

DÁIL ÉIREANN

AN ROGHCHOISTE UM THITHÍOCHT, PLEANÁIL AGUS RIALTAS ÁITIÚIL

SELECT COMMITTEE ON HOUSING, PLANNING AND LOCAL GOVERNMENT

Déardaoin, 22 Márta 2018

Thursday, 22 March 2018

Tháinig an Roghchoiste le chéile ag 2.30 p.m.

The Select Committee met at 2.30 p.m.

Comhaltaí a bhí i láthair/Members present:

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| Teachtaí Dála/Deputies | |
| Mick Barry,* | |
| Pat Casey, | |
| Barry Cowen, | |
| Eoghan Murphy (Minister for Housing, Planning and Local Government), | |
| Kate O'Connell,* | |
| Eoin Ó Broin. | |

* In éagmais / In the absence of Deputies Ruth Coppinger and Fergus O'Dowd.

I láthair / In attendance: Deputies Joan Collins and Jan O'Sullivan.

Teachta/Deputy Maria Bailey sa Chathaoir/in the Chair.

Business of Select Committee

Chairman: As the Minister has been delayed while taking a Topical Issue in the Chamber, I propose that we suspend the meeting until 3 p.m. Is that agreed? Agreed.

Sitting suspended at 2.30 p.m. and resumed at 3.10 p.m.

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

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

Chairman: Apologies have been received from Deputies O'Dowd and Coppinger for whom Deputies O'Connell and Barry, respectively, will substitute. The meeting has been convened for the purpose of consideration by the select committee of the Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016, a Private Members' Bill sponsored by Deputy Joan Collins and other Deputies. The Bill was referred to the select committee by order of the Dáil on 9 November 2016.

Before we begin our consideration of the Bill, I propose that we deal with some housekeeping matters. To ensure the smooth running of the meeting, any Deputy acting in substitution for a member of the committee should formally notify the clerk now if he or she has not already done so. I propose that if needed, after approximately two hours of consideration - at approximately 4.45 p.m. - we take a break for 15 minutes. Is that agreed?

Deputy Eoin Ó Broin: I do not think we will be here for two hours.

Chairman: Try to say it slow; we are good company.

At 5.30 p.m., if consideration of the Bill is not concluded, I propose we consider whether to continue with the consideration of the Bill. Is that agreed?

Deputy Eoin Ó Broin: Agreed.

Chairman: I welcome the Minister for Housing, Planning and Local Government, Deputy Eoghan Murphy, and his officials. I also welcome Deputy Joan Collins, who is the sponsor of the Bill.

I remind members to ensure that their mobile phones are switched off or in aeroplane mode for the duration of the meeting as they will interfere with the broadcasting system even when on silent mode.

Before Committee Stage commences, I wish to deal with a procedural matter relating to Bills to amend the Constitution. The substance of the debate on Committee Stage relates to the wording of the proposed constitutional amendment, which is contained in the Schedule to the Bill. As the sections of the Bill are merely technical, in accordance with long-standing practice, the sections are postponed until consideration of the Schedule has been completed. In accor-

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dance with precedence and Standing Order 151, I ask Deputy Ó Broin to move that consideration of sections 1 and 2 of the Bill be postponed until the Schedule is disposed of.

Deputy Eoin Ó Broin: I move:

That consideration of sections 1 and 2 of the Bill be postponed until the Schedule is disposed of.

Chairman: Is that agreed? Agreed.

AN SCEIDEAL

SCHEDULE

Tairgeadh an cheist: “Gurb é an Sceideal an Sceideal a ghabann leis an mBille.”

Question proposed: “That the Schedule be the Schedule to the Bill.”

Deputy Joan Collins: I thank the committee for inviting me in again to address the Third Stage of the Bill. I refer Deputies to the letter I wrote to the Minister in response to his letter. They will have received a copy by email yesterday. I thank Fiona for sending them out.

My intention in introducing the Bill, which has been signed by a significant number of Deputies, is to ensure that our public water system is not privatised in the future. This is a key concern of the Right2Water campaign. People saw the introduction of charges and metering as a means for commodifying water and preparing the basis for privatisation. Every Deputy should have received emails from the Right2Water campaign in the past few days showing that hundreds of people signed up calling for the committee to support the referendum. I received a few Fianna Fáil responses. Deputy O’Dea said he was in favour of the referendum. Deputy Scanlon said “Thank you for your email, Fianna Fáil fully supports the 35th amendment on public ownership and will support a referendum to enshrine it in our Constitution.” I hope that will be the tone of today’s meeting.

Increasingly water is viewed as a key resource with the potential of high profitability by the major transnational corporations. It is, in effect, the new oil. It would be extremely foolish to believe that these companies will not look to get their hands on this resource in Ireland.

As I stated in my letter, it is worth noting that this issue was the single biggest concern of the public as evidenced in the number of submissions to the expert commission on the funding of domestic water services and was one of the key recommendations of the Joint Committee on the Future Funding of Domestic Water Services. I again emphasise that we would be foolish to think that our water is not on the horizon for big transnational companies. The following is a quote from Willem Buiters, who is Citigroup’s chief economist:

I expect to see in the near future a massive expansion of investment in the water sector, including the production of fresh, clean water from other sources... storage, shipping and transportation of water. I expect to see pipeline networks that will exceed the capacity of those for oil and gas today.

I see fleets of water tankers (single-hulled!) and storage facilities that will dwarf those we currently have for oil, natural gas and LNG.

He continued to outline the thinking behind financial institutions:

Water as an asset class will, in my view, become eventually the single most important phys-

ical-commodity based asset class, dwarfing oil, copper, agricultural commodities and precious metals.

