

# Caretaker governments and caretaker conventions

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19 March 2021 (First published 2016 updated March 2021)

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## Introduction

A caretaker government works in the period between the termination of one government and the formation of another. In parliamentary democracies, the outgoing government tends to remain in office as a caretaker government from the day parliament is dissolved until the day a new government is sworn in. This principle, often outlined in the constitution or in legislation, is designed to ensure that the country is never without an executive.

An almost universal characteristic is that a caretaker government may not resign. Further, as caretaker governments cannot claim to command the confidence of parliament, and thereby lack democratic legitimacy, most parliamentary democracies have developed **explicit caretaker conventions** to guide their actions.

This *L&RS Note* looks at the concepts of caretaker governments and caretaker conventions:

1. Caretaker governments in Ireland and an introduction to caretaker conventions;
2. Caretaker governments and conventions in other parliamentary democracies; and
3. Role of **incoming parliaments** (including Dáil Eireann) during the caretaker government.



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## 1.Caretaker governments in Ireland

In Ireland, under Article 28.11.1 of the Constitution, the incumbent Taoiseach and Ministers remain in office as a caretaker government until a successor is appointed. This is the case even where the Taoiseach or Ministers are not re-elected as members of the incoming Dáil. Ministers of State<sup>1</sup> also remain in office, even if not re-elected.

### ARTICLE 28 BUNREACTH NA hÉIREANN

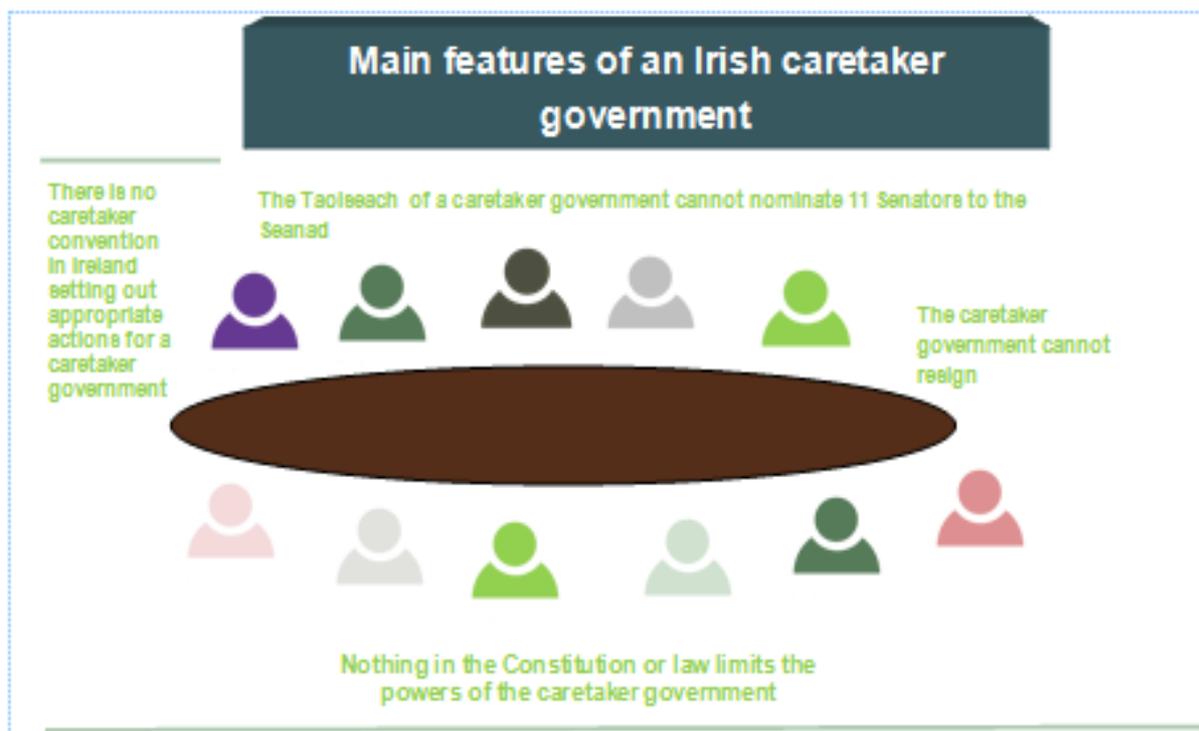
28 11 1° If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed.

2° The members of the Government in office at the date of a dissolution of Dáil Éireann shall continue to hold office until their successors shall have been appointed.

### What an Irish caretaker government can and cannot do

Firstly, a caretaker government in Ireland may not resign. It remains in place until a successor government is appointed i.e. until the election of a new Taoiseach (by a simple majority in the Dáil)<sup>2</sup> and a Dáil vote in support of the new Taoiseach's proposed government). Unlike in some other States (e.g. Spain) the Constitution sets no time limit for government formation.

Secondly, there is nothing in the Constitution or Irish law which explicitly limits the powers of a caretaker government. However, if a caretaker government introduces legislation it must pass through the (newly elected) Dáil and the existing Seanad. If the Seanad has been dissolved (an election to the Seanad must take place within 90 days of the Dáil's dissolution), the caretaker government's power to successfully bring forward legislation is curtailed (this is explained below).



