



**Submission in response to  
Irish Water's *Lead in Drinking Water  
Mitigation Plan Issues Paper***

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## 1.1 Introduction

Threshold is a national housing charity that provides housing information, advice and advocacy services for people with housing problems and people at risk of homelessness. Last year our advisors dealt with 20,000 housing queries from tenants living in the private rented sector.

Threshold has helped people living in the private rented sector for almost 40 years and in responding to this consultation seeks to ensure that Irish Water has due regard to the rights and interests of tenants in formulating its *Lead in Water Mitigation Plan*.

## 1.2 Legal framework

The right to adequate housing includes the right of access to safe drinking water.<sup>1</sup> This right is however inadequately protected by the legal and regulatory framework relating to the supply of drinking water to tenants in the private rented sector. It is submitted that Irish Water should have regard to the very limited range of options and remedies available to a tenant who is placed at risk by a landlord's failure to repair internal water pipes in the rented dwelling.

### *Lease agreement*

A landlord may be under a contractual obligation to maintain and repair internal water pipes depending on the terms of the lease agreement between the parties to the tenancy.

Where a tenant is issued with a written lease agreement, it will normally contain a clause which sets out the respective rights and responsibilities of the landlord and the tenant for the maintenance and repair of the dwelling. Normally, a landlord will be responsible for the external structure of the dwelling, while the tenant will be responsible for the interior (though these terms may be superseded by the obligations imposed on landlords by virtue of the Residential Tenancies Act 2004, discussed more fully below).

Whether or not internal water pipes are included within the external structure of the dwelling, and whether the repair and maintenance of such pipes are the responsibility of the landlord or the tenant, will depend on the wording and interpretation of the particular lease agreement. Even where a landlord is responsible under a lease agreement for repairs to the internal water pipes, they will not usually be liable unless they knew or ought to have known of the need to carry out repairs.<sup>2</sup>

### *Breach of duty*

The failure to maintain internal water pipes may also give rise to a breach of the duty owed by the landlord to the tenant at common law.

Where a landlord retains control of the building in which a rented premises is situated, he or she owes a duty to take reasonable care to prevent the risk of reasonably foreseeable harm to the tenant. However, in order for a landlord to be held liable in negligence for a personal injury arising from, for example, the failure to maintain internal water pipes so as to ensure that they do not give

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights, Article 11(1), read in conjunction with General Comment No.4 on the right to adequate housing, para 8(b), UN Doc E/1992/23.

<sup>2</sup> See generally JC Wylie, *Landlord and Tenant Law*, (3<sup>rd</sup> ed.) (Bloomsbury Professional; 2014), at para.15.16.

rise to risk of harm to the tenant, the tenant will have to be establish on the balance of probabilities that the landlord knew or ought to have known of the risk of harm.<sup>3</sup>

It is arguable that a landlord will be fixed with constructive knowledge of the risk of harm to a tenant where, for example, they have been subject to a direction by Irish Water or a local authority under the European Union (Drinking Water) Regulations 2014 (discussed below). However, where a landlord does not know, or could not reasonably have known, of the risk posed to tenants by water pipes the rented dwelling, they will not be held liable in negligence for an injury attributable to the consumption of the drinking water.

#### *Minimum standards regulations*

Regulations prescribing minimum standards for the private rented sector do not place any obligations on landlords as to the quality of drinking water supplied to their tenants, or as to the state of repair of water pipes within the rented dwelling.<sup>4</sup>

While minimum standards for the private rented sector impose a duty on landlords to keep a rented dwelling in a 'proper state of structural repair', this does not extend to maintaining water pipes within the dwelling.<sup>5</sup> Similarly, while an obligation is placed on landlords to provide access to sanitary and food preparation facilities, including 'a piped supply of cold water taken direct[ly] from the service pipe supply water from the public main or other source',<sup>6</sup> the regulations expressly provide that they shall not be read 'as requiring or authorising anything to be done in connection with a water supply [...] otherwise than in accordance with the enactments relating thereto'.<sup>7</sup>

#### *Residential Tenancies Act 2004*

The obligation placed on landlords by the Residential Tenancies Act 2004 ('the 2004 Act') to carry out repairs to the structure and interior of a rented dwelling is limited to such repairs as are necessary to comply with the minimum standards regulations.<sup>8</sup>

A tenant is entitled to carry out repairs him or herself to the structure or interior of the dwelling in circumstances where the landlord has failed or refused to comply with a request to carry out such repairs, and where the postponement of repairs would give risk to a significant risk to the health and safety of the tenant. This right only arises however where the landlord would otherwise be responsible for such repairs.<sup>9</sup>

Given that, as outlined above, repairs to internal water pipes are not required to be carried out under the minimum standards regulations, a tenant would not be entitled under the 2004 Act to carry out such repairs him or herself, and to seek reimbursement for such repairs from the landlord.