He is bang on. Official figures show water producing twice the operating surplus and paying twice the dividends to shareholders in water firms compared with any other class of investment other than financial services. That just shows how profitable water is to these big trans-national companies.

A constitutional amendment would protect against the threat of a government being strong-armed by an external authority. We saw that when the troika came into Greece. If anyone wants me to go into those details, I have the information. Greece was forced to privatise its water on the basis that it had structures already there and companies set up.

The committee should also note that the Bill was unopposed on Second Stage in the Dáil. There was no request for a vote. I understand the Government indicated it wanted to look for any unintended consequences.

I believe that in a referendum there would be widespread public support to insert this provision into the Constitution. I am disappointed that despite the considerable length of time since the Bill passed Second Stage, neither the then Minister, Deputy Coveney, nor the present Minister, Deputy Eoghan Murphy, has made any formal proposal and the Minister still claims he is awaiting advice from the Attorney General.

I am also disappointed that on two occasions in December and February I asked the Minister to meet me, as he indicated he would in his letter to the committee in February. He said that he would be happy to meet the sponsors of the Bill to discuss these points and the further approaches to be adopted and progressed in the Bill. I wrote a letter to the Minister and he came back on 23rd February and said he would meet but not before being properly briefed on the legislation etc. I am still waiting for that meeting I was advised to seek.

It is strange that neither the Department nor Irish Water seems to be able to distinguish between what is a public water system, for which it is responsible, and the private system, such as group water schemes and private boreholes. This seems to be an area where there are most concerns about possible unintended consequences. I would be very happy to discuss any word changes or amendments that would help clarify this issue, provided so doing does not in any way water down the key aims of the constitutional amendment.

I attended a meeting in December at which the Parliamentary Legal Adviser presented her legal opinion on the Bill. The issue of a clarifying Bill was raised. As I also set out in my letter to the Minister, one clear solution to this would be for the Government to draft legislation in advance of any referendum, providing legal clarity on these issues. The legislation would simply be a clarifying Bill setting out exactly what is in the public system and what is not, and detailing the responsibility of the State with respect to both the public and private systems. Such clarifying legislation could be introduced in advance of a referendum.

On the issue of where the amendment should be placed in the Constitution, it is my view - based on the legal advice given to me by Séamas Ó Tuathail SC, who helped draw up the proposal with the Right2Water campaign - that the amendment should be placed in Article 28, which deals with the responsibilities of the State. Inserting the amendment into Article 10 or Article 40 would not be sufficient in keeping the public water system in public ownership and management. Article 10 simply confers general rights, which often have to be validated through the courts system.

In his opening statement provided to the committee for a meeting on 4 May 2017, Séamas Ó Tuathail stated:

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[. It] 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; [Article 29.4.1°] assigns the Government with the responsibility for the external affairs of the State. Conferring responsibilities on the Executive is more effective and precise than using a rights-based approach by inserting rights into Article 40.

We have spent considerable time on scrutiny and discussion of the legislation.

We have taken evidence from my legal adviser, Séamas Ó Tuathail, and there is legal advice from the Office of the Parliamentary Legal Adviser, OPLA, which has taken evidence from the Department officials, and the former Minister, Deputy Coveney. There has been sufficient scrutiny and as no amendments have been tabled, I request the committee to now move the Bill to the next Stage.

Deputy Eoin Ó Broin: I thank Deputy Joan Collins for the work she and her team have done on the Bill. Our party was very proud to be a co-signatory of the Bill, at her request, as many other Deputies were. We are 15 months on from the passing of Second Stage of the Bill. As Deputy Joan Collins says, we have had much discussion. Throughout that discussion several contributors have expressed concerns at the wording of the amendment. I accept their sincerity. The Minister and his predecessor outlined concerns orally and in writing. The National Federation of Group Water Schemes has done so and the written advice from the OPLA also outlined those concerns. It would be remiss of the committee to dismiss those or not take them seriously given that this is a proposed amendment of the Constitution.

Our discussion with the legal representative from the OPLA was very interesting because she shared several of the concerns the Minister outlined in his letter to the committee. We had a very interesting conversation because the concerns are about the absence of a legal definition of the water system, the public water system, where public ownership stops and where private and group ownership start. If that is not defined could there be ownership conflicts and legal challenges on the other side of a successful referendum? What do the key words in the Bill, the “protection, management and maintenance” of that system mean? What is the responsibility of the State, central government, local government or agents of the State such as Irish Water in protection, management and maintenance in respect of the private and group schemes? We made a sensible suggestion, which was not the suggestion of the OPLA, but our own, that if it is clarified in law and stated very clearly in legislation what the public system is, where it starts

and stops, and the same for the non-public system, and if we define the responsibility of the State and its agents with respect to protection, management and maintenance before the referendum, those concerns are dealt with. That would take some time but those of us who want to see that constitutional protection would be more than happy to work with the Department and Minister in producing that legislation because we want to make sure that if there is constitutional protection it is done in the right way and without negative consequences for people, whether on the voluntary or statutory side currently providing water services. That is my response to the concern I anticipate the Minister will raise today.

The water debate was very divisive. Those of us who sat on the Oireachtas Joint Committee on the Future Funding of Domestic Water Services will have fond memories of those sessions. The one issue that was not divisive, however, was that of constitutional protection of the public water system. The trade union movement was very divided about water charges, some took an active role in campaigning against them, some stayed neutral and others took the view that it was a sensible move. All of those unions, particularly in the context of the negotiations on Irish Water's single utility proposal, are saying they would like to see the constitutional protection because it would reassure their members that, whatever the detail of the industrial relations issues that transpire, they would have the protection of being public sector workers working for a public utility in the public good. That reflects the fact that the largest number of submissions to the expert commission on domestic water services was on this issue and polling data indicate strong public support.

