

## **Covid19 Emergency Measures in Ireland: Achieving Accountability and Protecting Rights**

Dr Fiona Donson, University College Cork

### **Introduction: Ireland's ad hoc government in the time of a pandemic**

When Ireland held its general election on 8 February the Covid-19 health crisis had not been declared a global pandemic, although 9 days earlier on the 30<sup>th</sup> January the WHO had declared it to be a Public Health Emergency of International Concern. Nevertheless, with no cases in the country, public life seemed little troubled by the impending crisis. The election was for Ireland a rare three way race resulting in the three largest parties each getting around between 20-25% of the votes.<sup>1</sup> The result meant that government formation would require negotiation, not least because the party with the highest percentage of the vote, Sinn Féin, is a centre-left party with a long association with the IRA.<sup>2</sup> By the time the first Covid-19 case had been reported in Ireland on 28 February talks to form a government had not even begun and the leaders of the traditional parties of government, Fianna Fáil and Fine Gael were resolutely refusing to consider a coalition with Sinn Fein. The practical result of this is that as Covid-19 arrived in Ireland there was only a caretaker government in place led by the outgoing Taoiseach (Prime Minister) Leo Varadkar<sup>3</sup> with ministers continuing on in their roles from the previous government, despite the fact that some had lost their seats in the Irish Parliament (Oireachtas).

The reason for setting out this political context is to show the lie of the land in terms of possible oversight and accountability as Covid-19 arrived into Ireland. The caretaker government was not slow to act in response to increasing reports of cases. Perhaps this was in part because early cases included a secondary school in the east of the country which was closed for 14 days after it was confirmed that a student had the virus following a skiing trip to Northern Italy. While the leader of Sinn Fein, Mary Lou McDonald, tested positive and was side-lined from the political realm for a number of weeks while she recuperated.

The practical running of Ireland's covid-19 response has therefore been in the hands of a caretaker government which had been clearly rejected by the electorate in the February election losing 12 seats and going from being the largest party to third place. Yet by the end of March their political approval had returned to its previous governmental level of 34% first preference voting intentions, an increase

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<sup>1</sup> Fine Gael, the previous largest party got 20.9%, Fianna Fáil 22.2% and Sinn Féin 24.5%.

<sup>2</sup> The Provisional Irish Republican Army was an Irish republican paramilitary organisation formed to end British rule in Ireland.

<sup>3</sup> Varadkar had formally resigned as Taoiseach on the 20 February 2020 but announced he would continue as a caretaker leader until a new government could be formed.

in 13% from the previous month's election.<sup>4</sup> The context of crisis provided Fine Gael with an opportunity to respond competently and reasonably, while effectively allaying public fears. Indeed, the caretaker Taoiseach even returned to medicine 1 day a week<sup>5</sup> symbolising measured competency.

The role a caretaker government normally takes is generally limited and it is not seen as having democratic legitimacy, although there is nothing formally set out that limits that power.<sup>6</sup> In Ireland the outgoing Taoiseach and ministers remain in post until a successor is appointed under Article 28.11.1 of the constitution and it is clear that Ministers remain in post even if they are not re-elected.<sup>7</sup> Given that the constitution makes no provision for a time limit regarding government formation, the reality is that a caretaker government may be in place for an extended period.

It is in this space that the Irish government is now operating, bringing forward key emergency powers to deal with the Covid-19 health emergency despite a lack to democratic legitimacy. While the Irish government had generally done a very capable job of managing the crisis, the challenge of passing the primary and secondary legislation with appropriate oversight is significantly constrained.

### **Covid-19 and the accountability gaps in the context of a caretaker government**

Globally, legislative bodies have struggled to deal with sitting effectively in the context of the Covid-19 pandemic. As key oversight bodies, Parliaments (along with the media and NGOs) need to be able to adapt to changed circumstances. However, in reality the rules governing Parliamentary sittings are often inflexible. This is exacerbated by challenges of access including spacing limitations of ancient buildings, old fashioned technology and deep rooted traditional of the ceremony of Parliamentary processes.

Some Parliaments have been able to adapt better than others, although globally it seems that the pandemic situation has put much of "normal" government business on hold. In Wales, a devolved assembly, the proceedings are regulated by standing orders which have been amended to allow for

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<sup>4</sup> This was according to the Red C Research and Marketing organisation which runs regular polls in Ireland: <https://www.redcresearch.ie/voters-turn-back-to-fine-gael-in-time-of-crisis/> (date accessed 29 May 2020).

