



House of Commons
Justice Committee

Constitutional processes following a general election

Fifth Report of Session 2009–10

*Report, together with formal minutes, oral and
written evidence*

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The current staff of the Committee are Fergus Reid (Clerk); Dr Sarah Thatcher (Second Clerk); Gemma Buckland (Committee Specialist); Hannah Stewart (Committee Legal Specialist); Ana Ferreira (Senior Committee Assistant); Sonia Draper (Committee Assistant); Henry Ayi-Hyde (Committee Support Assistant); and Jessica Bridges-Palmer (Committee Media Officer).

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1 Introduction

1. In the light of speculation that the forthcoming general election could result in a House of Commons where no one party has an overall majority—and independent study of the implications of such circumstances¹—we agreed to hold an evidence session on how constitutional principle, provision and practice apply after general elections.

2. We are publishing this short report in order to make available all the evidence received, oral and written, and to respond to the invitation of the Cabinet Secretary, Sir Gus O’Donnell, for us to comment on the draft chapter of the Cabinet Manual being developed by the Cabinet Office which deals with elections and government formation.² We welcome the publication by the Cabinet Office of that text for consultation.³ We were grateful for sight of this draft prior to the Cabinet Secretary’s appearance before us. We note his intention to publish a more finished version in time for the forthcoming general election.⁴

3. The steps that have to be taken after a general election, and the roles and responsibilities of the Prime Minister, the Sovereign, the Civil Service and other key actors, are not widely understood. They need to be clear, and clarity is particularly important when the election results in a situation where no one political party has an overall majority in the House of Commons.⁵ Our aim was to shed a little more light on this aspect of the UK constitution and to ascertain what preparations were being undertaken within the Government to address the different possible outcomes.

4. The Cabinet Secretary told us that: “in terms of the Civil Service, people ... have not seen many changes of administration and they have certainly not seen a hung Parliament situation. So can we assume that the Civil Service is up and ready for this? No.”⁶ He told us he wanted to put this chapter before the Committee “because it is hugely important that we get some clarity ahead of an election ... I would want to try and get this finalised before the start of an election campaign.” He added that “in the absence of commands otherwise” he would be following the principles set out in the finalised chapter up to and following the forthcoming election.⁷

5. We were very grateful to Lord Butler of Brockwell and Lord Turnbull of Enfield, former cabinet secretaries;⁸ Professor Robert Hazell, Director, Constitution Unit, UCL, Peter Riddell, Senior Fellow, Institute of Government, and Professor Vernon Bogdanor, Professor of Government, Oxford University,⁹ for participating in the session. We were

1 See, for example, *No Overall Control?*, Hansard Society, 2008 and *Transitions—preparing for changes to government*, Institute for Government, 2009

2 Q 87

3 Ev 23-27

4 Q 97

5 Ev 28, paras 1.1-1.2 and Qq 31, 62, 63, Q 65 [Riddell], and Qq 78, 87

6 Q 87

7 Q 95

8 Qq 1-58

9 Qq 59-86

also grateful for the submission, by Professor Hazell and Mr Peter Riddell, of memoranda on the codification of constitutional practice drawing on international comparators.¹⁰ The session was concluded by oral evidence from the Cabinet Secretary.¹¹

6. The evidence we have gathered is published as part of this report, including the draft chapter on elections and government formation made in public by the Cabinet Office on 24 February.¹²

2 Evidence heard

“Hung” Parliament

7. We regard the term “hung Parliament” as an unavoidable idiom, but we believe that it would be better to use the phrase “no overall majority” in formal guidance and official discourse, as it is more accurate and contains rather fewer pejorative connotations.

Issues raised

8. Discussions with our witnesses, prior to the appearance of the current Cabinet Secretary, ranged very widely. Subjects raised by witnesses included such topics as: the importance of protecting the role of the Sovereign from the appearance of involvement in political considerations;¹³ the role of the House of Commons as, effectively, an ‘electoral college’ for the selection of a government;¹⁴ the benefits and disadvantages of almost instantaneous decision-making in forming any new administration;¹⁵ and practical considerations of how the House might best demonstrate confidence, or a lack of it, in a prospective administration.¹⁶ These discussions are published in full with this report.