Leaving aside the merits of the constitutional protection, if the Minister is keen to achieve a positive outcome with the unions on the single utility, an issue where he and I probably disagree on some of the details, this referendum is even more important now than prior to the single utility proposal. There is a solution to these concerns and I take those concerns very seriously. I and others supporting the Bill are willing to work with the Government to deal with those concerns prior to any referendum to ensure that everybody benefits from good legislation and what could be a good referendum campaign.

Minister for Housing, Planning and Local Government (Deputy Eoghan Murphy): I welcome the opportunity to join the committee for Committee Stage of the Thirty-fifth Amendment of the Constitution Bill (Water in Public Ownership) (No. 2) Bill 2016. I acknowledge the work of Deputy Joan Collins in bringing it forward and the active engagement to date of other Members of these Houses. I have not received the Deputy's recent letter and I agreed to meet with her but the meeting was not requested. I agreed to appear before the committee but that meeting was postponed. For my part, I am not trying to avoid debating or discussing the merits of this proposed amendment to the Constitution but in dealing with the sections of the Bill I want to advise the committee on the Government's position.

The Bill has two sections and the wording of the proposed amendment is set out in two parts that are contained within the Schedule. I would like to speak directly to the provisions of the Bill as appropriate on Committee Stage. I have written to the committee to provide my views on the Bill and the wording of the amendment. Much of what I have to say reiterates points in my letter. It is important, however, to record these matters in the Official Report. There is a great deal of detail involved and I ask the committee to bear with me.

My predecessor in this Department, the present Minister for Foreign Affairs and Trade, Deputy Coveney, attended the pre-legislative scrutiny of the Bill last May. He observed that during the Second Stage debate there was a common view on all sides of the House that the State should own the vital public service that is water. Deputy Joan Collins observed at that

time that the public at large holds this view. I share both perspectives.

I reiterate that I remain strongly committed to working with the committee to advance an appropriate constitutional amendment. Such an amendment must be capable of achieving the policy aim, which is to provide an insurance against the transfer into private ownership of a national water services authority. This would be in keeping with the recommendation of the report of the Oireachtas Joint Committee on the Future Funding of Domestic Water Services, which both Houses have adopted. I support this recommendation.

The Bill, however, raises several significant concerns which require attention and it should not therefore be adopted in its current form. I am also of the view that any amendment of the Bill would require proper legal scrutiny. No amendments have been tabled but I hope there is scope to amend the Bill further on Committee Stage. I therefore ask the committee not to vote to approve the sections of the Bill as currently cast. I am happy to work further with the committee and directly with the Bill's sponsors.

I acknowledge and respect that there are different views of the Bill and its potential impacts. Some of these were heard during the scrutiny hearings and the previous debates. I set out my views as Minister having engaged extensively with the Attorney General on the many questions arising from the Bill, having given careful consideration to its potential policy implications, having reviewed a report of the OLPA submitted on 14 December 2017 that I received as an *ex officio* member of the committee and having reviewed the committee's own report on its scrutiny of the Bill. In my recent letter I set out the issues and concerns which I believe fall to be considered by the sponsors of the Bill, ideally in collaboration with the committee and with me.

The Bill seeks to insert a new provision into the Constitution under Article 28. This provision would effectively mean that the Government would be "collectively responsible for the protection, management and maintenance of the public water system." The Government would be bound to ensure "in the public interest that this resource remains in public ownership and management." As Minister, I accept that it may not be possible to achieve certainty of outcome whatever the wording of a constitutional amendment. We have to ensure, however, that the wording proposed for insertion achieves as high a degree of clarity as possible and is robust. I do not think this is the case at present. The proposed amendment can be read and argued in different ways, which makes for uncertainty and unpredictability. There are significant risks in the wording of the Bill in so far as the meanings of the key terms such as "protection", "management", "maintenance", "public water system" and "ownership" are not clearly defined and may not lend themselves to precise definition within the Constitution. These key terms in the Bill are not self-evident and can be interpreted in different ways. This raises questions and concerns about the impact of the amendment on how water services are operated and delivered in this jurisdiction. It also creates the potential for unforeseen consequences or unintended implications which can arise when the amendment falls to be interpreted by the courts.

In respect of the impact on the existing arrangement for the provision of water services, the wording leaves the following matters open to question: public water system, it is not clear what falls within the public water system and for instance whether it includes infrastructure, ancillary services such as water quality services or how it applies to public waters on private lands. The question arises of whether provision could prevent the use of private facilities by the public water system or, alternatively, the use of public facilities in water services arrangements that have private elements. In many instances there are hybrid schemes in place. These group water schemes involve an intermingling of private water initiatives, which serve significant numbers of the public and public entities. In some instances the water is supplied by Irish Water or the

scheme is supported by State funding or both. It is not clear how this amendment would apply to or affect these arrangements, a concern that has been raised separately by the National Federation of Group Water Schemes.

It is not clear from the amendment what might be meant by the term “maintenance” and what implications might arise from the possible elevation of this responsibility to the level of a solemn constitutional duty. As policy makers, we need to have an understanding of how the term “maintenance” might be interpreted and the costs that might arise for citizens in the raising of public revenues by placing such an obligation on the Government through the Constitution. There is the risk that it would make the provision constitutionally justiciable. For example, we do not know how the courts might deal with cases where there were routine disruptions of the water supply. Questions arise about whether such instances might be constitutionally justiciable and what the implications of public policy might be for the Exchequer.