<sup>5</sup> <https://www.irishtimes.com/news/ireland/irish-news/coronavirus-varadkar-returns-to-practising-medicine-to-help-during-crisis-1.4221463>

<sup>6</sup> Daly, E. "Residual Conventions of the Irish Constitution: the Incongruous Example of Collective Responsibility" (2011) *Public Law* 703.

<sup>7</sup> Article 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.

both zoom meeting and remote voting.<sup>8</sup> However, it remains the case that even in this context business is required to be limited, as is the number of those attending.<sup>9</sup>

The UK Parliament approved a motion in late April to allow members to opt for either physical or virtual attendance in the House of Commons chamber which is capable of accommodating only 50 MPs under Covid-19 restrictions.<sup>10</sup> Adopting a hybrid approach to parliamentary business increased the number of MPs able to attend by a further 120. The House of Commons quickly adopted a system whereby any business could be dealt with under a hybrid system with Ministers primarily attending in person and backbench politicians participating remotely. In addition, virtual select committees were quickly established to carry on their work. The results were welcomed as a positive move to ensuring at least some form of ongoing oversight along with a less party-political “gladiatorial” atmosphere.<sup>11</sup> Indeed, the rapid development of the approach was seen as being facilitated by a cross-party approach:

That all is proceeding smoothly is due not only to the staff of the House but also to its political leadership, which has created a broad consensus in a way that seemed unlikely a few weeks ago. The Westminster parliament is now something of a market leader....<sup>12</sup>

It was therefore disappointing when, at the start of June, the House of Commons voted to abandon the remote voting system, a physical vote that took well over an hour to complete under social distancing rules.<sup>13</sup> The decision, prompted by the Government, was claimed to produce better democracy,<sup>14</sup> but many MPs claimed it discriminated against those who were unable to attend in person because of age or medical reasons.<sup>15</sup> Concerns about the wisdom of the change were said to

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<sup>8</sup> Oireachtas Library and Research Service, 2020, L&RS Note: How parliaments are working during the Covid-19 pandemic. Available online at [https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-05-01\\_l-rs-note-how-parliaments-are-working-during-the-covid-19-pandemic\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-05-01_l-rs-note-how-parliaments-are-working-during-the-covid-19-pandemic_en.pdf)

<sup>9</sup> *Ibid* at p.14.

<sup>10</sup> <https://www.parliament.uk/business/news/2020/april1/-mps-approve-historic-motion-to-allow-remote-participation-in-key-commons-proceedings/>

<sup>11</sup> Behr, R., “As Parliament returns, Covid-19 shows why we need more constructive politics”, 21 April 2020, The Guardian, available at: <https://www.theguardian.com/commentisfree/2020/apr/21/parliament-returns-covid-19-constructive-politics>

<sup>12</sup> Natzler, D., “Coronavirus and the Commons: how the hybrid parliament has enabled MPs to operate remotely”, 13 May 2020, The Constitution Unit. Available at: <https://constitution-unit.com/2020/05/13/coronavirus-and-the-commons-how-the-hybrid-parliament-has-enabled-mps-to-operate-remotely/#more-9443>

<sup>13</sup> O’Carroll, L., “MPs join 90-minutes-long queue to vote to end virtual voting”, 2 June 2020, The Guardian, <https://www.theguardian.com/politics/2020/jun/02/mps-join-90-minute-long-queue-to-vote-to-end-virtual-voting>

<sup>14</sup> Trendall, S., “Rees-Mogg claims ‘compromises of virtual parliament are no longer necessary’”, 2 June 2020, Public Technology, available at: <https://www.publictechnology.net/articles/news/rees-mogg-claims-%E2%80%98compromises-virtual-parliament-are-no-longer-necessary%E2%80%99>

<sup>15</sup> “Coronavirus: Discrimination row over MPs queuing up to vote”, 2 June 2020, BBC, available at <https://www.bbc.com/news/uk-politics-52895430>

have been borne out when the day after the vote the Business Secretary was tested for coronavirus after feeling unwell in the House of Commons.<sup>16</sup>

In Ireland, the Houses of the Oireachtas are meeting in a very limited way. The Dáil Chamber is inadequate to house its 160 members, and it is considered that full physical attendance would have to be provided for in a large auditorium such as the Dublin Convention Centre. Although remote attendance was raised as a possible solution for this, the response of the Oireachtas has been that it is not possible under the Irish Constitution. Legal advice relied on by the Business Committee of the Parliament stated that Article 15.1 of the Constitution requires a physical presence in Dublin:

1° The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas.