Thirdly, while a caretaker Taoiseach could fill casual vacancies among the Taoiseach's nominees (e.g. where a Taoiseach's nominee has been elected to the Dáil), **a caretaker Taoiseach cannot appoint the Taoiseach's nominees to the new incoming Seanad (Article 18.3 of the Constitution)**. This has significant implications for the legislative process when caretaker governments are in place for prolonged period; this is because from the time that the new Seanad has been elected (the election must be held no later than 90 days after the dissolution of the Dáil)<sup>3</sup> until the date a Taoiseach is elected by the newly-elected Dáil, the new Seanad is not fully composed and, therefore, cannot convene and take legislation. This issue was highlighted in 2018 by constitutional lawyers, Hogan and Whyte, who noted that a 'vacuum of legislative power' may emerge as 'the previous Seanad cannot then be reassembled, and a new Seanad cannot meet and legislate until a Taoiseach is appointed and makes his or her nominations.' Hogan and Whyte refer to it as 'a constitutional lacuna that could in certain circumstances be highly problematic.'

A High Court ruling in June 2020 brought some clarity to this issue. The case was taken by Senators (elected in March 2020)<sup>4</sup> who argued that the new Seanad should meet and take legislation in the absence of the 11 Taoiseach's nominees. The High Court ruled against the Senators stating that "Seanad Éireann does not exist until constituted as required by article 18.1 and is thus not entitled to sit before the Taoiseach has nominated the 11 members provided for in article 18.1."<sup>5</sup> The High Court disagreed with the argument that this issue is caused by a 'constitutional lacuna,' instead blaming it on the failure of the parties to form a government (lack of political consensus in the Dail). This 'lacuna' may be seen as placing an indirect time limit, or at least some time pressure, on parties endeavouring to form a government. Formal time limits on government formation exist in other parliamentary democracies (e.g. Spain) after which a new general election is automatically triggered.

This constitutional issue did not arise when the recent caretaker government (February – June 2020) introduced the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020* and the *Emergency Measures in the Public Interest Bill 2020*. Both Bills were published in March 2020 and were taken by the newly-elected Dáil and the outgoing Seanad (which had adjourned in January 2020 but was recalled).<sup>6</sup>

### What is a caretaker convention?

As caretaker governments cannot claim to command the confidence of parliament, and thereby lack democratic legitimacy, most parliamentary democracies have developed **explicit conventions** to guide their actions.<sup>7</sup> In some cases, the convention is un-written, in others it is provided for in the Constitution or legislation (e.g. Portugal, Spain) or in written handbooks of Cabinet procedures (e.g. New Zealand).

Central to caretaker conventions elsewhere is the principle that, while a caretaker government has full executive powers, it should avoid taking important decisions i.e. it should not initiate new policy initiatives or significant matters which do not require urgent decisions.<sup>8</sup> For example, in New Zealand, a caretaker government is expected to behave with restraint, and, the Cabinet manual<sup>9</sup> sets out that where a decision concerns:

- significant or potentially controversial issues;
- issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as signing a major contract or making a significant appointment);
- new policy initiatives or changes to existing policy.

Caretaker governments are expected to either defer them, make temporary arrangements or make them **in consultation with parties in the newly elected parliament.**

### **What is a convention?**

There is no one definition of convention but generally it means a rule or a certain practice. The UK Cabinet Manual<sup>10</sup> defines convention as: 'rules of constitutional practice that are regarded as binding in operation but not law.'

The Museum of Australian Democracy defines conventions as: 'Flexible rules which have evolved in response to circumstance, which are generally agreed to by all, but which may not be codified in precise terms. The caretaker conventions are a series of practices that governments facing an election follow at every level of government in Australia. Other conventions are observed in many areas of political life and the administration of government.'<sup>11</sup>

Conventions can be unwritten, be written as legislation or set out in a Cabinet handbook.

Table 1 (p.7-8) summarises the key features of caretaker conventions in select parliamentary democracies. A discussion of caretaker governments and incoming parliaments in practice follows.

### **Does Ireland need a caretaker convention?**

The All-Party Oireachtas Committee on the Constitution 2003<sup>12</sup> in its [Eighth Progress Report: Government](#) found that the existing constitutional provisions in relation to caretaker governments, the right to attend the Oireachtas and procedures for resignation (Article 28.8 to 28.12), are 'satisfactory and do not require amendment.'

Certainly, where the result of an election is clear and the process of government formation is quick, caretaker governments tend to be relatively uncontroversial and a convention may appear unnecessary. With few exceptions government formation processes in Ireland have been relatively straightforward prior to 2016 and 2020 (average 20 days).<sup>13</sup> Box 1 shows the longest-serving recent Irish caretaker governments.

### Box 1. Irish Caretaker Governments (time between date outgoing Taoiseach resigns and is appointed caretaker Taoiseach *and* the date new Taoiseach is appointed)

#### 2020: 128 days

General Election took place on 8 February 2020. Dáil met on **20 February 2020** and failed to elect a Taoiseach. Leo Varadkar resigned as Taoiseach of the outgoing government and remained in caretaker role until Michael Martin was elected Taoiseach on 27 June 2020 **140 days after the election**.

#### 2016: 57 days

General Election took place on 26 February 2016. Dáil met on **10 March 2016** and failed to elect a new Taoiseach. Enda Kenny resigned as Taoiseach of the outgoing Government and remained in caretaker role until he was elected Taoiseach again on 6 May 2016 **57 days after the election**.

#### 1994 - 28 days

On **17 November 1994** Labour Ministers resigned from government. Albert Reynolds resigned as Taoiseach of the outgoing Government and remained in caretaker role until John Bruton was elected Taoiseach 15 December 1994 without dissolution of the Dáil.