The amendment, as framed, might give rise to a question about the extent to which it might permit a role for local authorities in the delivery of public water services. I would not want to see a situation where the Bill could create ambiguity or any problem concerning the role of local authorities in that regard. Likewise, the question arises as to what tests would be applied in seeking to establish how a national water services body such as Irish Water might be considered to be in public ownership. It is important that the amendment not prevent the sale or disposal of obsolete assets or assets that will be decommissioned in the future.

The Bill would make the Government directly and collectively responsible for the management of the public water system. Based on the wording, it is unclear whether and to what extent the Government could delegate its responsibility for the management of the public water system to third parties. There is a question about the extent to which the Government might be obliged to monitor, oversee and/or directly manage the provision of water services. For instance, it might be argued that the amendment would restrict the scope of legislation to allow for another entity to perform these functions and/or require the Government to manage the activities of Irish Water, possibly even in routine operational matters. At a minimum, it would seem to give rise to some uncertainty in practice. As policy makers, it behoves us to clarify our intentions in framing a constitutional amendment and represent them clearly in legislation, not just in debate. It is the text of the Bill that the courts would use in making an interpretation, rather than what might or might not have been our intentions, as legislators.

It is not exactly clear what is meant by the term “protection”. Given that it is a constitutional amendment, it seems likely that the courts would strive to give meaning to the term. There is a risk that it could be read in an expansive way, placing a constitutional duty on the Government in the provision of water services.

Cumulatively, the references to public ownership and maintenance and management by the Government might throw into question the capacity of Irish Water or a water services authority to enter into or conclude public private partnerships and design, build and operate contracts. It could also be argued that the use by Irish Water or a water services authority of contractors would be restricted in respect of activities involving aspects of the management or maintenance of the public water system. As matters stand, contractors are engaged in a variety of arrangements to enable delivery to meet certain aspects of statutory obligations attached to the provision of water and wastewater services. I understand the necessity or desirability of using such contractual arrangements in the provision of water services is not universally accepted and can be the subject of policy debate, but my concern is that these practices might no longer be feasible as options in the delivery of water and wastewater services, which could have the effect of

undermining existing planned and future arrangements in managing and delivering water and wastewater infrastructure and services.

In the absence of a clearly codified understanding of what is meant by the various terms used in the Bill, it would fall to the courts to give an interpretation. It is the uncertainty surrounding what such an interpretation might be that raises potentially significant problems. There is a risk that many of the questions and concerns I have outlined would be litigated in the courts. In a constitutional context, the courts would strive to give meaning to any ill-defined term and there is a risk that the provision could be read in different ways. While there would be arguments and counter-arguments for any particular proposition, there can be no certainty as to how the provision would be interpreted by the courts.

The amendment might have the effect of positively requiring the Government to make provision to extend the public water system to areas not covered by the system or, at least, to provide some resources to ensure they would have access to a water service directly comparable to the public system. While the amendment does not require this directly, the fact that the Government would be responsible for managing “in the public interest” a public water system might lead to demands from persons not connected to the system. The constitutional recognition and protection given to the public water system might reinforce this. It is difficult to be certain how a court might deal with such an argument.

In other contexts, the courts have been reluctant to interfere with legislative choice or Executive discretion in the allocation of resources. In this case, the amendment is discrete, specific and novel in nature. Therefore, how it would be interpreted in practice by the courts cannot be predicted with certainty. I accept that it might be argued by some that placing a constitutional obligation on the Government in respect of rights in this area was desirable from a policy point of view. The risk, however, is that any such implied right would have to be balanced against other rights and decisions on future policy priorities the Government and the Oireachtas might wish to make. For example, they might be restricted in their scope to make decisions on practical policy matters in the provision of water services. This could impact on the allocation of State resources, including the provision of infrastructure and services in other policy areas. It would be surprising if elevating the new provision to the level of a formal constitutional duty had no impact on the current system. The risk is that we do not know and cannot predict what the impact would be. As a member of the Government and a legislator, I find this problematic to the point where I consider it necessary to look at alternative approaches.

I will address the location of the proposed amendment when we reach the relevant Part.

Having considered the advice of the Attorney General and that of the Office of the Parliamentary Legal Adviser received by the committee, my reservations about particular aspects of the Bill are well founded. I stress that I do not doubt the intent or sincerity of those Deputies who have sponsored the Bill and that these observations do not in any way detract from my commitment to work with the committee to advance an appropriate constitutional amendment capable of ensuring water services will continue in public ownership in keeping with the recommendation of the Oireachtas joint committee in April 2017 which was approved by both Houses. If the intent of the constitutional protection is to ensure the national water services authority cannot be privatised, it seems more appropriate that the focus should be on the entity supplying the service. Therefore, there is scope to work on developing a model that will seek to ensure the entity responsible for the provision of water services will not be placed in private ownership. It seems such an approach would be less likely to give rise to the difficult questions and concerns I have outlined. To this end, my Department and I propose to engage further with

the Office of the Attorney General. The legal advice received is clear in raising issues with the Bill that need to be addressed on Committee Stage and I ask the committee to have regard to that advice. I also urge it to defer consideration of this matter pending further engagement by my Department and I with the Attorney General on a more robust wording. I reiterate that I am willing to collaborate closely with the committee in this work.

Deputy Mick Barry: I noted the Taoiseach's comments when he was asked about the Bill. He made a case against progressing with it on the grounds that it was not urgent and no longer necessary. That is interesting because he did not argue against the Bill on legal or technical grounds but on political grounds. Is he right? Is it no longer urgent or necessary? Then and only then must the technical issues be considered. That is my party's view on the issue.

