants and the Government is tied into those contracts, at a cost, for periods of between 15 and 25 years. That is an important part of our deliberations.

I had expected more from Ms Graham's presentation about the basis upon which the Department believes there are wording challenges or unintended consequences. That is not in her submission. Is it the Government's view that private bore holes, private group water schemes or privately owned land on which public water infrastructure sits is part of the public water system or could be considered thus and if so, what is the legal basis of its concern, whether in Irish or European law? That is my first question for Ms Graham.

Ms Maria Graham: The concern is around those things that we would consider primarily private. We must ensure that the group water scheme sector, for example, in the context of a constitutional provision, could continue to act in the same way as it has done heretofore. The same concern arises with regard to people with private wells continuing to act as before. This is part of the teasing out work that we are doing with the Office of the Attorney General. What do we mean by the public water system? If one puts words in the Constitution, unlike legislation, there must be absolute clarity and that is where the potential for unintended consequences comes into play. Most contributors here have referred to the desire to have the public water system in public ownership but in practical terms, what does that mean? The day-to-day operation

of the water system means that there are way leaves for pipes through private land, for example. It is those kinds of issues that -----

Deputy Eoin Ó Broin: I understand but wayleave and ownership are two separate things.

Ms Maria Graham: Absolutely ---

Deputy Eoin Ó Broin: Wayleave is a right to access. Under law, there are public assets, that is, things that the public owns and there are private assets, that is, things that private property holders own. In the Department's deliberations to date, is there anything in Irish or European law that suggests that this is confused and that we do not already have clear legal definitions of what is public and private? If that is the case, I ask Ms Graham to share it with us.

Ms Maria Graham: In terms of European Law, I do not believe there is anything because the European Commission has said that the ownership and delivery of water infrastructure and services is a matter for the individual member states. In terms of Irish law, one of the concerns relates to practical issues. Irish Water is responsible, statutorily, for the delivery of public water services and through service level agreements with local authorities is operating the system and controlling the assets. There is a process under way of transferring those assets and when we went into the detail of doing that, it was not as straightforward as we had thought in terms of ownership. That is at another level, as the Deputy will appreciate, in terms of what is on folios and so forth. If, for example, a local authority had built a wastewater treatment plant, it may have, as part of its engagement with the community, made land available for football pitches or allotments. A process had to be put in place to answer the question of what is the public asset and what is the local authority asset. It is in the detail -----

Deputy Eoin Ó Broin: Yes, but that is more to do with the registration of the assets rather than the legal definition.

Ms Maria Graham: Yes but if one is testing, through a process - as I imagine the other committee is doing - a wording, one must determine what that wording will mean for the day-to-day operation. The concern is not at the level of a theoretical split between public and private but at the level of unintended consequences for the day-to-day operations.

Deputy Eoin Ó Broin: My second set of questions is for both presenters and goes back to the issue of privatisation. The 2014 Act makes it very clear that privatisation in the context of those additional protections is to do with the sale of shares but of course, as other members have said, privatisation is also to do with the sale of assets. It could also relate to extraction rights or the privatisation of the public delivery of the service. I am a little confused and I ask the witnesses to clarify an issue related to the restrictions on the sale of assets contained in section 31 of the 2007 Act. Do all of the restrictions in the 2007 Act now apply to Irish Water? If not, which ones do not? I also ask them to clarify whether those restrictions would require, for example, ministerial approval for assets to be sold rather than the additional requirements in what a member referred to as the "triple lock" contained in the 2014 Act? I further ask the witnesses to confirm that clauses four and seven of the constitution of Irish Water give widespread powers to Irish Water, with ministerial approval, to dispose of assets. It is really important for people to know the answers to those questions. While the stronger legislative protection of the 2014 Act obviously covers the sale of shares, it provides a much weaker level of legislative protection for the sale of assets. If that is correct, would it not be possible for Irish Water, with ministerial approval, to sell off very substantial portions of its assets, thus reducing Irish Water to a shell or a holding company? In that context, the sale of its shares would be immaterial because the

bulk of its assets and work would effectively have been privatised.

My last question requires a “Yes” or “No” answer from both witnesses. I ask them to tell the committee, on the record, whether they believe constitutional protection of the public water system would be stronger than legislative protection.

Ms Maria Graham: The provisions of section 31 (12) (a) of the Water Services Act 2007, in the consolidated version thereof which reflects what was repealed in 2013, remain in place in terms of the protection of assets.