2° The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.

3° The Houses of the Oireachtas shall sit in or near the City of Dublin or in such other place as they may from time to time determine.

While Article 15 further states that sittings should be in public (15.8.1°), members should be “present” (15.11.1°) and that parliamentary privilege applies to “utterances made in either house” (15.12). The advice relating to the need to meet in person appears therefore to be rooted around these elements. This has been roundly rejected by constitutional lawyers who note that all concerns can be addressed.<sup>17</sup> Primarily a more practical reading of the constitution would allow for adaptation to take place to meet the specific needs of the pandemic situation while also embracing technological solutions. As Kenny notes:

The overall purpose of Article 15 is to establish and empower a legislative branch of government to actually make the law. We should be slow to interpret its provisions in an overly literal way that makes this difficult or impossible. There is nothing fundamental to the purpose or nature of the Oireachtas that requires these provisions to be interpreted in this manner. Indeed, its nature and purpose would be hindered by these readings.

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<sup>16</sup> Mason, R., & Syal, R., “Business secretary tested for Covid-19 after feeling ill during Commons speech”, 3 June 2020, The Guardian, available at: <https://www.theguardian.com/world/2020/jun/03/business-secretary-alok-sharma-coronavirus-test-speech-commons>

<sup>17</sup> The primary questioning of the position adopted by the Oireachtas is set out in a blog by Kenny, D. “Remote sittings for Ireland’s parliament: questionable constitutional objections, 23 May 2020, The Constitution Unit <https://constitution-unit.com/2020/05/23/remote-sittings-for-irelands-parliament-questionable-constitutional-objections/>

Indeed, the purpose of Article 15.1.3° is to provide for sittings other than Dublin, that may be considered appropriate thus embodying the idea that there be flexibility in the way the Parliament meets.<sup>18</sup>

The idea that a literal reading of the constitution in the time of a health crisis should be adopted is somewhat strange but is typical of the general approach of the Irish Parliamentary culture on questions of constitutionality. Lawyers have argued that the Irish courts would be well aware of the exceptional context in which remote meetings and votes would take place in and that this would fit within the normal approach adopted by the courts when ruling on questions of constitutionality.<sup>19</sup> Even in the unlikely context situation of the court finding that legislation was passed under an unconstitutional Parliamentary process, they may well consider that the context outweighs the need to act. Indeed, not only do the courts adopt a “presumption of constitutionality”, in recent years the courts have even adopted a more “practical” approach to the provision of remedies even where a breach is found. This includes the suspension of a declaration of unconstitutionality<sup>20</sup> to allow the Oireachtas to find a solution to the problem.

The approach adopted by the Oireachtas in failing to amend its standing orders and provide a virtual or part-virtual Parliamentary sitting arrangement is not clearly required by the Constitution. This then leads to the question of why adopt a very literal and narrow interpretation of the text of the Constitution. There are a number of reasons which can briefly be explored here.

### *Fearing litigation*

The first reason for the approach of the Oireachtas may arise from a genuine fear of litigation with its resultant uncertainty and costs. In recent years, a range of cases have been brought, particularly in the context of Oireachtas committees.<sup>21</sup> Indeed, far right activists brought an application for judicial review challenging the constitutionality of legislation and regulations enacted by the Oireachtas and Government to deal with the Covid-19 crisis. The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public

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<sup>18</sup> Casey, C., Hogan, H. & Toland, C. “Remote Sittings of the Houses of the Oireachtas: A constitutional solution to a potential democratic deficit” 7 April 2020, Constitution Project @UCC blog

<http://constitutionproject.ie/?p=770>

<sup>19</sup> *ibid*

<sup>20</sup> *PC v Minister for Social Protection* [2018] IESC 57

<sup>21</sup> See for example, *Maguire v Ardagh* [2002] 1 IR 385 in which the Supreme Court ruled that Oireachtas committees should not make adverse findings against individuals who are not members of the Oireachtas, *Kerins v. McGuinness* [2019] IESC 11 in which the Supreme Court ruled that there was no absolute barrier to proceedings concerning Committees of the Oireachtas, and *O’Brien v Clerk of Dáil Éireann* [2019] IESC 12 in which the Supreme Court ruled that it is for the Oireachtas to protect any rights that are infringed upon by privileged statements.