#### 1992 – 29 days

General Election took place on 25 November 1992. Dáil met on **14 December 1992** and failed to elect a new Taoiseach. Albert Reynolds resigned as Taoiseach of the outgoing Government and remained in caretaker role until he was elected Taoiseach again on 12 Jan 1993 **48 days after the election**.

#### 1989 – 13 days

General Election took place on 15 June 1989. Dáil met **on 29 June 1989** and failed to elect a new Taoiseach. Charles Haughey resigned as Taoiseach of the outgoing Government and remained in caretaker role until he was elected Taoiseach again on 12 July 1989 **27 days after the election**.

However, political scientists have noted that, in the absence of a caretaker convention in Ireland, caretaker governments in the 1990s used powers to make politically-motivated appointments prior to leaving office.<sup>14</sup> Further, when the process of government formation is extended (e.g. the period following the 2016 and 2020 general elections), the question of the legitimacy, behaviour and remit of the caretaker government and its relationship with the newly-elected parliament becomes increasingly relevant. This is particularly the case where the outgoing government has lost the confidence of the people i.e. following an election where it has not been returned or following a vote of no confidence (and a possible dissolution of the Dáil or election of an alternative government). In the context of an evolving party system, the possibility that future elections will return unclear results that lead to prolonged government-formation processes, a caretaker convention may be considered in Ireland.

## 2. Caretaker conventions in practice

Table 1 below sets out the main features of caretaker conventions in parliamentary democracies according to whether it is unwritten, provided for in legislation or in the constitution.

**Table 1: Key features of caretaker governments and conventions**

	Source of guidance on powers of caretaker government	What can the caretaker government deal with?	Limits on caretaker government's actions?
<b>Unwritten convention</b>			
<b>Netherlands</b>	Unwritten convention	Same executive powers as any cabinet	Caretaker cabinet does not take controversial actions/measures
<b>Belgium</b>	Unwritten convention	Non-political matters of daily arrangement;  The continuance of important matters started before the caretaker period and for which all policy questions have been decided before that period;  Urgent matters.	Important matters where all policy questions have not yet been answered.  Political matters.
<b>Constitution</b>			
<b>Portugal</b>	<a href="#">Constitution</a> limits actions of caretaker government	Executive body with limited powers and should undertake actions that are strictly necessary in order to ensure the management of public affairs (Article 186.5).	There are different interpretations of the constitutional limitations. But there is some consensus that it may not present legislation to execute its Programme, introduce political innovation or actions which would impede the incoming government.
<b>Set out in legislation</b>			
<b>Spain</b>	Legislation <sup>15</sup>  Constitution sets out time limit <sup>16</sup>	Should facilitate the normal process of the formation of the new government.	Explicitly prohibited from proposing a consultative referendum, approving the draft law on State budget and from submitting bills to parliament.
<b>Set out in cabinet handbook</b>			
<b>New Zealand</b>	<a href="#">Cabinet handbook</a> (Chapter 6)	A caretaker government is expected to behave with restraint.	Caretaker government is expected to defer decisions, make temporary arrangements or consult with parties in the newly elected parliament if the decision concerns: <ol style="list-style-type: none"> <li>1. significant or potentially controversial issues;</li> <li>2. issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as signing a major contract or making a significant appointment);</li> <li>3. new policy initiatives or changes to existing policy.</li> </ol>
<b>England and Wales</b>	Cabinet handbook ( <a href="#">see paras 2.27 to 2.31</a> ).	Expected to observe discretion in initiating any	Refrain from: <ul style="list-style-type: none"> <li>• taking or announcing major policy decisions;</li> </ul>

		<p>new action of a continuing or long-term character'</p> <p>If decisions cannot wait they may be handled by temporary arrangements or following relevant consultation with the Opposition</p>	<ul style="list-style-type: none"> <li>entering into large/contentious procurement contracts or significant long-term commitments; and</li> <li>making some senior public appointments and approving Senior Civil Service appointments, provided that such postponement would not be detrimental to the national interest or wasteful of public money.</li> </ul>
<b>Other source</b>			
<b>Canada</b>	Set out in <a href="#">Privy Council Office document</a> (2015)	<p>A caretaker ministry should restrict itself (in matters of policy, expenditure and appointments) to activity that is: routine, or</p> <p>non-controversial, or</p> <p>urgent and in the public interest, or reversible by a new government without undue cost or disruption, or agreed to by opposition parties (in those cases where consultation is appropriate).</p>	It should not make decisions or act on controversial matters
<b>Australia</b>	<b>Australian Capital Territory (ACT)</b> Guidance from Chief Minister's Department <sup>1</sup>	<p>At federal and state level caretaker governments:</p> <ol style="list-style-type: none"> <li>Avoid making major policy decisions like to commit a new incoming government;</li> <li>Consult with opposition;</li> <li>Avoid appointments of any significance and the awarding of major contracts and undertakings;</li> <li>May approve commencement of legislation passed by parliament;</li> <li>Avoid attending intergovernmental meetings.</li> </ol>	Do not bind incoming government to policy decisions or contracts or undertakings

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<sup>1</sup> Caretaker conventions are also in place for the six States in Australia's federation. **New South Wales** Memorandum no. T2002-6; **Northern Territory** Guidelines by the Cabinet Office, Dep of the Chief Minister; **Queensland** Guidance is given at election time; **South Australia** Cabinet Office guidance; **Tasmania** State election caretaker guidance from Department of Premier and Cabinet; **Victoria** Guidance from the Department of Premier and Cabinet; **Western Australia** Premier's Circular 2005/01