9. The two key areas arising from this evidence, that we later pursued with Sir Gus O’Donnell, were as set out below.

- The agreement, and publication, of a clear statement of principles—a “caretaker convention”—applying to government business in the period between the announcement of an election and the formation of a new government. This included the issues of safeguarding such principles, how diversions from them might be dealt with and the importance of avoiding administrative inertia or paralysis.¹⁷

10 Ev 28-49

11 Qq 87-[end]

12 Ev 23-27

13 Qq 13,14, 17, 22, 59, 61-2, 74, 78, 80-1, 109-10

14 Qq 10, 19, and 78 [Bogdanor]

15 Qq 2, 9, 10 and 50

16 Qq 64 and 72-77

17 Qq 36-47, 62-63, 65- 66, 68-71 and 87

- The agreement of effective arrangements for pursuing and supporting the business of negotiations between government and opposition parties in circumstances when the election has not returned an overall majority for any one party and it is not immediately clear who could form a government commanding the confidence of the House.¹⁸

Caretaker principles

10. Evidence from our academic witnesses and former senior civil servants made it clear that the existing conventions—currently known as “election purdah”—on the parameters of acceptable government activity and decision-making in the period between the announcement of an election and the formation of a new government needed clarification and strengthening. This would be particularly sensitive and important if it appeared likely that there might be any substantial period, after polling day, before a new government was in place.¹⁹ Our evidence demonstrated that it needed to be clear that, until a government has established that it can command an overall majority in the Commons, the “caretaker” principles, which applied prior to polling, should continue to be applied.²⁰

11. The draft chapter published by the Cabinet Office currently states:

As long as there is significant doubt whether the Government has the confidence of the House of Commons, it would be prudent for it to observe discretion about taking significant decisions, as per the pre-election period. The normal and essential business of government at all levels, however, will need to be carried out.²¹

The Cabinet Secretary, Sir Gus O’Donnell, conceded that, even as it stood, this was “civil service speak” for a sterner injunction than it appeared. He said: “personally, the stronger this is the better from my point of view”.²² He emphasised that this was not a “power grab” by the civil service and while “hard and fast” rules were impossible, clarity over the principles was important.²³

12. We also asked about the steps to be taken in circumstances where Ministers and civil servants disagree on the application of “caretaker principles” (or where Ministers explicitly decide to set the principles aside). Sir Gus O’Donnell said:

“If we get to a situation where a Prime Minister wanted to do something during that [caretaker] period where there was not all-party agreement then ... we would have to say “That can only be done, Prime Minister, if you direct me to do it” and we would make that direction available in the normal way to Parliament.”²⁴

18 Qq 24-30, 34, 86, 110, 112-116

19 Qq 65-71

20 Qq 66 and 92

21 Ev 25, para 20

22 Qq 98-99

23 Qq 104, 88 and 87

24 Q 89

He drew an analogy, as had our other witnesses, to long-standing procedures for departmental accounting officers to require Ministerial directions²⁵ in certain circumstances, and the arrangements for making them public via the Comptroller and Auditor General and the Public Accounts Committee.²⁶

13. We agree with our witnesses that there should be more clarity in this area on a number of points:

- **The term “caretaker” is clearer and more meaningful than “purdah” and should be used in formal guidance.**
- **The period in which “caretaker” principles should apply should be defined (and the extra restrictions that apply to government activity, especially communications, in the run-up to polling day should also be set out).**
- **The fact that a “caretaking” period has commenced, or concluded, should be explicitly announced.**
- **The “caretaker” principles should be as clear as possible on the sorts of decisions that need to be avoided, deferred and/or consulted upon with opposition parties. Clearly there are some issues and some circumstances in which delay can be extremely damaging to a particular industry, to the supplier who has bid for a contract or to a whole industry or sector. Conventions need to be in place to facilitate agreement by consensus across the parties on such matters.**
- **A procedure should be established for mediating and, if necessary, making public, differences of opinion between Ministers and the civil service on the application of the “caretaker” principles.**

14. We propose the addition of text along the following lines to the Cabinet Manual draft chapter on elections and government formation, augmenting or replacing existing provisions as appropriate.

Caretaker principles

Once the Monarch has agreed to a dissolution, and the Prime Minister has announced an election, constraints apply to the way government should conduct business—the “caretaker principles”.