Interest (Covid-19) Act 2020 were passed in March 2020.<sup>22</sup> The challenge related to both the constitutionality of the making of the law and the content. On this latter point, they argued that the measures adopted, including restrictions on movement,<sup>23</sup> were disproportionate to the “incidence and effects of Covid-19”.<sup>24</sup> Their application, however, relied heavily on assertions that the government was acting on “fraudulent science”, that the powers ushered in the arrival of a “police state” and parallels to Nazi Germany could be made.<sup>25</sup> On the former challenge to the legislative process, the applicants argued that the government had no legal standing as three of its members had lost their seats at the general election in February.<sup>26</sup> The High Court swiftly dismissed this claim finding that Article 28.11 clearly provided for the situation that was operating. Indeed, the court refused the application for leave to bring the case criticising the applicant’s overall approach to their case:

[T]he applicants gave unsubstantiated opinions, speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany. Such a parallel is both absurd and offensive. Unsubstantiated opinions, speeches rhetoric and a bogus historical parallel are not substitutes for facts.<sup>27</sup>

The poor quality of the application<sup>28</sup> has meant that we will never know whether a case was arguable in practice because the court never heard appropriate legal argument on the key points.

#### *The role of the Oireachtas as a central oversight mechanism*

The lack of a clear resolution to find a more effective Parliamentary oversight process in the context of the pandemic can be secondly be understood as being part of Ireland’s struggle with accountability historically. There has been an ongoing inability to effectively recognise and embrace the fundamental role of the Oireachtas as a central oversight mechanism within the Constitutional framework.

Elected representatives of the Oireachtas are required by the constitution to hold government to account under Article 28 of the Constitution, but that provision is very short on specifics as to how this might happen:

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<sup>22</sup> Further statutory instruments were also made.

<sup>23</sup> Section 10 of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 amends the Health Act 19947 by inserting section 31A. (1) which empowers the Minister to make regulations restricting travel both internally in the State and externally.

<sup>24</sup> *O’Doherty & Anor v The Minister for Health & Ors* [2020] IEHC 209 at para 36.

<sup>25</sup> *Ibid* at para 39.

<sup>26</sup> Katherine Zappone, Minister for Children and Youth Affairs, Shane Ross, Minister for Transport, Tourism and Sport and Regina Doherty, Minister for Employment Affairs and Social Protection, all lost their seats in the election yet continue to act as caretaker ministers as part of the interim government.

<sup>27</sup> *Supra* n.24 at para.77(6).

<sup>28</sup> The transcripts of court proceedings were made public by the applicants and have been considered essential reading in relation to how now to argue your case: <https://joan.ink/2020/05/15/gird-your-eyeballs/>

#### 28.4 1° The Government shall be responsible to Dáil Éireann.

While the specific accountability tasks include scrutiny of finances, evaluation of executive implementation of policy, and carrying out of scrutiny in public, the Irish experience of this at the legislative level has been historically weak.<sup>29</sup> Heavy reliance on traditional models of individual ministerial responsibility have typically proved inadequate while Oireachtas Committees were historically considered weak as compared with similar jurisdictions<sup>30</sup> and many of the challenges brought to Oireachtas oversight activities have centred upon this activity. The overall weakness of this central oversight mechanism led, in part, to an over reliance upon unwieldy and expensive public inquiries into corruption scandals that were left unchecked through other mechanisms.