In **Canada** the caretaker government's decision-making capacity is significantly curtailed by a 'caretaker convention' which is written by the Privy Council Office and holds that decision-making should be restricted to routine, non-controversial matters. Further, where an outgoing government has been clearly defeated, the expectation of restraint is stronger.<sup>17</sup> The consequences of breaching this are political (rather than legal).<sup>18</sup>

In **Belgium**, where caretaker governments have been in place for long periods (194 days in 2007/8 and 541 days in 2010/11), the convention, referred to as a 'customary constitutional law,' is that a caretaker government (or a 'government of current affairs') deals with:

- non-political matters of daily arrangement;
- the continuance of important matters started before the caretaker period and for which all policy questions have been decided before that period; and
- urgent matters, even of major importance, which cannot reasonably be postponed. These tend to include the budget, the management of semi-autonomous agencies and international obligations.

The practice of restricting a caretaker government's actions to 'current affairs,' was stretched during the 2010/2011 period which coincided with the financial crisis in Europe.<sup>19</sup> Where a caretaker government is considered to have exceeded its boundaries, a complaint may be made to the State Council (Administrative Court) which decides by case law whether the caretaker government has stayed within the boundaries of the convention.<sup>20</sup>

In some cases, where caretaker governments are in place for a pro-longed period **the incoming parliament** plays a significant role in determining the limitations on its actions.

In the **Netherlands**, while the caretaker government (de-missionary cabinet) has the same executive powers as any cabinet, the unwritten convention is that a caretaker cabinet does not take controversial actions i.e. measures in areas on which there is much political debate. It is the incoming parliament which tends to determine which actions are 'controversial.'<sup>21</sup> The situation is similar in **Sweden** where the limits on caretaker governments are informal, its capabilities restricted by the fact that it is unlikely to find support for its proposals in parliament.<sup>22</sup> It is expected to decide urgent matters or matters which are purely administrative. As such, caretaker governments tend not to propose new legislation, establish inquiries or appoint new senior officials.<sup>23</sup> It is not, however, legally prohibited from doing so and if the period of time is extended, Larsson suggests that a caretaker government would operate more and more like an ordinary cabinet (i.e. take decisions to parliament for approval).<sup>24</sup>

On the other hand in **Spain**, which had a caretaker government for over ten months (between December 2015 and December 2016), a caretaker government is legally restrained by the *Act on Government (L.50/1997)*.<sup>25</sup> It provides that caretaker governments facilitate the normal

development of the government formation process and refrain from adopting any other measures (except in cases of urgency 'duly authorised or for general interest reasons').<sup>26</sup> Caretaker governments are explicitly prohibited from certain actions including proposing a consultative referendum, approving the draft law on the State budget and from submitting bills to parliament. Further, the caretaker government (2015-2016) stated in 2016 that it is not answerable to the incoming parliament, a stance which led to parliament taking a case to the Constitutional Court (discussed further below).

Similarly, in **Portugal** a caretaker government is an executive body with limited powers which, under Article 185.6 of the Constitution, 'should undertake actions that are strictly necessary in order to ensure the management of public affairs.'<sup>27</sup> While the Constitution places limits on the caretaker government's actions, the exact nature of its competencies is not set out in any law, and the constitutional provisions have been open to different interpretations. These different interpretations raise questions, not unique to Portugal, about the application of a caretaker convention.

### Conflicting legal interpretations of caretaker conventions

There are conflicting legal interpretations of the extent to which a caretaker government's actions are restricted. For example, one legal interpretation in **Portugal**<sup>28</sup> argues that a caretaker government maintains an administrative function *only* and that it should use this function to undertake necessary, urgent and 'duly founded' decisions. These include acts which are strictly necessary and impossible to postpone, or essential to ensure the management of public affairs and/or to prevent significant harm to the collective interest.

A second, broader interpretation, which has tended to be supported by the Constitutional Court and the Attorney General's Advisory Board in Portugal, is that caretaker governments may undertake *any* act – political, legislative or administrative – where the act is needed and impossible to postpone.<sup>29</sup> However, there is some consensus between both groups around the idea that a caretaker government:

- may **not** present legislation to execute its Programme,
- may **not** introduce political innovation or actions which would impede the incoming government;
- Is expected to be politically responsible before the Assembly of the Republic.<sup>30</sup>

A similar debate about the application of the caretaker convention has been played out in **New Zealand** where there have been a number of controversial incidents which some saw as stemming from the overly-strict application of the caretaker convention. For example, a caretaker Minister for Education delayed an announcement of annual funding allocations for tertiary institutions while he consulted with opposition parties; and this presented difficulties for the institutions' forward

planning. A caretaker Minister for Health directed a Health Authority to defer its decision to award a contract for cardiac surgery which involved a participant from the private sector on the basis that the decision could bind the next government to a policy it did not support.<sup>31</sup>