People can shout from the rooftops, but a privatisation agenda was clearly part and parcel of the debate on the introduction of water charges. Has that agenda gone away?

Regarding a move towards having a single utility in the form of Irish Water, the plan was for it to be completed by 2025. The current proposal is for it to be completed by 2021. In my party's view, the move towards a single utility would facilitate a privatisation agenda. Without drilling down too far into it, the move to a single utility, plus the service level agreements, would not result in changes to the wages, conditions and pensions of current staff and the unions are sufficiently strong to guarantee this. The question is about what would happen to new hires. When Mr. Jerry Grant of Irish Water appeared before us a few weeks ago, he did not rule out - not by a long shot - Irish Water being in a situation where new hires would be on lower wages and reduced conditions and pensions. Time and again in recent years in State and semi-State companies, that type of scenario has facilitated a privatisation agenda. A company does not opt for compulsory redundancies, but it lets time take its course and the company applies pressure in various ways such that there are fewer and fewer staff on the older and higher wage levels and more new staff on the lower levels. That makes the company more attractive to those in the private sector who wish to own and control it. A process which does not *ipso facto* lead to privatisation but can greatly facilitate privatisation is being speeded up, and the 2025 deadline has now become 2021. I and many other people who marched and campaigned during the water charges movement suspect that what the water charges movement has achieved is the defeat of a short-term agenda of moving towards privatisation and that now, for those in the establishment who support it, it has become more of a medium-term aim. Is the idea of an anti-privatisation, keep water in public ownership Bill or referendum still something which still has relevance? Our political conclusion is that it is absolutely relevant. There are legal and technical issues. No Bill is perfect. However, if there are legal and technical issues we should let the Bill proceed to the next Stage and table amendments, which are debated and teased out, and the Bill is honed and sharpened to the point where it is watertight, if the committee will excuse the pun. We then proceed on that basis.

I am wary of the argument that suggests that the entity is kept in public ownership and therefore there is no need to have that copper-fastened by way of a referendum. There are ways in which an entity can be kept in public ownership but, through design-build-operate, outsourcing or contracting, we are led to a situation where large elements of the system are privatised. That is not a sufficient bulwark against privatisation. I am wary of those who clearly had a privatisation agenda yesterday, who got knocked back by the anti-water charge movement and who are arguing for that arrangement today. They say it is a bulwark against privatisation but it could actually help to facilitate it.

I believe there is a need for a Bill and a referendum. If technical issues arise they can be

sorted out via the normal mechanism, which is amendments at the next Stage.

Deputy Jan O’Sullivan: I want to talk about the recommendations of the expert commission and of the Oireachtas committee of which a number of us present were members. The first recommendation of the summary of the expert commission said, under the heading of public ownership: “As part of the overall approach to settling the issues addressed in this report 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, as part of its deliberations”. We should respect that. I agree that we need a constitutional provision to ensure that water services are kept in public ownership. The Oireachtas committee also recommended this, and specifically referred to Deputy Joan Collins’s Bill. There is an onus to provide for a constitutional referendum. The Oireachtas committee clearly agreed that by majority. There certainly was a respect on all sides of the political divide for the recommendations of the expert commission, and I believe those recommendations should be implemented.

I recognise that the Minister has concerns about the language. He spoke about considering alternatives and spoke about focusing on the entity rather than the system. If this wording is not appropriate and not considered acceptable, there is an onus on Government to come forward with proposals, or at least amendments, that would achieve the result of providing for a referendum, because that is clearly the desire of both the committee and the commission.

I do not support Deputy Barry’s theory of a privatisation agenda. I do not believe there was such an agenda. In fact, certain provisions were put into legislation to prevent privatisation. However, I agree that we need to go a step further and have a constitutional referendum. There is a public fear that water services will be privatised, and that has to be addressed, which is why we have to find acceptable language.

I am here to support the proposals of Deputy Collins and her colleagues. In fact, my colleague, Deputy Penrose, also published a Bill, and I believe some other Bills were published as well. His wording was slightly different and provided that electricity and gas transmission and distribution networks, the public water supply and waste water treatment services - which must also be specified - shall be maintained in public ownership. That Bill was published in May 2016.

While I cannot vote, I express the support of the Labour Party for ensuring that agreed wording is found which will ensure that this matter proceeds to a constitutional referendum.

Deputy Barry Cowen: The expert commission, the Oireachtas committee and the Dáil all agreed that the ownership of water services be enshrined in the Constitution by means of a referendum. This Bill sought to do that. I thank Deputy Collins for her forbearance and patience as we sit at this apparent impasse. As the Deputy mentioned, the Bill had the support of the Dáil in its efforts to reflect and to ensure that that commitment would be honoured. It is disappointing that the Government has not proposed amendments to reflect the opinion that has been furnished to it by the Attorney General, or a wording to address the fears of unintended consequences for private and group water schemes as related to us by the Minister.

Voting for the Bill in its present form is compromising private and group water schemes, and that is not something I wish to have to do. Against that background, and taking into account what has been said here today and based on the commitment and consensus that exists, there is an onus of responsibility on the Government to act. This is notwithstanding the fact that we have been waiting for 15 months for amendments to be proposed. It was unanimously agreed in

the Dáil that this issue be addressed in the way this Bill seeks. We have not only heard from the Minister and the Government but also the Confederation of Group Water Schemes. A legal presentation was also made available to us by the Oireachtas as well. Based on that information, it is incumbent that a correct wording to reflect the fears of unintended consequences be found. To that end, I hope there would be agreement for deferral and a timescale put in place to seek to hold the Government and its drafters to account in providing the relevant wording that would meet their approval. In itself, this would dispel the fears that Deputy Barry raised in quoting some of the Taoiseach's comments in response to questions about this recently. I expect that is not the view of the Government as I heard the Minister relay the commitment to this process. I ask the committee's indulgence to see if we can agree a deferral and put some time limit on a process that would allow the Government to meet Deputy Joan Collins and give her some assurance, as proposer of the Bill, that the process has an end game rather than it petering out. The same fears referred to by other speakers remain and will only grow in many minds with regard to the aspirations of the Dáil not being met. It could go to the contrary.