Deputy Eoin Ó Broin: For the benefit of the committee, I ask Ms Graham to explain what those restrictions are -----

Ms Maria Graham: Those restrictions are not subject to ministerial consent. The Act says:

Notwithstanding any provision of this or any other enactment, a water services authority [which is now Irish Water] shall not enter into any agreement or arrangement with another person...for the provision of water services jointly with or on behalf of the authority which—

(i) involves or may involve the transfer of the water service’s assets or infrastructure, or any part of such assets or infrastructure, to that person

That protection for assets remains in place.

Deputy Eoin Ó Broin: The constitution of Irish Water suggests the organisation has the ability to transfer assets with ministerial approval. How does that tie in with section 31(12)(a) of the 2007 Act?

Ms Maria Graham: The memoranda and articles of association can only be read in the context of the statute which has a higher power. The only assets Irish Water could dispose of with the consent of the Minister were assets that were no longer required for water services provision.

Chairman: I am conscious of the time. While we may have a difficulty in having everyone contribute, I will allow this discussion to continue because Deputy Eoin Ó Broin’s questions are important and relevant. I hope that is agreed.

Deputy Eoin Ó Broin: I asked a question about the alternative legal view and another question to which I sought a “Yes” or “No” answer.

Mr. Séamas Ó Tuathail: On the Deputy’s third question to which he sought a “Yes or “No” answer, my answer is “Yes” if that pleases him, but it is also that effectually. On the other part of the question, I refer to the written text inserted in the other official language. The powers which had been provided under statute for the water authorities under section 31 of the 2007 Act do not seem to have been transferred and many were deleted. Section 7(2) of the Water Services (No. 2) Act 2013 provides that references to a water services authority under the 2007 Act in so far as they related to functions transferred under the Act will be construed as references to Irish Water. Therefore, references to a water services authority in section 31 of the 2007 Act still remain as references to local authorities. I appreciate-----

Deputy Eoin Ó Broin: Does that mean that Mr. Ó Tuathail is disputing Ms Graham’s interpretation of the Act?

Mr. Séamas Ó Tuathail: Yes, in effect. We differ-----

Deputy Eoin Ó Broin: Does that mean that Mr. Ó Tuathail's interpretation of the legislation is that Irish Water could sell off assets with the approval of the Minister.

Mr. Séamas Ó Tuathail: I think so, yes. I do not want to upset my friend here, but that is my view. One must also remember that in common law water and air are incapable of ownership. This is reflected in the title deeds of the Duke of Devonshire for the Munster Blackwater. After the Battle of Kinsale, he was granted by Elizabeth I the bed and soil of the river and the fish that flowed therein. What was missing, of course, was the water because in common law water was incapable of ownership - air likewise.

I will quickly read Article 10 of the Constitution:

All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.

Anybody who has ever looked at a land folio in Ireland has seen the reservation that while A or B becomes the owner in fee simple of the land, the air, minerals and underlying assets belong to the State. That is reflected in the article. What we are talking about in essence is raw water which is fluoridated and piped and, therefore, converted into potable domestic water. However, in reality the State already has some jurisdiction over water, even though it is not capable of ownership in common law. However, the Constitution includes air and all forms of potential energy and natural resources which would include water.

Chairman: Article 10 of the Constitution is very helpful.

Deputy Jim Daly: To take up the issue raised by Deputy Eoin Ó Broin, it is an indisputable fact that constitutional protection is stronger than legislative protection. I do not know anyone who has posited a case to the contrary.

I thank Mr. Ó Tuathail for his presentation. Tá brón orm mar gheall ar na deacrachtaí a bhain leis an aistriúchán. One of Mr. Ó Tuathail's statements brings us to the nub of the issue. Nobody is arguing that we are in favour of privatisation. What we are wondering is whether a referendum is necessary. We must be clear that this is the focus of the debate. Mr. Ó Tuathail has stated privatisation of water provision "poses a serious threat to access and quality." This explains the reason so many submissions were made on this issue. While I accept that people fear privatisation, in my humble opinion statements such as this generated this fear which has been blown up and made more real than is necessary. The opposite of this statement is that the public ownership of water protects access and quality, which is not the case. Thousands of my constituents do not have access to water and its public ownership does not guarantee supply. We should ask people in Galway who had to put up with cryptosporidium for their view on the issue. They will tell us that public ownership of water does not guarantee quality. Let us be honest - there is an element of fear stoking and remarks such as Mr. Ó Tuathail's on privatisation go to the heart of it.