In **Portugal** concerns in 2015 were the opposite – that the caretaker government (a minority government which had been defeated after just 11 days in office from 28 October to 10 November 2015) had overstretched the limitations of its power, adopting measures strongly criticised by the opposition.<sup>32</sup> For example, opposition parties claimed that the caretaker government's decision to complete a deal on 12 November 2015 (which had been agreed in June 2015) to sell a significant share of the State's holdings in the 'national airline' (TAP Air Portugal) to a private business man was illegal. They argued that the government's caretaker status meant that the 'legal and political conditions' to complete the sale were absent.<sup>33</sup> The opposition parties subsequently formed the new government which (in 2016) unwound some elements of the deal,<sup>34</sup> ensuring the government retained a 50% share of the company.<sup>35</sup>

In **New Zealand**, two distinct schools of thought emerged within a group of senior officials and academics. The pragmatists argue that there must neither be an excessive use of power *nor* a failure by a caretaker government to exercise its legal authority where decisions are required. They argue that opposition parties should be consulted where an issue is significant and controversial, if it is unclear that it would secure a majority in the newly-elected parliament and if the course of action would be hard to reverse; in other cases, the caretaker government should act without consultation. The second group – the constitutionalists - argue that a caretaker government should not interfere with any existing pre-election policies without parliamentary authority since a caretaker government requires the imprimatur of the new parliament to override the old.<sup>36</sup>

In many circumstances, and in particular where there is uncertainty and where proposed measures are potentially controversial, caretaker governments are expected to consult with opposition political parties in the incoming parliament (where the caretaker government is in office following an election). However, this does not always happen. The final section looks more closely at the role of the incoming parliament during a period of caretaker government.

### **3. Parliament during periods of caretaker government**

**In general**, the longer the period of a caretaker government, the more difficult it becomes to defer *all* policy decisions and the greater the need for the caretaker government to take decisions which may appear to breach convention.

These decisions are of concern to the newly-elected parliament which has a constitutional duty to hold government to account (Government is ultimately responsible to parliament) even if the caretaker government is not formally accountable to it (i.e. cannot be defeated by a confidence

motion). As such, these decisions tend to be heavily scrutinised by the incoming elected representatives and where caretaker processes are too long to allow decisions to be deferred, inter-party consultation (through parliament or outside parliament) is often used to temporarily replace the democratic mandate.<sup>37</sup>

In countries which are accustomed to long government-formation processes, **the newly-elected parliament increases its level of activity the clearer it becomes that the process is stalled**; in many cases Committees are established, legislation introduced and in some cases e.g. Belgium and the Netherlands, the level of activity is almost normal.

For example, in **Belgium**, government formation has becoming increasingly difficult due to the splintering of the party system and the election of sizeable parties with little common ground between them. The process is further complicated by there being two parallel party systems reflecting the linguistic communities (Box 2). The result was that a caretaker government held office for *over* 190 days in 2007 and for 541 days in 2010/2011.

Where a caretaker government's time in office lengthens, and the government formation process is clearly stalled, the Belgian federal parliament has gradually extended its activities.<sup>38</sup> In the two most recent extended periods of government formation (2007 and 2010-2011):

- The Belgian caretaker government brought legislation to parliament, which was reviewed by the House Conference of Presidents<sup>39</sup> and accepted by it if it was deemed to be within the government's caretaker status;
- Committees were established and oral questions to the caretaker government continued through the process in committee;
- Interpellations<sup>2</sup> were permissible in plenary (although in reality interpellations were similar to Questions as there could be no confidence vote);
- Formal question time was not organised.<sup>40</sup>

A recent academic study of the **Belgian parliament** found that parliament takes more initiative (e.g. Private Members' Bills) during caretaker periods and that parties' voting behaviour (while still along party lines) was less connected to an opposition/coalition divide and more policy based (left-right divide):

- In the parliamentary year 2010-2011 the number of private members' bills and government bills passed was **almost equal** (72 and 73 respectively) compared to in 'normal times'

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<sup>2</sup> Interpellations are debates formally provided for in many parliaments which begin with a parliamentary question and *may* end with a vote.

when 80% of bills passed are government initiated. During the shorter period of (2007-8) the number of accepted private members' bill was 39 compared with 76 government bills.

- Further, during both periods the numbers of Private Members Bills were at an all-time high and government bills at an all-time low.

### **Box 2: Background to the extended processes of government formation in Belgium**

While it frequently takes some time for government formation in Belgium, the government formation process was prolonged in 2007 and even more so in 2011.

There are effectively two party systems for elections to the federal parliament; one set of parties run the Walloon region and the other in the Flemish region. In 2007, on the Flemish side an alliance between the Christian Democrats and the Flemish Nationalists won the election on a nationalistic platform which contrasted sharply with the agenda of the winning parties on the Walloon side.

**After 194 days of caretaker government** an 'interim cabinet' was formed in 2007 and a few months later in March 2008 a new cabinet replaced the temporary government. To facilitate the formation of government, the alliance between the Flemish Nationalists and Christian Democrats was broken; the former did not join the government. There were fresh elections in 2010.

In **2010/11 elections**, the Flemish Nationalist Party (which had stayed out of government) became the biggest party on the Flemish side; the Socialist Party the biggest in Wallonia. They had little in common in terms of State reform or social-economic policy and during **541 days of caretaker government** the King asked seven people from five different parties to take up a role as informatuer/mediator/ negotiator. Eventually, Elio Di Rupo reached an agreement on state reform (which required the support of 2/3 of parliament) with 8 parties and a new government was formed with the involvement of 6 parties. **Flemish Nationalists were part of neither.**

In the **Netherlands**, which is accustomed to drawn-out periods of government formation, an agreement between parties on what will constitute a 'controversial issue' takes place in advance of, and following, elections. Any action by a caretaker government on such issues would require consultation. As such, 'non-controversial' business proceeds almost as usual; legislation is introduced, budgets have been introduced, subsidies handed out and appointments made. Inter-party consultation and cooperation replaces the government's democratic mandate as a basis for action.<sup>41</sup> In fact, according to a parliamentary official (March 2016), 80% of normal business goes ahead.