#### *Juricentric constitutionalism and legislature timidity*

Finally, we must note a constitutional cultural response which has been adopted in Ireland, specifically by the legislature but also more broadly in relation to our understanding of the separation of powers under the constitution. This has been characterised by legislative passivity; the reactive and judicial focused approach of our Parliamentary mechanisms in relation to oversight have been increasingly highlighted as government has become more complex. However, “[a] Constitution is fundamentally about the positive exercise of public power, not its placement within non-interacting silos”,<sup>31</sup> something that requires the members of the Oireachtas to actively engage with how they should function under the Constitution. In Ireland at the present time, however, decision making on the constitutional role of the Oireachtas is made with both eyes on the court and little internal reflection of what values underpin its operation. This has led to a timid legislature which finds it difficult to frame its own actions (other than in the frame of court decisions).<sup>32</sup> The decision to adopt a literal interpretation to something as fundamental as Oireachtas meetings illustrates this. In addition, it further reinforces the need to change internal, cultural understandings of the role of the Irish Parliament in carrying out administrative oversight functions:

even where structural change is developed, it is important to recognize the limits of the law against the wider cultural context. We need to acknowledge that we cannot simply constitutionalise or legislate our way to effective parliamentary scrutiny, such change may

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<sup>29</sup> Donson, F., & O’Donovan, D., *Law and Public Administration in Ireland* (2015, Clarus Press), chapter 2.

<sup>30</sup> Ibid. In addition, see Donson, F. & O’Donovan, D., “Designing Effective Parliamentary Inquiries: Lessons from the Oireachtas Banking Inquiry” (2016) 39 *Dublin University Law Journal* 303.

<sup>31</sup> Ibid, chapter 16 para 16-07.

<sup>32</sup> This is also informed by a small number of significant court decisions on the role of Oireachtas committees. See below.

ultimately raise false hopes where there is no overarching change in the political and administrative cultures.<sup>33</sup>

### **The Oireachtas Special Committee on Covid-19 Response**

Against this background, one positive accountability response has been the formation of a special Oireachtas Committee to examine the Government's Covid-19 response. Meeting in person, given the accepted wisdom that virtual meetings are not permissible, the Committee has sought to build on recent incremental improvements in the committee structures of the Oireachtas. The Committee was established at the beginning of May 2020 "to consider and take evidence on the State's response to the Covid-19 pandemic".<sup>34</sup> It has had three substantive hearings to date, all held in the main chamber of the Oireachtas to effectively accommodate the 19 members under social distancing rules. Key topics have included the crisis in Direct Provision (DP) centres, infection rates and responses to Covid-19 in the Nursing Home setting,<sup>35</sup> and the question of state engagement with private hospitals.<sup>36</sup>

The opportunity for elected representatives to engage directly in oversight activities is a very welcome development and allows them to shine a light on the darker corners of government action such as in relation to the housing of asylum seekers. The format of committee hearings allows for a more focused and constructive method of questioning of government decision-makers than is available in the more formalised and party dominated main chamber debates. It is instructive to note that one of the main topics considered already has been that of Ireland's approach to housing asylum seekers, an example this paper will now move to consider under an example of bad government practice in response to the pandemic.

### **Responding to Covid-19 – the good, the bad and the importance of human rights**

Much of the business of government operates "as normal" in abnormal times and the current Irish experience has thrown up both good and bad examples of government response to the health crisis. The following examples provide a small insight into government implementation of covid-19 responses which, in large part, reflect the pre-existing culture and normal operating practice of the relevant sections of government. The Covid-19 health crisis amplifies the internal culture of decision making and tests the operation of government systems and their oversight.

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<sup>33</sup> Donson & O'Donovan, supra n.29. chapter 16 para 16-06.

<sup>34</sup> <https://www.oireachtas.ie/en/press-centre/press-releases/20200511-oireachtas-special-committee-on-covid-19-response-to-meet-for-first-time/>

<sup>35</sup> Both of these hearings were held on the 26 May 2020:

[https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid-19\\_response/2020-05-26/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid-19_response/2020-05-26/)

<sup>36</sup> Held on the 2 June 2020: [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid-19\\_response/2020-06-02/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid-19_response/2020-06-02/)

### *The Good: protecting prisons from Covid-19*

The example of good practice arises in the context of the Irish Prison Service (IPS), an executive office within the Department of Justice and Equality (DoJE) which has a relatively high degree of independence over operations and policies. Recognising the potential dangers of Covid-19 spread within the confined spaces of the (overcrowded) prison estate, the Director General of the Prison Service established an Emergency Response Planning Team early in the crisis involving senior staff and drawing on expertise from across the service. Temporary release was approved by the Minister of Justice to quickly reduce numbers and allow prisons to exercise better health control.<sup>37</sup> In addition, the IPS opened a specific unit in one of its prisons to allow for isolation of cases; given the absence of confirmed cases that unit has been used to isolate suspected cases in line with World Health Organisation advise.<sup>38</sup> The decision to take a decisive early response meant that the IPS was able to report at the beginning of May that it had had no confirmed Covid-19 cases amongst the prisoner population, although there had been 5 cases amongst prison staff.<sup>39</sup>