Chairman: We are on Committee Stage. On Second Stage a deferral is possible but it is not possible on Committee Stage. A postponement is possible on Committee Stage. As a committee we are obliged to act on the Bill. It is up to the committee as to whether it wants to postpone this. Otherwise, we are obliged to proceed. I will leave it to members to decide.

Deputy Eoin Ó Broin: I will respond to the Minister. I do not know if he agrees but I like to think of myself as a fair-minded person.

Deputy Eoghan Murphy: I am not sure I agree.

Deputy Eoin Ó Broin: He says he wants to work with the committee to see the recommendations of the special Oireachtas committee and the Dáil through. I genuinely want to believe the Minister. We have battles over policy but I always think that with a constitutional referendum, having the maximum degree of consensus is the best way to go. It is the best way to guarantee in a referendum campaign, if and when it happens, that the question is passed.

The frustration on this side of the House is the length of time that he and his predecessor have been telling us that they want to work with us, while in all that time, as Deputy Cowen notes, no alternative proposals have been put on the table. It is about 15 months. We were originally told by the Minister's predecessor, Deputy Coveney, that he wanted to consult the Attorney General and he gave the impression it would come back to us. We gave him quite a lot of time to do that. There was a change in Minister and Deputy Eoghan Murphy came into the position. We have dealt with him since.

If the Minister had made the proposal for us to postpone this a year ago or even six or seven months ago, it would have been reasonable and I would certainly have had no difficulty with it. We are 15 months on from the passing of the Bill on Second Stage and there is no amendment or alternative proposal. Again, if the Government argued that the Bill cannot be amended but it had a better alternative proposition, nobody on this side of the House would have refused to engage, formally or informally, to tease all of that out. On that basis, at this stage I cannot accept a postponement of the legislation.

Some of the matters raised by the Minister were dealt with pretty comprehensively by Mr. Séamas Ó Tuathail when he presented to the committee. He spoke, for example, about management by third parties, whether they were design and build; design, build and operate; or public private partnerships. Notwithstanding the fact that I do not like those models and my

understanding is Irish Water does not like those models because they are not the most cost-effective, Mr. Ó Tuathail's legal advice to the committee was that the constitutional referendum as proposed does not jeopardise any such arrangements. They would be a management decision for the public authority as set out. Mr. Ó Tuathail dealt with the sale of obsolete assets very comprehensively, saying that once an asset is obsolete it is no longer part of the public system or the functioning water and sanitation network. Its decommissioning automatically means it is excluded from the terms and protections of the wording and therefore can be sold or dismantled.

I note neither the Minister nor Deputy Cowen responded to the solution we put forward on the uncertainty aspect. I know the Minister was not at the committee meeting when the Office of Parliamentary Legal Advisers gave detailed advice and therefore he did not have the benefit of the subsequent conversation. The best way to avoid that uncertainty falling to the courts is for the Government to legislate that uncertainty away. The solution to those problems identified by the Minister - I stress the Minister's sincerity in this - is not to change the wording but rather to clarify the matters in law before any constitutional amendment so everybody can have legal clarity in terms of what is public and what is not, and what protection, management and maintenance means. The argument is that this may lead to additional obligations on the State to provide public water to people who are not currently in the system. I genuinely do not see how that is possible as this deals with the public system as it currently exists and the responsibilities of the State in that respect. Again, clarifying legislation could deal with that.

I will not repeat all these points when we go through the parts of the legislation and Deputy Collins can speak for herself but we have waited long enough. Our preference at this stage is that we decide on this. If the Government is opposed to this or Fianna Fáil cannot support it in its current form, people should know that and we should decide and move on. If this is rejected today, my understanding is it is to be sent back to the Dáil because it has not passed Committee Stage. The clerk might clarify that. It still would not mean the matter goes away. If the Government is not accepting this but it is committed to honouring fully the recommendations of the Oireachtas committee on the future funding of water services, it will have to come up with an alternative proposal at some stage. Why not allow us to proceed at this stage and do it on Report Stage or when it goes to the Seanad? It would help us get this done.

Deputy Eoghan Murphy: I thank the Deputies for those contributions. I say to Deputy Barry that there is no other agenda here. When the Taoiseach made his comments he would of course have been speaking to the spirit of the Bill and not the legal text that is before us now, as we are speaking about a Bill that brings about a referendum to amend the Constitution in a very specific way. We must focus on that legal text and what the implications might be from that text if it were to be inserted in the Constitution.

I agree that there are more urgent referendums that need to take place. I am thankful that as a result of a decision of the Dáil yesterday, we hope one of those referendums will be taking place very shortly. It is good that it is happening. Most people will rightly agree that the Bill taken yesterday is more urgent than this one. There is no privatisation agenda or proof thereof. It is important to ask, even in the absence of constitutional protection, how the public water system could be privatised, given the triple-lock that is in place. There are huge barriers currently in place that again inform how urgent this Bill or referendum might be versus others that many people in the Dáil want to see. There is a lengthy list of them.