If it is argued that the reason for holding a referendum is precedent, what will be next? Mr. Ó Tuathail statement that access to water is essential to public health is very interesting. Does he believe any other entity or commodity is essential to public health and should, therefore, be

afforded constitutional protection? For example, should we have a referendum to guarantee that the health service cannot be farmed out to private ownership? Should we then have one to prevent education from being farmed out to private ownership and guarantee access to education? The blood transfusion service is a life-giving service that is essential to public health. Should we also hold a referendum to guarantee it would remain in public hands? My point is whether this will become an endless exercise in which the State inserts guarantees on everything in the Constitution or whether Mr. Ó Tuathail regards water as unique and considers that no other service, commodity or entity has the same standing.

If a referendum were to be held, I do not know if there would be a “No” side. Who would argue in favour of privatisation? There is an onus to provide for a balanced debate. In that case, while I acknowledge a few people would be tempted to do so, who would populate the airwaves to provide for a 50:50 balance and argue in favour of privatising water services? The referendum would be nonsensical and completely one-sided because there would not be a debate. Those who want a referendum to be held and hope people will become exercised about the issue would be engaged in a self-defeating exercise because no such debate would take place. I wonder how this would play out.

Would a referendum have a knock-on effect, positive or negative, on the thousands of my constituents who do not have a public water supply? They would be extremely bored during the referendum campaign because it would be irrelevant to the one third of the population who do not have their wastewater collected whether the water service was publicly or privately owned. Would a referendum have a knock-on effect for them?

Mr. Séamas Ó Tuathail: I will reply to Deputy Jim Daly as best I can. There is no precedent when it comes to a referendum and there never is. While there may be one in case law, the courts and so on, in terms of holding a referendum, in the Constitution there is no such thing as a precedent. There are referenda on different subjects at different times. The various examples the Deputy mentioned are a type of *reductio ad absurdum*. He is moving down a scale of things that make a nonsense of the proposal. The proposal is to be considered on its own merits and has considerable support. The ultimate outcome would be the outcome of a referendum, should one proceed.

On the Deputy’s other complaints which I fully accept are all valid in rural Ireland, I will quote one of the examples I gave to highlight the need for a referendum. I have cited the citizens of Paris, a huge city in France, who saw the cost of water increase by 265% over a 23-year period. When it was re-municipalised, €35 million was saved in water charges by the city council.

Deputy Jim Daly: May I interrupt? Those are not answers to the questions that I asked. I asked about the necessity of a referendum. We can go on all day about the negatives of privatisation, but I did not ask about them.

Chairman: The Deputy is right. Could Mr. Ó Tuathail just address the questions as tightly as he can?

Mr. Séamas Ó Tuathail: As I perceive it, the need for the referendum is not a negative, but a positive. People want reassurance. That is it.

Chairman: Are we okay to proceed?

Deputy Jim Daly: I have a final and minor, but important, point. Would such a referendum

have a knock-on effect on the design, build and operate agreements? If public management, treatment, ownership and so on are guaranteed, what about the public-private arrangements and the like? Would they all have to be cancelled?

Mr. Séamas Ó Tuathail: The referendum proposal in its text is preventative and defensive. It does not interfere with any existing arrangement.

Deputy Jim Daly: I thank Mr. Ó Tuathail.

Mr. Séamas Ó Tuathail: It is difficult to conceive of an arrangement that a future constitutional referendum could affect.

Chairman: I thank Mr. Ó Tuathail. That was a straightforward answer to the question. I will try to allow everyone to contribute. Senator Clifford-Lee is next, but I do not know who offered first after her, Deputy O’Sullivan or Deputy Healy.

Deputy Jan O’Sullivan: Deputy Healy’s hand was up before mine.

Chairman: Okay.

Senator Lorraine Clifford-Lee: I will keep my questions as brief as possible. I thank our guests for attending. I have three questions for an tUasal Ó Tuathail. Will group water schemes subsidised by the State be affected by any constitutional change? Will the constitutional shift place any additional pressure on them to be taken over by Irish Water? Are there international examples of explicit constitutional protection?

I have one question for Ms Graham. Has the Department estimated the cost of holding a referendum and, if so, what is it?

Mr. Séamas Ó Tuathail: In reply to the Senator’s questions, the answer to Nos. 1 and 2 is “No” and to No. 3 is “I do not know”.

Chairman: We could not get a better answer than that. Go raibh míle maith agat.

Ms Maria Graham: I thank the Senator for her question. The figure is potentially €20 million, but that depends on whether a number of referendums are being held on the same day. We might clarify that to the Chair with our franchise section.