The caretaker period extends from the granting of dissolution and announcement of an election until the formation of a government commanding the confidence of the House of Commons. The start and finish of this period is the subject of formal

25 A Minister may direct an accounting officer [senior official with special responsibility for oversight of expenditure] to proceed in accordance with a ministerial policy decision despite formal notification from that officer of an objection to the proposed course of action on grounds of propriety, regularity or value for money. Such directions are copied to HM Treasury and the Comptroller and Auditor General (NAO) who may forward them to the Committee of Public Accounts. In this context, such directions are exempt from the general rule that civil servants do not disclose advice to Ministers. (See Guide to the scrutiny of public expenditure, HM Treasury, chapter 4, Giving evidence before the PAC, pp 21-2.)

26 Qq 90-91 and 104 and see Qq 36-42 and 67

announcement. This is a development and clarification of the period formerly known as “election purdah”.

In caretaker mode, the government retains its responsibility to govern and ministers remain in charge of their departments. Essential business is carried on. However, ministers must exercise care not to bind future governments. This means the deferral of:

- taking major policy decisions
- entering into significant government contracts
- making senior public appointments

provided that such postponement would not be detrimental to the national interest or wasteful of public money.

If decisions cannot wait, they should, where possible, be handled by (a) temporary arrangements (*e.g.* extending a board appointment, or rolling over a contract for a short period); or (b) consultation with opposition parties. The Cabinet Office can be consulted about appointments, and the Office of Government Commerce about government contracts. Consultation with the opposition parties must be done through, or with the authority of, Ministers who can consult the Cabinet Office in cases of doubt.

As soon as a general election is announced, the Cabinet Office issues guidance to departments on their activities during the caretaker period. Within this period, there are additional restrictions on some forms of activity by civil servants and government departments prior to polling day. These include avoiding competition with Parliamentary candidates for the attention of the public and ensuring that any material produced is impartial.²⁷

The principles applying to government activity during the caretaker period should not be treated as an excuse for inactivity or inertia; the primary aim is the avoidance of binding decisions of a politically contentious nature. Responsibility for advice on the interpretation and application of the rules rests with departmental permanent secretaries and, ultimately, the Cabinet Secretary. Responsibility for decisions rests with Ministers and, ultimately, the Prime Minister. It is open to permanent secretaries or the Cabinet Secretary to require a Ministerial direction—equivalent to those for accounting officers—before proceeding with a policy decision where formal objection to the Minister’s proposed course of action has been made because of concerns about propriety under the caretaker principles. Such directions, together with the reasoning provided by permanent secretaries, or the Cabinet Secretary, should be made public by the department immediately and laid before both Houses at the first opportunity after the new Parliament has met.

²⁷ The guidance to Government departments issued in 2005 is available at www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/electguide.pdf

15. We recommend that the Cabinet Secretary adopts these substantive points which reflect the discussion held when he gave evidence to us.

Government formation

16. The fundamental constitutional principle that the person who can command the confidence of the House of Commons is invited by the Sovereign to form a government is clear.²⁸ However, there is limited experience of determining who that person is in circumstances where an election has not returned a party with an overall majority in the Commons.²⁹ It is also clear that the government is not directly elected by the electorate and the incumbent Prime Minister does not *have* to resign until the confidence of the House of Commons has been explicitly withheld, for example by losing a vote on the Queen's Speech.³⁰ It is now inconceivable that a Prime Minister would not resign as soon as it became apparent that an opposition party had gained an *overall* majority in the House.

17. What is not possible, in any imaginable circumstances, is for a Prime Minister, facing a House without an overall majority, to ask the Sovereign for a further dissolution before that House has met.³¹ Lord Turnbull drew our attention to the "Lascelles principles" which refer to the conditions under which a request for a dissolution might be denied by the Sovereign. These are:

- the existing Parliament was still vital, viable, and capable of doing its job
- a general election would be detrimental to the national economy
- another Prime Minister could be found who could carry on the government, for a reasonable period, with a working majority in the House of Commons.³²

18. In addition, Lord Butler and Professor Hazell both referred to what Professor Hazell described as the "political self-correcting mechanism" where a politician who caused a repeat election—for which the electorate did not see justification—would be very likely to be heavily "punished at the polls".³³

19. Our witnesses were unanimous that, in circumstances of a House with no overall majority, it was for the politicians to conduct negotiations to clarify who was most likely to be able to command the House's confidence and the Sovereign would not, and should not be expected to, take a role in that process. Professor Bogdanor told us that, in circumstances of a compact or coalition, "cast iron" and "public" evidence of the agreement would be required in the form of an endorsed text.³⁴ Sir Gus told us that it was the "responsibility" of the incumbent Prime Minister not to resign until the position was