A significant positive component of the response has been the cooperative work that has gone on between prisoners and prison staff. Pre-existing projects, particularly the Irish Red Cross prisoner volunteer programme were utilised to support this work.<sup>40</sup> The empowerment of prisoners as part of this programme, which long pre-existed the health emergency, has played a “critical role” in ensuring that information about COVID 19 was effectively shared within the prison.<sup>41</sup> In addition, the normal monitoring and inspection systems have continued during the restrictions. While these systems need strengthening, the commitment to inspection reinforces the culture and commitment of the IPS to outside oversight.<sup>42</sup>

However, the successful mitigation of the extreme harm that Covid-19 could have inflicted on those imprisoned in overcrowded institutions has provided a partial human rights success story. This must

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<sup>37</sup> [http://www.justice.ie/en/JELR/Pages/Information\\_regarding\\_the\\_Justice\\_Sector\\_COVID-19\\_plans](http://www.justice.ie/en/JELR/Pages/Information_regarding_the_Justice_Sector_COVID-19_plans)

<sup>38</sup> WHO, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, 15 March 2020. Available online at: [http://www.euro.who.int/\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1)

<sup>39</sup> See Grealish, S., “No Jail Cases: Coronavirus in Ireland – five prison staff contract Covid-19 but Irish Prison Service say no inmates test positive”, *The Irish Sun*, 11 May 2020 available online at <https://www.thesun.ie/news/5414019/coronavirus-ireland-five-staff-covid-no-inmates-positive/>

<sup>40</sup> This is a cooperative programme between the Irish Red Cross, the IPS and the Education and Training Boards which has introduced a Community Based Health and First Aid Programme into prisons a key effect of which has been prisoner empowerment: <https://www.redcross.ie/programmes-and-services-in-ireland/prison-programme-community-based-health-first-aid/>

<sup>41</sup> See the Irish Penal Reform Trust assessment of the IPS response: [https://www.iprt.ie/site/assets/files/6721/inclco\\_iprt\\_presentation\\_may\\_2020.pdf](https://www.iprt.ie/site/assets/files/6721/inclco_iprt_presentation_may_2020.pdf)

<sup>42</sup> Office of the Inspector of Prisons: <https://www.oip.ie/>

be countered of course by the reality of incarcerated life under more extreme lockdown conditions. Covid-19 has seen a significant reduction in in-prison services such as education (all prison schools have been closed since 15 March), family visits (these have been suspended since 27 March), and psychology services (only available via phone) resulted in significantly longer “in-cell” living. The lived reality of prisoners’ lives, 14% of whom experienced 19+ hours of lock-up conditions prior to Covid-19,<sup>43</sup> means that the legacy of overcrowding and poorly resourced elements of the system continue to have an effect despite the pro-human rights culture of management in responding to the health crisis.

*The bad: failing to respond effectively to Asylum seeker vulnerabilities*

The dangers of Covid-19 in confined setting also presents an example of poor practice from the Irish context through operation of centres housing asylum. While the IPS is an executive office of the state, it is the Department of Justice and Equality itself, through the Reception and Integration Agency which is responsible for the Direct Provision System. This operates centres for asylum seekers housing them while their applications are being dealt with.<sup>44</sup> However, the practice has been widely criticised with centres run by private contractors often failing to meet basic standards, while many “residents” remain stuck in the system for years because of slow processing of application.<sup>45</sup> As with prisons, living conditions for those in DP centres were likely to allow for rapid transmission of Covid-19 should it enter the living space.

Overcrowded and unsuitable living conditions<sup>46</sup> including shared kitchen and bathroom facilities, problematic under normal circumstances were made worse in the Covid-19 context by a lack of space for self-isolation where people either showed symptoms or had had contact with a confirmed case. Privately run centres in particular are inadequately monitored and even before the Covid-19 health crisis critics were highlighting the overall lack of oversight<sup>47</sup> and a failure to carry out vulnerability assessments of people in the system.<sup>48</sup>

Pre-existing tensions, including a poorly run and monitored system, were exposed and exacerbated then in the health crisis. A lack of health information provided to residents, many of whom have

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<sup>43</sup> Supra, n.41.