Senator Lorraine Clifford-Lee: If a number of referendums are held on the same day, would the €20 million-----

Ms Maria Graham: It would be cheaper.

Senator Lorraine Clifford-Lee: Would it increase a bit or would it be capped at €20 million?

Ms Maria Graham: My understanding is that, if one is holding a number of referendums, there might be some additional costs, but the fixed costs would make it cheaper per referendum. We might refer to the Senator with the figures.

Chairman: On behalf of the committee, I will ask the Department to revert to us with the information on, for example, the cost of the previous eight, nine or ten referendums. We will get a sense and send it-----

Senator Lorraine Clifford-Lee: And how many amendments were decided on the same day.

Ms Maria Graham: Yes.

Chairman: I thank Ms Graham.

Deputy Seamus Healy: Last week, I asked about the percentage of collection in respect of non-domestic users.

Ms Maria Graham: We have been gathering information based on last week. I am checking some of the figures, but I understand that it is approximately 89%. I need to verify it precisely.

Deputy Seamus Healy: Ms Graham can revert to us.

Ms Maria Graham: By the end of the week.

Deputy Seamus Healy: It was suggested that we should not have been discussing this issue, but it is wholly appropriate for this committee to discuss a constitutional amendment. We are discussing the principle, not the specifics, which are for another committee to address. A constitutional amendment is the only certain protection against privatisation of water services, so the suggestion that the currently stated view of political parties and individual politicians that they are not in favour of privatisation represents a guarantee against it is almost laughable.

Chairman: Does the Deputy have a question or is he making statements?

Deputy Seamus Healy: That was a statement made by another committee member.

Chairman: I am trying to move on.

Deputy Seamus Healy: So am I.

Chairman: In fairness, I want to allow other members to contribute.

Deputy Seamus Healy: The statement does not stand up. In the witnesses' view, is a constitutional amendment the only certain protection against privatisation? Is it not the case that any current protection, whatever it might be, can be changed by an Act of the Oireachtas?

There appears to be a difference of opinion on the alienation of assets. Is that in itself not an indication that a constitutional amendment is the better way of proceeding? If the departmental and legal views at this meeting differ, is it not clear that the only way to achieve certainty is by way of a constitutional amendment?

Do the Minister and Ervia have voting rights in Irish Water? I am seeking a "Yes" or "No" answer to my next question. Is Mr. Ó Tuathail satisfied that a constitutional amendment would not in any way affect current group water schemes?

Chairman: I thank the Deputy, but my understanding is that some of his questions have already been asked by Deputy Murphy.

Deputy Seamus Healy: They may have been.

Chairman: Is that the case, Deputy Murphy? I could be wrong, but Deputy Healy asked five questions, the last two of which had not been asked previously. I will ask our guests to

answer each of them,-----

Deputy Seamus Healy: Please do.

Chairman: -----but I believe three of them were answered previously.

Deputy Seamus Healy: I do not believe that they were the same.

Chairman: The Deputy may be correct.

Mr. Séamas Ó Tuathail: As to whether a constitutional amendment is the only way-----

Deputy Seamus Healy: The only certain way.

Mr. Séamas Ó Tuathail: I would say “Yes”. As to whether any other protection can be removed, I would say “Yes”. As to the difference of opinion, I will not comment. That has already been said. The Ervia question is for Ms Graham. As to whether I am satisfied that an amendment would not in any way affect existing rights, “Yes” is the answer.

Ms Maria Graham: I can only refer to my statement, in which I said that we had sought to maximise the protections within the existing legislation. The Minister has recognised the sincerity of the proposals being made and the concerns that have been raised, and he is open to a work-up of proposals. For that reason, the Bill was not opposed and it was suggested that it needed legal and technical scrutiny when on Committee Stage.

A constitutional protection is always higher than a legislative provision. We have discussed the issues with wording.

Regarding voting, Ervia is owned by the State and Ervia owns Irish Water. Ervia has the voting rights, not the Minister. Rather, he has the economic rights. However, there is a range of provisions under the legislation for which ministerial consent is required. The Minister also gives Ervia what is called a shareholder’s expectation letter, which sets out the range of activities that he, as the shareholder in the State company, expects Ervia to perform. That involves a number of metrics and is common to the NewERA family, as it were, those being, ESB, Gas Networks Ireland, etc. That would set out a range of things to do with dividend policy, water policy, and energy policy, etc. While the Minister does not have a voting right, there is obviously a policy construct within the legislation, within the NewERA legislation, and within the specific ministerial consents that are set out in legislation.