28 Qq 1 and 59

29 Q 87

30 Qq 1 and 19

31 Qq 15, 16, 59 and 83

32 Sir Alan Lascelles, then Private Secretary to King George VI, writing under the pseudonym "Senex" to the Editor of *The Times*. Published, 2 May 1950. See Qq 15 and 16

33 Q 83 and see Q 16

34 Q 80 and see Q 19

clear.³⁵ Other witnesses described this as a “national duty” of the Prime Minister,³⁶ above and before party political considerations, as primary adviser to the Crown (but by no means the sole source of information³⁷).

20. The factors and considerations in play during negotiations between government and opposition parties to determine the person to be invited to form a government are impossible to predict, not least without knowing the shape and character of the election result. **It is clear from the draft chapter produced by the Cabinet Office, and emphasised by Sir Gus in evidence to us, that support from Cabinet Office personnel is envisaged—and indeed has already been authorised by the present Prime Minister—to assist the administration and process of negotiations, not only between government and opposition parties, but also between opposition parties themselves, in any period of discussion of government formation.**³⁸ These arrangements should be set out in the Cabinet Manual.

3 Conclusions

21. We welcome the evidence of significant thought and effort being put into preparations for the full range of parliamentary election outcomes by the Government, and the Cabinet Secretary in particular. As Professor Hazell told us, the work undertaken by the Cabinet Office was “an excellent initiative and ... the draft chapter is a very strong start”.

22. We look forward to seeing the fruits of the informal consultation set in motion by the Cabinet Office on its draft chapter on elections and government formation in due course and prior to an election being called.

35 Q 110

36 Qq 54-56 and see Qq 13-14

37 Qq 18, 60 [Riddell], 61, 80, 83 and 109

38 Qq 27-30, 86-87 and 112

Conclusions and recommendations

1. We agree with our witnesses that there should be more clarity in this area on a number of points:
 - The term “caretaker” is clearer and more meaningful than “purdah” and should be used in formal guidance.
 - The period in which “caretaker” principles should apply should be defined (and the extra restrictions that apply to government activity, especially communications, in the run-up to polling day should also be set out).
 - The fact that a “caretaking” period has commenced, or concluded, should be explicitly announced.
 - The “caretaker” principles should be as clear as possible on the sorts of decisions that need to be avoided, deferred and/or consulted upon with opposition parties. Clearly there are some issues and some circumstances in which delay can be extremely damaging to a particular industry, to the supplier who has bid for a contract or to a whole industry or sector. Conventions need to be in place to facilitate agreement by consensus across the parties on such matters.
 - A procedure should be established for mediating and, if necessary, making public, differences of opinion between Ministers and the civil service on the application of the “caretaker” principles. (Paragraph 13)
2. We recommend that the Cabinet Secretary adopts [the] substantive points [set out in paragraph 14] which reflect the discussion held when he gave evidence to us. (Paragraph 15)
3. Our witnesses were unanimous that, in circumstances of a House with no overall majority, it was for the politicians to conduct negotiations to clarify who was most likely to be able to command the House’s confidence and the Sovereign would not, and should not be expected to, take a role in that process. (Paragraph 19)
4. It is clear from the draft chapter produced by the Cabinet Office, and emphasised by Sir Gus in evidence to us, that support from Cabinet Office personnel is envisaged—and indeed has already been authorised by the present Prime Minister—to assist the administration and process of negotiations, not only between government and opposition parties, but also between opposition parties themselves, in any period of discussion of government formation. These arrangements should be set out in the Cabinet Manual. (Paragraph 20)

Formal Minutes

Tuesday 16 March 2010

Members present:

Rt Hon Sir Alan Beith, in the Chair

Rt Hon Alun Michael

Jessica Morden

Julie Morgan

Mr Andrew Turner

Mr Andrew Tyrie

Dr Alan Whitehead

Draft Report *Constitutional processes following a general election*, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 22 read and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 23 March at 4.00 pm]