<sup>44</sup> <https://nascireland.org/campaigns/asylum-process-direct-provision>

<sup>45</sup> See NASC & CCJHR, *Beyond McMahon – Reflections on the Future of Asylum Reception in Ireland* (2018) available online at: <https://nascireland.org/sites/default/files/Nasc-CCJHR-Beyond-McMahon-Report-Dec-2018-FINAL.pdf>

<sup>46</sup> [https://www.ombudsman.ie/downloads/DP\\_Report\\_2020EMBARGO.pdf](https://www.ombudsman.ie/downloads/DP_Report_2020EMBARGO.pdf)

<sup>47</sup> <https://www.thejournal.ie/asylum-seekers-inspections-emergency-accommodation-4963562-Jan2020/>

<sup>48</sup> <https://www.thejournal.ie/deeply-concerned-call-for-state-to-implement-vulnerability-assessments-for-asylum-seekers-4653830-May2019/>

limited English, and access to soap and cleaning materials, made it difficult for residents to effectively protect themselves.<sup>49</sup> Residents were not provided with additional space or alternative accommodation in which they could effectively practice the Government’s social distancing advice<sup>50</sup> while allegations have been made (and unanswered) that the movement of Covid-19 infected residents spread the disease from Dublin to the South West county of Kerry.<sup>51</sup> Indeed, this particular decision has been seen as a microcosm of poor practice with people within the system not wanting to be moved across the country, the accommodation being clearly unsuitable for social distancing. The Oireachtas Special Committee on Covid-19 responses held on 26 May 2020 heard that a resident had been placed in isolation the day after being moved to the new centre in a remote part of the country, underlying concerns that the decision to move people had in fact spread the virus to new geographical locations.<sup>52</sup> Deputy Foley asked a particularly significant question in the proceedings:

[W]ho, among the organisations whose representations are assembled here, including the HSE and the Department of Justice and Equality, has oversight of what the operator is doing on the ground? Is it the HSE, the Department of Justice and Equality or neither body?<sup>53</sup>

The response was that “the Department of Justice and Equality is the responsible Department for direct provision centres. They are our residents and are people for whom we have the ultimate responsibility.” This of course fits with the normal run of operation; little other oversight mechanisms have been provided as they centre remain a relatively closed space. Recent provision for limited independent oversight by both the general Ombudsman and the Ombudsman for Children has been provided but their remit is narrow.<sup>54</sup> Despite this, it is significant that in the context of Covid-19 he chose to express concern about the “unsuitability” of DP accommodation stating:

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<sup>49</sup> A coalition of NGOs developed the Covid-19 World Service initiative creating up-to-date public health information for migrants living in Ireland including those in DP centres. Voiced by health care professionals and to date covering 23 languages the videos have been taken up by the Government health service, the Health Service Executive, as a key resource. See <https://nascireland.org/covid-19-world-service>

<sup>50</sup> <https://www.irishexaminer.com/breakingnews/ireland/direct-provision-centres-covid-19-response-deeply-troubling--irish-refugee-council-998736.html>

<sup>51</sup> <https://www.thejournal.ie/covid-19-transported-by-bus-from-dublin-to-caharciveen-dail-committee-told-5107606-May2020/>

<sup>52</sup> Norma Foley, TD, Special Committee on Covid-19 Response debate, 26 May 2020, [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid-19\\_response/2020-05-26/5/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid-19_response/2020-05-26/5/)

<sup>53</sup> Ibid. The two key organisations referred to by the TD were the Department of Justice and Equality, the Health Service Executive, the executive body responsible for delivery of health services. Representatives from key sections within those organisations attended the meeting.