In other cases, the 'caretaker government' may consult opposition parties informally. In their analysis of **New Zealand**, Levine et al argue that in the event of a long caretaker period there would 'almost certainly be a need for the convention to be relaxed somewhat so that the normal business of government – presentation of the budget and the presentation of legislation to parliament – could continue without undue delay.' They also suggest that there would need to be agreement between the parliamentary parties over the matters on which the caretaker government could be left to take new initiatives (in consultation) and those matters which definitely should be deferred until the political situation had been clarified.

A caretaker government held office in **Spain** for over six months in 2015/2016. A general election on 6 December 2015 was followed by a protracted government-formation process and, following

failed attempts to form a government, parliament was again dissolved in May 2016 (in line with the Constitution) and fresh elections called for 26 June 2016 [the Constitution sets out that fresh elections must be held if no candidate secures the confidence of parliament two months after the first investiture vote (i.e. vote to elect a Prime Minister)]. The June 2016 election was also inconclusive ([see L&RS Infographic here](#)) with no party achieving close to the 176 seats needed to form a majority government. However, the *Partido Popular*, which led the 2015/2016 caretaker government, increased its share of the seats and formed a minority government (2016-2018).

The Spanish parliament has less experience of long-drawn out government formation processes than the Netherlands and Belgium and there are legal constraints on what a caretaker government may bring to parliament. Between December 2015 and May 2016 parliament took some actions in addition to meeting to elect the Speaker and attempting to elect a Prime Minister. For example:

- Parliamentary Committees were established in February 2016 and Chairs appointed;
- Hearings in Committee proceeded although (as outlined below) caretaker Ministers refused to appear before them;
- Parliamentary groups addressed requests/concerns for the future government to the Committees;
- While Private Members' Bills could be introduced in theory, the rules of procedure require Government's opinion on the bill and its assent if the bill has budgetary consequences;
- While it is possible in theory to hold parliamentary question time to allow Members to seek information and ask questions of the caretaker government, the precedent is that this is suspended until a new government has been elected.

**During the long-drawn out caretaker period there was considerable controversy over parliament and government's respective roles**, and in particular over parliament's role in questioning and holding a caretaker government to account. In spite of its pro-longed period in office, the caretaker government in Spain refused to answer oral parliamentary questions and its Ministers refused to appear before parliamentary committees. In March 2016, the Speaker of Parliament threatened to take a case to the Constitutional Court on the grounds that the caretaker executive was preventing the lower house from doing its job (scrutinising and holding the government to account). In particular, the Speaker criticised the failure of the acting Defence Minister to appear before the Defence Committee, in spite of a formal request placed on the order of business.<sup>42</sup> Under political pressure from all other parties in parliament, the caretaker Prime Minister appeared before parliament to answer questions about the European Council meetings of March when the agreement between the EU and Turkey on migration had been discussed.

The caretaker government insisted, however, that this appearance before parliament was an exception and that it would not submit to oversight on ordinary matters of government highlighting the constitutional provisions on caretaker governments.<sup>43</sup> **In April 2016, parliament voted to take the case against the caretaker government to the Constitutional Court.** Over two years later, in November 2018, the Constitutional Court ruled that the caretaker government had violated the law by refusing to be held accountable by parliament.<sup>44</sup>

In **Portugal** caretaker governments do not bring bills to the parliament and parliament does not 'hold it to account.' However, standing committees may be immediately established and Members are free to bring pieces of legislation to the parliament. Members introduced legislation in 2015 while waiting for a government to form. However, the new government was sworn in and its programme presented to parliament, before voting on the private members' legislation took place.<sup>45</sup> As noted above, parliament was not consulted by the caretaker government on some decisions which were considered controversial and outside of a caretaker government's competence (e.g. a decision to complete the deal to sell the significant government share in the national airline TAP).

### **Dáil Éireann during periods of caretaker government**

Generally, the Taoiseach is elected at the first sitting of the Dáil following an election. There have been four periods of more extended caretaker government in Ireland since the 1980s (see Box 1). Apart from 1994, these were due to protracted government formation negotiations following a general election. Similar to experiences outlined elsewhere (Section 2 above), the longer the period of government formation, the more business transacted in the Dáil. The business of the Dáil was arranged by agreement with the parliamentary parties during these periods, rather than the usual government control of the Order of Business. There was no division between Government and Private Members time.

In 1989 the only business taken was the elections of the Ceann Comhairle and the Taoiseach. In 1992, when government formation was more protracted and occurred at the end of the year, essential legislation pertaining to the budget was taken (Appropriation Bill 1992 and Finance (No. 2) Bill 1992) as were Statements on a European Council meeting. In 1992 the Seanad met once, during the Seanad election campaign, to pass the Appropriation Bill 1992 and the Finance (No. 2) Bill. It was agreed that questions would not be taken.<sup>46</sup>

By comparison, in 2016, when it was clear from the day the Dáil first met that government formation would take some time, the Dáil transacted far more business.<sup>47</sup> A number of Oireachtas committees were established, both standing (EU Scrutiny (SO 112 Select Committee) and select (Dáil Reform, Housing and Homelessness). Statements were taken on a number of topics (e.g. housing and homelessness, mental health, Irish Water) as well as Statements on European

Council meetings required by Standing Orders. Estimates were introduced to fund Census 2016 which occurred during the period of the caretaker government. The only votes taken were on business of the House and the nomination of Taoiseach. There were (written) parliamentary questions taken. There was no legislation introduced (while legislation was published e.g. Adoption Amendment Bill, 2016) and the Seanad did not meet during the period of the caretaker government.