Deputy Jan O’Sullivan: We are in favour of a referendum not because any particular pressure group is in favour of a referendum, but because the general public, whom we represent here, are in favour. There have been clear expressions of concern at the possibility of privatisation. Deputy Ó Broin made the point that the majority of submissions have raised this issue. It is on that basis that I want to state clearly that we are in favour of a referendum. In that context, the specific wording of the proposed amendment that is going before the committee, while it is a matter for that committee, we must be satisfied that that wording would achieve what we want to achieve. As I understand it the wording concerns the protection of the water system. I am concerned that we accurately define what we mean by that. Is it the assets and the infrastructure? Does it protect the utility as it is now and therefore tie people’s hands to change the nature of Irish Water into the future? My concern is to protect the assets and the infrastructure.

I challenge Mr. Ó Tuathail. The Minister has every right to consider possible amendments, but so do the rest of us. We actually have a duty to scrutinise legislation, to look at it on Com-

mittee and Report Stages, and if we think that the wording is inadequate then we all have a duty to propose amendments. I want to make that point clearly. We may not agree with the exact wording of Deputy Joan Collins. We agreed it on Second Stage but we may not agree with the exact wording. That is our duty as public representatives. That does not mean that we are not absolutely in favour of a constitutional referendum being put to the people. My concern about wording is that we have to make sure that it does what we want it to do, which is to protect the assets and the infrastructure and not necessarily tie down the utility in stone as it exists today.

Chairman: Do you have a quick question?

Deputy Jan O’Sullivan: My question is whether the witnesses have any comments on the wording, or are they satisfied that the definition around water systems is acceptable. I know that is a matter for the other committee. Today we were presented only with the wording as Deputy Collins has presented it, whereas there may well be other more appropriate wording that would achieve what we want to achieve in terms of putting -----

Chairman: The point the Deputy made on elected representatives in Leinster House is supportive of what Senator Coffey said earlier. That is that point.

Deputy Jan O’Sullivan: Yes, but not just for the Minister. For the rest of us as well.

Chairman: Absolutely. That was his view as well.

Ms Maria Graham: Two points on that. We highlighted some potential issues around the wording. We will be working with the Attorney General to try to clarify and tease through those issues to see if there are issues around the wording, and as Deputy O’Sullivan said, that would inform the Minister’s contribution. The Minister and the Department have committed to assisting the joint Oireachtas committee, and we will obviously provide whatever assistance we can to the committee as our work proceeds.

Mr. Séamas Ó Tuathail: I would generally accept what Deputy O’Sullivan has said. The particular wording is a matter for Céim an Choiste, Committee Stage. I am also aware from my own research that the Labour Party proposed something similar to deal with the public ownership of Coillte, ESB and water.

Deputy Jan O’Sullivan: Gas, electricity and water, yes.

Mr. Séamas Ó Tuathail: Sorry, gas, yes.

Deputy Jan O’Sullivan: Not Coillte.

Mr. Séamas Ó Tuathail: That is beyond my remit, as it were. I am happy with that wording as it is drafted, but of course Máire Whelan, the Attorney General, may have a view on it, and the Dáil itself may have a view on it. That is why we have a Committee Stage.

Chairman: The Dáil and the Seanad have a constitutional input, a point made earlier. I will allow a couple more contributions, we will run over slightly.

Senator Paudie Coffey: I am supposed to be in the Seanad for a vote.

Chairman: That is okay. Is the Senator coming back?

Senator Paudie Coffey: Yes. Thank you.

Deputy John Lahart: I have a few comments, and I thank our guests for their comprehensive documents today, and their presentations. Ms Graham in her opening statement mentioned the initial set up of Irish Water and how it was envisaged that the utility would be a public utility, a State body in public ownership. Some of the contributions seem to suggest that all the problems around this emerged out of nothing, or *ex nihilo*, as Mr. Ó Tuathail suggested. I am interested in what Ms Graham says was the original intention. It is worth briefly recapping on why we are here, and how it became so muddled and confused for people. It looked suspiciously like Irish Water was being prepared for privatisation through a whole series of actions. This was not something in people's imaginations, despite what the original motivation might have been. The Government at the time went against its own consultant's report in setting up Irish Water as a subsidiary of Bord Gáis. Parts of Bord Gáis were subsequently privatised and sold off. That gave rise to suspicions. It was given to Bord Gáis on the one hand because it was stated that Bord Gáis had the operational capacity to deal with it yet there was this necessity for huge sums of public money to be paid out to external consultants for Irish Water. Demonstrably, Bord Gáis did not have the capacity to deal with all the aspects of it. There was the speed with which it was set up.