Witnesses

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Wednesday 24 February 2010	
Lord Butler of Brockwell and Lord Turnbull of Enfield , House of Lords	Ev 1
Professor Robert Hazell , Constitution Unit, UCL, Mr Peter Riddell , Senior Fellow, Institute of Government and Professor Vernon Bogdanor , Professor of Government, Oxford University	Ev 8
Sir Gus O'Donnell KCB , Cabinet Secretary and Head of the Civil Service and Stephen Laws , Cabinet Office	Ev 16

List of written evidence

1	Cabinet Secretary	Ev 23
2	Professor Robert Hazell and Peter Riddell	Ev 28, 48

Reports from the Justice Committee since Session 2008–09

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2009–10

First Report	Cutting crime: the case for justice reinvestment	HC 94 (<i>Cm 7819</i>)
Second Report	Work of the Committee in 2008-09	HC 233 (<i>n/a</i>)
Third Report	Appointment of HM CPS Chief Inspector	HC 244
Fourth Report	Appointment of HM Chief Inspector of Prisons	HC354

Session 2008–09

First Report	Crown Dependencies: evidence taken	HC 67 (<i>HC 323</i>)
Second Report	Coroners and Justice Bill	HC 185 (<i>HC 322</i>)
Third Report	The work of the Information Commissioner: appointment of a new Commissioner	HC 146 (<i>HC 424</i>)
Fourth Report	Work of the Committee in 2007–08	HC 321 (<i>n/a</i>)
Fifth Report	Devolution: a decade on	HC 529 (<i>Cm 7687</i>)
Sixth Report	Sentencing guidelines and Parliament: building a bridge	HC 715 (<i>Cm 7716</i>)
Seventh Report	Constitutional reform and renewal: Parliamentary Standards Bill	HC 791 (<i>HC 1017</i>)
Eight Report	Family legal aid reform	HC 714 (<i>HC 1018, and HC 161, Session 2009–10</i>)
Ninth Report	The Crown Prosecution Service: gatekeeper of the criminal justice system	HC 186 (<i>HC 244, Session 2009–10</i>)
Tenth Report	Draft sentencing guideline: overarching principles—sentencing youths	HC 497 (<i>n/a</i>)
Eleventh Report	Constitutional reform and renewal	HC 923 (<i>HC 1017</i>)
Twelfth Report	Role of the prison officer	HC 361 (<i>Cm 7783</i>)

Oral evidence

Taken before the Justice Committee on Wednesday 24 February 2010

Members present:

Sir Alan Beith, in the Chair

Rosie Cooper
Mr David Heath
Mr Douglas Hogg
Mrs Siân C. James
Alun Michael

Julie Morgan
Dr Nick Palmer
Mr Andrew Turner
Mr Andrew Tyrie
Dr Alan Whitehead

Witnesses: **Lord Butler of Brockwell**, a Member of the House of Lords, and **Lord Turnbull**, a Member of the House of Lords, gave evidence.

Q1 Chairman: Lord Butler, Lord Turnbull, welcome. We are very glad to have your help and advice and I am sure the whole country is going to be glad to have your help and advice. Lord Butler, you and I have been here before in February 1974, I remember. Are the procedures for the formation of a government following a general election in which there is no overall majority clear at least in the minds of those most closely involved? What is your experience?

Lord Butler of Brockwell: I think that they are clear and that they are simple. The convention is that the Prime Minister before the election remains Prime Minister until it is clear that he can no longer command the majority in Parliament, and that somebody else can. I think it may be the popular myth that the Prime Minister loses office if his party is defeated in a general election, but that is not the position. The Prime Minister remains Prime Minister until he cannot command a majority in Parliament and somebody else can.

Q2 Chairman: Is there an assumption that the process must be completed very quickly? For example, how soon does Parliament have to meet? What other time constraints are there?

Lord Turnbull: Chairman, at the time that the old Parliament is dissolved, a timetable is usually set for the start of the new one, and implicitly it assumes that the process of forming a new government is not going to take too long. It certainly does not allow for the length of time which one sees in many other jurisdictions. There is an assumption that a hung Parliament is either not very likely or can be quickly resolved, and it is possible that you could find that there is some conflict between those two.

Q3 Chairman: Lord Butler, when you were in Number 10 in 1974 it did take until Monday before the issue was resolved. Were you conscious of a tremendous time constraint and that things had to be rushed and decisions made very quickly?