<sup>54</sup> That oversight was established in 2017 See Ombudsman, *The Ombudsman and Direct Provision: The story so far* (2018) available at: <https://www.ombudsman.ie/publications/reports/the-ombudsman-and-direct/> See also Ombudsman for Children, “Ombudsman for Children can now investigate complaints from those in Direct Provision”, 3 April 2017, <https://www.oco.ie/news/ombudsman-children-can-now-investigate-complaints-direct-provision/>

In my view the crisis, and in particular the highly contagious nature of the virus, brings into sharp relief just how unsuitable and unsustainable it is to have three or more people in the same room as is the case in many Direct Provision centres, particularly those being used on an emergency basis.<sup>55</sup>

Within this policy area, the Irish state has consistently avoided a regularised independent oversight mechanism. Direct provision centres are not inspected by the Health Information and Quality Authority which is an independent authority responsible for driving care standards for people using both health and social care services in Ireland. In this system, the overall response of the DoJE has been characterised by a self-protective approach to criticism. While the Prison system has sought to follow WHO guidelines on places of detention,<sup>56</sup> the asylum space is one that engenders a more defensive attitude generally within government resulting in less cooperation and a determination to carry out actions even in the face of obvious problems. In addition, by not seeing that DP centres could be better protected by applying the WHO rules in relation to places of detention the reality of the heavily regulated nature of the living conditions on resident's health is ignored. The result has been that by the end of May, 14 clusters of the virus had been identified in DP with 175 cases overall.<sup>57</sup>

## Conclusion

These examples of practice under the Covid-19 health crisis within Ireland over the past few months arise from the same government department, yet they illustrate the potential for difference at the local level. This is not unsurprising and can reflect policy, structural and cultural differences that arise at the coal face of policy implementation. Developing a consistent approach that respects the rights of those affected while meeting key health needs is challenging, and in a pandemic situation there is a sense in which Government has to do the best they can in challenging circumstances. This, though, can lead to a situation where oversight may be reduced, where criticism and accountability are put on hold until after the crisis passes. How does accountability work in this context? It also illustrates the need to effective accountability systems to be in place to meet both normal and crisis scenarios.

While the response of the Irish Prison Service is not perfect and prisoners' rights are significantly curtailed in order that the system can minimise the spread of covid-19 in enclosed institutions, the overall approach has been constructive, cooperative and compliant with good practice. It has also

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<sup>55</sup> Ní Bhroin, C., "Ombudsman concern at suitability of direct provision accommodation", RTE News, 23 April 2020 available at: <https://www.rte.ie/news/2020/0422/1134209-asylum-seekers-complaints/>

<sup>56</sup> Horsford, P., "Impact of Covid-19 on Direct Provision centres to be raised at Oireachtas committee", Irish Examiner, 25 May 2020 available at: <https://www.irishexaminer.com/breakingnews/ireland/impact-of-covid-19-on-direct-provision-centres-to-be-raised-at-oireachtas-committee-1001526.html>

<sup>57</sup> Carroll MacNeill, TD, Special Committee on Covid-19 Response debate, 26 May 2020, [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid-19\\_response/2020-05-26/5/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid-19_response/2020-05-26/5/)

ushered in new initiatives such as the development of a new family video link to allow those in prison to maintain contact with their families on the outside while in person visits are not permitted.<sup>58</sup> Meeting the crisis by respecting the dignity, rights and needs of all those in the prison system is a welcome development.

Conversely, the response of the DoJE to the Covid-19 health crisis has deepened the already problematic Direct Provision system. A culture of resistance to accountability mechanisms and outside criticism has meant that the system has been left largely without external oversight. This has been made worse by the inability of private contractors, often providing poor services at the best of time, to respond effectively and quickly to the crisis. While the racism that permeates the immigration and asylum system has led to a lack of trust between residents, officials, and service providers as well as many of the communities these centres operate within. The result has been that residents are ignored and isolated. Respect for their dignity and human rights has, it seems, not been a priority in this environment.

The contrast between the response to prisons and direct provision centres, both of which see vulnerable residents heavily reliant upon the state to make decisions in their best interest, is stark. Yet the conclusion from both situations reinforces the importance of effectively entrenching accountability and oversight methods not only in the practice of our government but also in the culture of those working within them. This needs to extend from the operation of the Oireachtas itself as an operational oversight mechanism through to the executive implementation of government policy. When Ireland eventually emerges from the health crisis and has time to reflect in detail on its response it will be essential that questions around accountability are centrally placed, and that lessons are embedded in normal practice.

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<sup>58</sup> [http://www.justice.ie/en/JELR/Pages/Information\\_regarding\\_the\\_Justice\\_Sector\\_COVID-19\\_plans](http://www.justice.ie/en/JELR/Pages/Information_regarding_the_Justice_Sector_COVID-19_plans)