Moving to a single authority or utility allows us to have a more efficient response both in terms of financially deploying resources and also in times of crisis. We saw with storms Ophelia and Emma how having a single utility can be more effective in fixing disruptions to service

in a timely manner. The Deputy accepts there are legal and technical issues so why has he not provided amendments? This is not a Government Bill and it comes from certain other sponsors. If the Deputies accept those difficulties, where are the amendments to address them?

A Deputy referred to the recommendations that have been made and supported and I agree that the recommendation for a constitutional provision should not put group water schemes at risk. It is a great fear that we have arising from advice from the Attorney General and separate advice to the committee. This amendment would put group water schemes at risk. The concerns about the language are shared not just by me as a Minister but in the legal advice received by the committee and the Attorney General. This is not a Government Bill so the onus is not necessarily on the Government to provide amendments, but we have been trying to see how we can improve or amend the legislation. We cannot do so and that is why we think there should be a whole new approach to trying to put a constitutional protection in place for water services. We are working on that but it is a complex matter. The risk of privatisation has been addressed but I still support the recommendation put forward and agreed last year. This Bill does not address the recommendation.

As Deputy Cowen notes, much work has been put into this. I completely acknowledge that it is not simple to put together a Bill and persist with the legislation to try to meet the recommendation that the Oireachtas agrees with. Unfortunately, this Bill does not do that. The Deputy spoke about a Government amendment but it is not that simple because of the complexity of the water delivery services. The Deputy knows that complexity full well. Again, if it was simple, those amendments would already have been made and would have been brought forward by members of this committee or by other people. I want to work together in trying to find the right type of amendment that might be made. However, I believe this will require a different approach from that proposed in the current wording of the Bill. As Deputy Cowen has pointed out, we should be concerned about unintended consequences on group water schemes because of the role they have in our communities in providing water to public people and public entities.

On a timeframe, we had meetings at the Office of the Attorney General recently to see how we can come up with a new direction and a new type of amendment that would put in place the necessary protections in the Constitution that would meet the recommendations of the Oireachtas. I will endeavour to come back to the committee as quickly as possible, next week if I can, to outline a timeframe that might be acceptable to the committee in how we might do that.

On the concerns raised by Deputy Ó Broin, I think he is right about a constitutional referendum. We want to have as much consensus as possible. As we approach this in terms of bringing a referendum to the people, which we will do, it should be a slam-dunk. It should be very simple and easy and people should all be able to rally around it and say, "Absolutely, we want to protect public water in the Constitution." This Bill will not do that. The Bill as currently drafted, even if we attempt to make amendments around the language, will raise concerns with members of the public in certain parts of the country as to what the eventual interpretation might be by a court of law when it comes to the actual language in the Constitution. That is why I do not think the Bill can achieve what we all want to achieve, namely, public acceptance of a referendum when it is put to the people and to have that referendum agreed upon.

I do sense the Deputies' frustration. I know it took a long time for the committee to get its own legal advice because it is a complex area. However, there has been no delay on my part or on that of my office. I note that a large part of last year was spent in dealing with the water services legislation that was taken through the House.

On opinions that were received from other people that this committee, legal opinions, ultimately, the courts will decide based on what is in the Constitution. There will be different opinions on that, which speaks to the uncertainty that exists and the unpredictability of the proposed amendment. Again, if it is so simple to define these things, I ask the Deputy to show me the definitions and how it was clarified. We have tried and it is not simple. I have to act on the advice of the Attorney General. That is paramount for me as a Minister of the Government. I do not want this issue to go away. I want us to be able to resolve it because it is a recommendation that we accepted and I agree with it personally. I do believe there are very significant protections in place already to protect any privatisation of the water system. There is no agenda on my part or that of the Government to privatise the water system. However, I accept that the public would be happier and would feel safer if there was a change to the Constitution that protected their water services from private ownership. I will work with the committee to do that. Unfortunately, this Bill will not achieve it in my view.

Deputy Joan Collins: Last year, the previous Minister, Deputy Simon Coveney, was in this room and raised the same issues the current Minister has raised today. He said that until he had that confirmation or clarity, he could not give the committee a definite answer as to whether it is or is not problematic. He went on to state:

There are issues here on which we have to be reassured. If we cannot get that reassurance, we will have to change the wording to ensure we are covered in the areas where there is concern. That is my point. We can potentially make that change on Committee Stage or Report Stage, but we would be better off doing it on Committee Stage rather than leaving it to the last Stage of the process.

Here we are, nearly at the last Stage of the process, and the Minister, Deputy Eoghan Murphy, has not come with any amendments or anything written from the Attorney General to say what the issues are. I remember that at that meeting of 4 May 2017, Mr. Séamas Ó Tuathail clearly explained that group water schemes are defined by their make-up, ownership, etc.

They have to apply to the local authority if they want to go back onto the public water system. By that definition, they are a private water scheme even if they receive public water into the scheme. He made it very clear that this is the case. The Minister has given no evidence on his part. I am sure group water scheme participants are wondering if they are private or public. Irish Water obviously does not know and neither does the State, by what the Minister is saying. Mr. Ó Tuathail explained it in detail, however. I suggest the members go back and read the transcript.

The fact that group water schemes receive water from the public water system does not change their status. For example, where does Diageo get its water from? It gets it from the public water system, as do thousands of other businesses. Does this affect their status as being private companies? No, it does not. They are receiving public water and are supposed to pay for it. That is a different situation. Group water schemes are private schemes by definition and in how they operate and are set up in co-operatives or whatever.