It is doubtful whether it would open to a tenant to refer a complaint to the Private Residential Tenancies Board under the 2004 Act relating to a breach of landlord's repair obligations in

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<sup>3</sup> JC Wylie, *Landlord and Tenant Law*, (3<sup>rd</sup> ed.) (Bloomsbury Professional; 2014), at para.15.14. See also *Siney v Dublin Corporation* [1980] IR 400

<sup>4</sup> Housing (Standards for Rented Houses) Regulations 2008 (SI No 534 of 2008) as amended by the Housing (Standards for Rented Houses) (Amendment) Regulations 2009 (SI No 432/2009).

<sup>5</sup> *Ibid.*, reg.5

<sup>6</sup> *Ibid.*, regs 6(1) and 8(2)(e)

<sup>7</sup> *Ibid.*, reg. 3

<sup>8</sup> Residential Tenancies Act 2004, s.12(1)(b)

<sup>9</sup> *Ibid.*,s.12(1)(g)

circumstances where a landlord had failed to ensure that the quality of drinking water supplied to the tenant was not impaired by water pipes within the dwelling, as the maintenance and repair of such pipes is not required under the 2004 Act or the minimum standards regulations.

#### *European Union (Drinking Water) Regulations 2014*

It is to be considered whether regulations prescribing quality standards for drinking water provide adequate protections for tenants in rented dwellings.

The definition of ‘owner’ provided for in the European Union (Drinking Water) Regulations 2014 (‘the 2014 regulations’) clearly encompasses landlords, in that it extends to those persons who are entitled to receive the rent in respect of the premises.<sup>10</sup>

While the 2014 regulations impose an obligation on the owner of a premises to maintain the domestic distribution system in such a condition that it does not give rise to non-compliance with prescribed standards for drinking water, this statutory duty is only engaged where the owner is supplying water for human consumption as part of a ‘commercial or public activity’.<sup>11</sup>

It is to be noted in this regard that the commercial or public activities referenced in this context (schools, hospitals and restaurants) do not expressly include making a dwelling available for letting. Threshold would argue however that leasing a dwelling is a ‘commercial activity’ for the purposes of the 2014 Regulations, such that a landlord is under an obligation to ensure that internal water pipes are maintained in a state of repair that ensures that they do not cause, contribute to, or give rise to a risk of non-compliance with prescribed drinking water standards.

This argument is advanced on the basis that (a) making a dwelling available for letting is an activity engaged in by landlords with a view to generating rental income, and as such is a ‘commercial activity’ for the purposes of the 2014 regulations,<sup>12</sup> (b) the list of commercial or public activities provided for in the 2014 regulations is non-exhaustive, and as such may extend to activities not expressly referenced therein, and (c) these activities may be commercial *or* public, such that activities which are commercial but which take place in the private sphere (such as making a dwelling available for letting) are encompassed by the 2014 regulations.

It is recognised Irish Water will not be liable for a breach of the 2014 regulations where the domestic distribution system is in not in its control – i.e. where the internal water pipes are under the control of the owner of the premises.<sup>13</sup>

Notwithstanding, where there is a risk of non-compliance in a premises where water is supplied for human consumption as part of a commercial or public activity, Irish Water or the relevant local authority is under a duty to ensure that appropriate action is taken to prevent or restrict the supply

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<sup>10</sup> European Union (Drinking Water) Regulations 2014 (SI No 122 of 2014), reg.3. As such the definition of ‘owner’ is analogous to the definition of ‘landlord’ provided for by s.5(1) of the Residential Tenancies Act 2004.

<sup>11</sup> *Ibid.*, reg. 6(2)

<sup>12</sup> By way of analogy, it is recognised that tenancy/lease agreements are consumer contracts for the purpose of Council Directive 93/13/EEC on unfair terms in consumer contracts, as implemented by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No. 27/1995). See Case C-488 *Brusse v Jahani BV*, Case C-226/12 *Constructora Principado SZ v Alvarez*, and *London Borough of Newham v Khatun* [2004] EWCA Civ 55.