The Dáil met regularly when the caretaker government was in office from February to the end of June 2020.<sup>48</sup> It met on twenty-six occasions and legislation was taken on two occasions (both related to the Covid crisis and both taken before the new Seanad had been elected).<sup>49</sup> The majority of business was regular Statements (followed by a debate) from the Taoiseach and Ministers in relation to how the relevant department was dealing with Covid-related issues. Motions were taken, including motions regarding amendments to Standing Orders to deal with the circumstances. e.g. written questions, not always the norm during a caretaker government period, were reinstated, albeit initially with a cap on the number of questions permitted to the Minister of Health.<sup>50</sup> Revised estimates were approved by the Dáil.<sup>51</sup> The Dáil established the Business Committee, Committee on Standing Orders and Dáil reform, a Special Committee on the Covid-19 Response and a Select Committee to perform the role of the Oireachtas under the Lisbon Treaty (Standing Orders 131 Select Committee).

## Conclusion

Most parliamentary democracies have caretaker conventions designed to ensure continuity of executive power and essential decision-making while simultaneously preserving democratic legitimacy during extended periods of government formation. Conventions generally aim to guide the actions of caretaker governments and limit them to non-controversial, routine and unavoidable measures which do not bind the future government to policy agendas, appointments or expenditure.

Caretaker Conventions vary in terms of where they are set out (constitution, legal, cabinet handbook, unwritten) and the extent to which they are explicit. While a written convention can bring greater clarity to the role, different legal and political interpretations inevitably arise as to when and how a caretaker government should act. This uncertainty can lead to controversial outcomes caused by either the actions or the inaction of caretaker governments. In countries with most experience of long-drawn out government formation processes, such as Belgium and the Netherlands, the role of the incoming parliament in legitimising the actions of caretaker governments, and in defining what constitutes 'controversial' or 'binding' policies which should therefore be avoided, increases as the caretaker government's period in office lengthens.

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## End notes and references

This Note may be cited as Oireachtas Library and Research Service (March 2021) *L&RS Note: Caretaker governments and caretaker conventions*.

<sup>1</sup> Section 1.2 of the *Ministers and Secretaries (Amendment) (No. 2) Act, 1977*

<sup>2</sup> A simple majority is 50% of the TDs present/who take part in the vote plus one.

<sup>3</sup> After a Dáil dissolution and subsequent General Election, the Seanad continues to exist until the day before a Seanad general election is held. Under the Constitution (Article 18.8), the election of a new Seanad Éireann must take place no later than ninety days after a dissolution of the Dáil. **Every Member of the Seanad continues to hold office until the day before the Seanad election** (unless they previously resign, become disqualified or die). Therefore, a newly-elected Dáil co-exists for a short time period with a Seanad which is about to end its mandate; this Seanad may take legislation proposed by a caretaker government right up until the day it is dissolved (the day before polling day). After it has been dissolved and elections to the new Seanad are held, the new Seanad may not convene to take legislation until a new Taoiseach has been appointed (this is because the new Taoiseach must appoint the 11 nominee Senators).

<sup>4</sup> Ivana Bacik, Victory Boyhan, Gerard Craughwell, Annie Hoey, Sharon Keogan, Michael McDowell, Rebecca Moynihan, Rónán Mullen, Marie Sherlock and Mark Wall.

<sup>55</sup> [2020] IEHC 313

<sup>6</sup> See Oireachtas website [Health \(Preservation and protection and other emergency measures in the public interest\) Bill 2020](#); [Emergency Measures in the public interest \(Covid 19\) Bill 2020](#).

<sup>7</sup> Schleiter Petra and Valerie Belu (2015) 'The Challenge of Periods of Caretaker Government in the UK' *Parliamentary Affairs* Vol 68, 229-247

<sup>8</sup> Laver and Shepsle (1994) ; Levine et al (1999) 'Caretaker government and the evolution of caretaker conventions in New Zealand' *Victoria University of Wellington Law Review*

<sup>9</sup> -New Zealand Cabinet Office Manual [\(2008\) – Caretaker Convention -](#)

<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60641/cabinet-manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf)  
1st edition October 2011

<sup>11</sup> <http://static.moadoph.gov.au/opfgovau/media/images/apmc/docs/63-Caretaker-role.pdf>

<sup>12</sup> <http://archive.constitution.ie/reports/8th-Report-Government.pdf>

<sup>13</sup> Alejandro Ecker, Thomas M Meyer ( 2015) '[The duration of government formation processes in Europe](#)', *Research & Politics* Dec 2015, 2 (4)

<sup>14</sup> Laver and Shepsle, 1994 *Cabinet Ministers and Parliamentary Government* Cambridge, Cambridge University Press. Schleiter and Belu, 2015, 231

<sup>15</sup> [Ley 50/1997](#) (law is valid from 1997 to 2 October 2016 after which it is reviewed)

<sup>16</sup> Article 99.5 [Spanish Constitution](#) sets out that if no candidate has obtained the confidence of Congress within a period of two months from the first investiture vote the King must dissolve both chambers and call a new election, with the endorsement of the President of Congress.