Chairman: Does the Deputy have a question?

Deputy John Lahart: I do, yes.

Chairman: Can he get to it?

Deputy John Lahart: I will, yes, but other people have made statements. There was the speed with which it was set up, there was the Siteserv element. There were a number of issues, not least the guillotining of the debate about it, that have brought us here, unnecessarily to some degree. We are here because of all those missteps that were taken along the way, and I think, Cathaoirleach, that has to be borne in mind by the committee.

Chairman: What is the question?

Deputy John Lahart: I am coming to it now. The public ownership and the lack of confidence the public developed over time in Irish Water were key findings of the commission. That was not something created by the Opposition. It was created by the manner in which Irish Water conducted itself. My questions are these. Was the privatisation of water services ever agreed or discussed with the troika at any stage? Is there anything available on that? Has the Department ever considered a model such as that currently being rolled out in England, and already exists in Scotland, where the network would be retained by Irish Water but where private operators could sell wholesale? If Irish Water or the Department had considered that, would a proposed constitutional protection safeguard against that? That question is directed to Ms. Graham and to Mr. Ó Tuathail. Thank you for your forbearance on this, Chair. We have talked about constitutional amendments, and Mr Ó Tuathail is convinced that that is the only way to handle it, so as a citizen and public representative I am interested in two aspects of this. Did you write the wording for the Right2Water campaign?

Mr. Séamas Ó Tuathail: Yes, I wrote it.

Deputy John Lahart: Okay. Many of us are old enough to remember the potential for constitutional amendments to defy the original intentions of their proponents. What kind of controls can be put in place to avoid a referendum result, and therefore decisions on water, eventually ending up being decisions of the Judiciary?

Chairman: Good question.

Mr. Séamas Ó Tuathail: I will let Ms Graham go first.

Ms Maria Graham: If I can reflect in a general way on some of the points. The water services legislation of 2007 was approximately ten years in gestation, and it was considered serious enough at that point to put protections in against the privatisation of assets, before Irish Water was contemplated. That was an important point at that stage. When we moved into the reform process, PricewaterhouseCoopers was specifically asked to report on the use of State utilities. Because of the time available to us under the agreement with the troika to establish the new utility, we were given a series of points which would have to be satisfied were we to have it under an existing utility such as Bord Gáis.

I have been involved in the water sector since 2009. I think I attended all of the meetings with the troika and the issue of privatisation was not raised. The Department only looked at the models included in the PricewaterhouseCoopers report such as the local authority agency model, among others. The question of privatisation or preparing for it was never on our agenda, pre or post-Irish Water.

Chairman: I thank Ms Graham for clarifying the matter.

Mr. Séamas Ó Tuathail: The context of Deputy John Lahart's question was very well informed. Ms Graham has answered the first and second questions. Legislation should be brought forward to reflect the intent and impact of the constitutional amendment, when and if it is carried.

Deputy Jonathan O'Brien: Leaving aside the wording, would it be the preferred option of the Department to have constitutional protection? Given that Ms Graham said the Department had concerns about the current wording, has it prepared alternative drafts?

Ms Maria Graham: The Department is guided by the Minister who has indicated that if there is a workable constitutional wording, he is happy to proceed with it.

Deputy Jonathan O'Brien: Is that the preferred option?

Ms Maria Graham: When we set out on the implementation plan, we had a public consultation process, the first on the issue, and questions and concerns about privatisation were raised on that occasion. We have tried to address the questions in legislation because we have concerns about the practicalities of including it in the Constitution. Underlying all of this have been our desire and policy objective that Irish Water be a public water utility. I can only reiterate what the Minister has said to the Dáil. If the Bill progresses, whatever the wording of the amendment may be, it will progress as normal.

Deputy Jonathan O'Brien: Are there alternative wordings?

Ms Maria Graham: We are engaged in teasing out the issues with the Attorney General and have not yet got to that stage.

Chairman: Labhair chuile dhuine ach amháin an Teachta Brophy. Everyone had an opportunity to contribute and ask questions. Gabhaim mo bhuíochas leis an Uasal Ó Tuathail, le Ms Treasa Brannick O'Cillín agus leis an Roinn. It was a very good, informed discussion in which good questions were asked.

JFFDWS

The joint committee went into private session at 3.35 p.m and adjourned at 4.30 p.m. until 1.30 p.m. on Wednesday, 1 February 2017.