I hear what the Minister is saying and I do want a Bill that would be robust in respect of the Constitution. We did not propose any amendments because we feel that the Bill we presented is robust. The Office of the Parliamentary Legal Adviser, OPLA, raised issues, which we discussed, and raised the possibility of legislation that could clarify, if necessary, where it stops and starts, what responsibility the Government would have etc. If that is what the Minister is

saying, I would be very supportive of taking a short period of time that we could look at the legislation and do it. By all accounts, and given the record to date, I am afraid I have little confidence that there is seriousness in this regard.

When the committee asked me in December to approach the Minister, I wrote three letters to him. I got a response from his constituency office, which forwarded the letter on to him. I got no further response to that. In response to the letter he provided to the committee in February, I wrote to him again and got a reply from him saying yes but that proper advice on legislation was needed. Now we are coming to a crucial part of the debate and are being asked to postpone it again. I do not have much faith in the process. The Minister has had 16 months to do it. I have made myself available to the Minister on numerous occasions. He has not come back to us. I am very sceptical about that approach.

On the utility, I think it is very dangerous putting a utility into the Constitution. I do not think that is a possible situation. It has been said to the committee that it is not an urgent Bill and is not on the referendum agenda. I think there are 11 proposed referendums at the moment. We are getting mixed messages. In a letter he wrote to the unions, the Minister stated explicitly:

Notwithstanding these provisions, I am willing to facilitate the holding of a referendum. The question of a referendum is currently before the Joint Committee on Housing, Planning and Local Government. The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016 has already been approved at Second Stage in the Dáil as part of the legislative process. There are issues around the timing of such a referendum in the first half of 2018 [that is the first we have heard about it] and challenges in framing the wording in such a way as to avoid adverse and unintended consequences. I am committed to working with the Committee over the coming months to address these matters.

The unions replied and stated clearly that they are appealing to this committee to support the referendum and the Bill, stating:

We believe that there is broad public support for the holding of a constitutional referendum to prevent the future privatisation of the public water system. We note that the Minister has confirmed that he is willing to facilitate the holding of a referendum. We understand that a Bill to give effect to the holding of a referendum will be considered at committee stage on 28 February 2018 [that was postponed]. We would urge all parties to co-operate to ensure that a referendum is held as soon as possible.

That is part of a letter in respect of Irish Water and the proposed move to a single utility.

I really need something more tangible and more concrete coming from the Minister's side of the table. I urge the other committee members to express that very strongly also. The group water schemes are protected by their very nature. Séamas Ó Tuathail is an eminent senior counsel. I do not know if the Minister has read his contributions to the committee last May. I appeal to the committee not to let this wither away now. While Deputy Ó Broin said he would not speak for me, I would prefer it to go to a vote. I would prefer if it was taken here today and that, if necessary, it would go back to the Dáil where we would have the debate. If the Minister is serious, we should be sitting down and looking at legislation to try to deal with those issues of clarification.

Deputy Barry Cowen: I formally propose that Committee Stage be postponed, that the

Minister agree to consult Deputy Joan Collins and that the committee receive an update within two months on what progress, if any, has emanated from that process. As the Minister stated, amendments will not be forthcoming from the Government because it intends to rebut the Bill, which is not to say it is not committed to producing legislation to effect a referendum to amend the Constitution. If other members are agreeable, I would like the process I have proposed to be investigated. If, following its completion, Deputy Joan Collins is still of the opinion that the legislation needs to be tested in the Chamber, so be it.

Chairman: Before I put the question, the Minister wishes to clarify a couple of matters.

Deputy Eoghan Murphy: Nothing I have said contradicts what I wrote in my letter to the trade unions. The point I made was that, in my view, the referendum on the eighth amendment was more urgent than the referendum proposed in this legislation. I also made that point in the Dáil when we spoke about the pace at which we were proceeding with this proposed amendment to the Constitution. I have also spoken to Deputy Joan Collins on the matter. I attend the Dáil on every sitting day and always make myself available for meetings. I have never refused a meeting with Deputy Joan Collins, but I wanted to obtain the advice of the Attorney General before any such meeting took place. Once I had that advice, I was in a position to write to the select committee in more detail.

The Tánaiste, when he was the Minister responsible, raised concerns at this committee. However, he was unable at the time to outline specific problems, as I have been able to do. Some of the sponsors of the Bill have admitted that they share these concerns and I do not know why they have not been addressed. I cannot provide members with the legal advice of the Attorney General because it is privileged. However, the risks to group water schemes are real, as noted in the independent advice received by the committee. The amendment could affect the operation of group water schemes. It is its unintended consequences that concern me. It is not an issue of being able to amend the wording as, from my perspective, an alternative wording will be required. That is where the difficulty lies.

Deputy Barry Cowen has made a proposal which may be constructive in trying to find an agreed position that could be put to the Oireachtas. We could then put a question to citizens and successfully implement it through a positive change to the Constitution.

Deputy Pat Casey: I second Deputy Barry Cowen’s proposal.

Question put.

| The Committee divided: Tá;, 4; Níl, 2. | |
|----------------------------------------|----------------|
| Tá; | Níl; |
| Bailey, Maria. | Barry, Mick. |
| Casey, Pat. | Ó Broin, Eoin. |
| Cowen, Barry. | |
| Murphy, Eoghan. | |

Question declared carried.

Chairman: Consideration of the Bill will be postponed to a date to be fixed. We will return with a date. We will seek an update from the Minister and the Bill’s sponsors. At our next

SHPLG

meeting we will deal with Estimates.

Progress reported; Committee to sit again.

The select committee adjourned at 4.25 p.m. until 1.30 p.m. on Tuesday, 27 March 2018.