<sup>17</sup> Levine Stephen, Boston, McLeay, Roberts, Schmidt, 'Caretaker government and the evolution of caretaker conventions in New Zealand' *Victoria University of Wellington Law Review* 30 (1999)p.3

<sup>18</sup> Hazell Robert and Akash Paun, eds. 'Making Minority Government Work' UK Institute of Governance and the Constitution Unit (2009) p. 29

<sup>19</sup> Van Aelst Peter and Tom Louwerse, (2014) 'Parliament without Government: the Belgian Parliament and the Government Formation Process' *West European Politics* Vol 37,2 475-496 p. 477-8.

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- <sup>20</sup> Correspondence between Library & Research Service and the Belgian Parliament's ECPRD Correspondent (March 2016); Belgian parliament (2007) ECPRD Query 979 'Regular Duties and/or Activities of outgoing government.' [ECPRD](#) is the European Centre for Parliamentary Research and Coordination through which staff and Members of European parliaments share information and network.
- <sup>21</sup> Correspondence between Library & Research Service and ECPRD Dutch Parliamentary official, 1 March 2016.
- <sup>22</sup> Levine (1999) cited above.
- <sup>23</sup> Correspondence between Library & Research Service and ECPRD Correspondent, March 2016
- <sup>24</sup> Larsson in Laver and Shepsle (1994) confirmed by ECPRD (2016)
- <sup>25</sup> [http://noticias.juridicas.com/base\\_datos/Admin/l50-1997.html](http://noticias.juridicas.com/base_datos/Admin/l50-1997.html)
- <sup>26</sup> L&RS contact with ECPRD correspondent, 1 March 2016
- <sup>27</sup> Article 186.5 [Constitution of Portugal](#) (English version)
- <sup>28</sup> This is articulated by Freitas do Amaral (2002) *Governos de Gestao, Principia* p.12 (cited by Portuguese response to ECPRD Request 879 (2010) Activities of Outgoing Governments.
- <sup>29</sup> J.J. Gomes Canotilho and Vital Moreira, *Constituiçao da Republica Portuguesa Anotada*, Coimbra Editora, 1993. Cited by Portuguese correspondent in response to ECPRD Request 879 (2010) cited above.
- <sup>30</sup> ECPRD Request no. 879 (2010) Response by Portuguese Parliament and confirmed through contact between L&RS and Portuguese Parliament, 1 March 2016.
- <sup>31</sup> Levine et al (1999)
- <sup>32</sup> Elections were on 4 October 2015, the minority government was established on 23 October and parliament voted no confidence in it 10 November 2015. On 26 November a new government was established as a socialist party minority government.
- <sup>33</sup> Correspondence between Library and Research Service and ECPRD Portuguese Parliamentary Official, 1 March 2016. See also Reuters, 11 November 2015, [Portugal's Socialists seek to suspend sale of TAP Airline](#)
- <sup>34</sup> Financial Times, 7 February 2016 [Portugal to unwind Tap Air Privitisation](#)
- <sup>35</sup> Centreforaviationnews.com, April 2016 '[TAP Portugal: ownership change almost complete while Azul relationship starts to bear fruit](#)' [retrieved 8 March 2021]
- <sup>36</sup> Levine et al (1999) p.9
- <sup>37</sup> Schleiter Petra and Valerie Belu (2015)
- <sup>38</sup> Van Aelst Peter and Tom Louwerse, (2014) 'Parliament without Government: the Belgian Parliament and the Government Formation Process' *West European Politics Vol 37,2* 475-496
- <sup>39</sup> Conference of Presidents is a body comprising the Speaker and Deputy Speakers which plays a significant agenda-setting and presiding role.
- <sup>40</sup> Library and Research correspondence with parliamentary official in Belgian Parliament, March 2016.
- <sup>41</sup> Schleiter Petra and Valerie Belu (2015) p. 232
- <sup>42</sup> See [press release issued by President of the Congresso de Diputados](#), 17 March 2016 and [proceedings of the Defence Committee](#), 17 March 2016.
- <sup>43</sup> See El Pais, 29 March 2016 (English Version) [PM Performs U-Turn and agrees to report on EU meetings in Congress](#).
- <sup>44</sup> Official State Bulletin 14 November 2018 [Constitutional Court Ruling 124/2018](#) and reported in [El Pais 23 November 2018](#)
- <sup>45</sup> Correspondence between Library and Research Service and ECPRD Portuguese Parliamentary Official, 1 March 2016.

<sup>46</sup> Dáil debates 15 December 1992

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1992121500004?opendocument>.

<sup>47</sup> Dáil debates 10 March 2016 – 6 May 2016.

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/ditelist?readform&chamber=dail&year=2016>.

<sup>48</sup> See [here](#) for a list of all debates which took place during the caretaker government's period in office.

<sup>49</sup> Emergency Measures in the Public Interest (Covid-19) Bill 2020 and Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020

<sup>50</sup> On 7 May, written questions were reinstated with cap of 3 per TD to Health Minister; on 21 May this cap was increased to 6 per TD to Health Minister; on 28 May a motion was passed to remove cap on written Qs to Health Minister from 10 June 2021.

<sup>51</sup> Revised Estimates for the Public Service 2020 were approved 18 May 2020

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