<sup>13</sup> European Union (Drinking Water) Regulations 2014, reg.6(1)

of drinking water and to restore the domestic distribution system to the requisite standard, and Irish Water enjoys the power to make appropriate directions in this regard.<sup>14</sup>

It may be noted that the duties placed on Irish Water or a local authority differ where the risk of non-compliance with the 2014 regulations arises in a premises where water is *not* supplied as part of a commercial or public activity.<sup>15</sup> The express duty to inform consumers of the non-compliance and to advise them of any additional remedial action that should be taken only arises whether the water is supplied otherwise than as part of a 'commercial or public activity', thus potentially excluding tenants in the private rented sector from the scope of this duty.<sup>16</sup>

Notwithstanding, Threshold would submit that supplying tenants with such information is amongst the appropriate measures which Irish Water is under a duty to take where there is a risk of harm arising from non-compliance by a landlord with the 2014 regulations.

A landlord who is non-compliant with the 2014 regulations is guilty of an offence<sup>17</sup> and may be exposed to prosecution at the instance of the Environmental Protection Agency, Irish Water, or the relevant local authority. Where a landlord fails to comply with a direction made under the 2014 Regulations, Irish Water or the relevant local authority may apply to the High Court for appropriate relief, including interim or interlocutory orders.<sup>18</sup>

It would seem however that a tenant does not have a directly effective remedy as against a landlord for breach of the 2014 regulations (given the jurisdictional issues outlined above), and instead is reliant on the intervention of Irish Water and/or a local authority on his or her behalf. The failure of most local authorities adequately to monitor and enforce the minimum standards regulations provides a discouraging precedent in this regard. It is imperative therefore that Irish Water takes a proactive role in fulfilling its statutory duties towards tenants to prevent the risk of harm posed to them by landlords who are not compliant with the 2014 regulations.

### **1.3 Need for the *Mitigation Plan* to take account of the private rented sector**

In the case of the private rented sector it is the tenant, as the consumer of water services provided by Irish Water, that will be directly affected by any unsafe lead concentrations in their water. Yet it is the property owner or landlord who will be responsible for any mitigation works needed to be undertaken to replace lead pipes or plumbing on the property. Irish Water needs to develop an approach that takes into account both these actors. At the moment the *Issues Paper* concentrates on the relationship between Irish Water and the property owner. The need to give due consideration to the rights and interests of tenants is increasingly important in circumstances where approximately 20% of all properties in Ireland are now rented.<sup>19</sup>

In order to take adequate account of the private rented sector, the *Mitigation Plan* should contain the following elements:

- Irish water should undertake an assessment, in conjunction with the Private Residential Tenancies Board, as to which properties deemed to have unsafe lead levels in the water are

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<sup>14</sup> Ibid., reg.6(3)

<sup>15</sup> Ibid., reg.6(5)

<sup>16</sup> Ibid., reg.6(5)

<sup>17</sup> Ibid., reg.6(6)

<sup>18</sup> Ibid., reg.18

<sup>19</sup> DKM Economic Consultants, [Future of the Private Rented Sector](#), (prepared for the Housing Agency on behalf of the Private Residential Tenancies Board), October 2014

currently being rented. This assessment should also identify which properties have multiple tenancies;

- Irish Water should ensure that all tenants in rented properties receive appropriate information, especially if the property has a number of subunits. At the moment the literature intends to provide one set of information per property;
- Irish Water should ensure that both tenants and landlords receive the same information throughout the process;
- Irish Water should develop a set of financial supports for landlords to ensure that they are not prevented from undertaking any necessary works due to financial considerations;
- Where the landlord is unable or unwilling to undertake mitigation works the tenant should be informed and should be able to terminate a tenancy/lease agreement without being subject to a penalty;
- Where a landlord is informed by Irish Water of the necessity to take appropriate mitigation works, any prospective tenants should be informed of these prior to entering into a tenancy.
- Where a landlord is unwilling or unable to undertake the requisite work necessary to ensure a safe supply of drinking water, Irish Water or the relevant local authority should fulfil its *a duty* the European Union (Drinking Water) Regulations 2014, *to ensure that appropriate action is taken to prevent or restrict the supply of drinking water.*
- Irish Water should engage with the Department of Environment, Community and Local Government to explore updating the Housing (Standards for Rented Houses) Regulations to provide a legal framework to ensure that all tenants in the private rented sector are provided with safe drinking water, especially with regards to lead.