Lord Butler of Brockwell: No, not at all because I think from Thursday to Monday is not a very long time by comparison with other jurisdictions. No, I think that what I and others of us in Number 10 were conscious of was tremendous public and media

pressure, but not pressure of a timetable. As I understand the situation, the writ for a dissolution sets a date for Parliament to meet again and that cannot be changed, but the Queen's Speech can be delayed so that if it took longer for an administration to be formed, then that is how it would be done.

Q4 Chairman: Is it not possible by a further proclamation to delay the opening of Parliament?

Lord Butler of Brockwell: It may be so. I do not know the answer to that.

Q5 Mr Hogg: Can I ask a question that is probably relevant to both Lord Butler and Lord Turnbull? I recognise of course that in 1974 it was possible to be a little more leisurely in the negotiations, albeit there was a great deal of public pressure. Now with the present economic condition which we face and a fear that the markets may be expecting early signs of spending plans or spending reductions, would you agree that the timeframe may be compressed by those market considerations?

Lord Turnbull: The answer is "yes" and that will condition the behaviour of the players. They will know that they cannot spend a long time haggling away, making no concessions. There is a game of blame here; that no-one will want to be blamed for being the people who perpetuated this position of uncertainty or who prevented an agreement. That will concentrate minds. There will be pressure, but it will, I believe, have a beneficial effect on the behaviour of the people involved.

Q6 Mr Hogg: Concentrating minds most wonderfully.

Lord Turnbull: It will, yes.

Q7 Chairman: You have made the point that in many other countries, particularly many other European countries, the process is quite slow, and some countries, like the United States, have a long hand-over period, or a long old administration period, but face the same markets. Why are we different in this respect or are we?

Lord Turnbull: One of the features is that we choose our ministers from the executive.

Q8 Chairman: From the legislature.

Lord Turnbull: Sorry, from the legislature. You could have a position in which you have a chancellor of the exchequer who either did not stand again or was defeated, still remaining as chancellor of the exchequer, and this is a slightly odd situation which I think in many other countries would not necessarily apply; that people would continue in their present posts in a more natural way. In the US of course it has provided a period of almost two months in which the previous administration stays in power until the new administration is ready take over.

Chairman: We are going to return to some of the caretaker government issues a little later.

Q9 Mr Heath: Of course, some countries manage without a government for rather long periods without any huge deleterious effect, apparently. I wonder, is there any formal arrangements for the Civil Service to co-ordinate with the authorities of Parliament under these circumstances? Is the contingency planning simply in the hands of the permanent Civil Service, or does it extend to the authorities in this House as well, because obviously there are implications for the way Parliament does its business early in a new potential administration?

Lord Butler of Brockwell: I think there would certainly be contacts between the Civil Service and the House authorities, and particularly so in circumstances when it looked as if the arrangements for the resumption of Parliament would have to be delayed, but I would expect that just to be, as it were, a normal bit of business between the Civil Service and the House authorities. Could I just say in relation to the previous exchanges: I have said in other contexts that I think the arrangements in Britain for the formation of a new government after an election are unwisely frantic because—I have seen this, and Lord Turnbull has seen it—if it is a new Prime Minister, when the new Prime Minister comes in, he or she comes in in circumstances where they have had a long campaign; they may have had to sit up most of the night waiting for their election results, they then may have to travel to London, and they arrive in a state of exhaustion. To then have to make decisions that are crucial for the country, including the appointments of your main lieutenants in the first few hours, and a lot of other important decisions, has never seemed to me to be particularly wise, nor does it seem to me to be necessary. It is part of a drama that we have got used to that everybody enjoys, and it is difficult to break.

Q10 Mr Hogg: In the present circumstances it is inevitable, is it not, given the financial position?

Lord Butler of Brockwell: I do not know. I would not agree with that actually. I do not think it is inevitable; but there are certain situations when outside pressures would be greater to get a new administration into place.

Q11 Mrs James: How important is it in any agreement between political parties to share power whether it be by coalition or by compact to be made public?

Lord Butler of Brockwell: I think it is inevitable that such arrangements would be made public. I suppose there could be confidential understandings which the parties keep to themselves, but I doubt whether they would remain confidential for very long!

Q12 Mrs James: Do you think it should be made public prior to an election? If they have been having these negotiations should they be published before an election so that people can make a decision on that agreement?

Lord Turnbull: I would say no because all those discussions will be hypothetical and there will be many permutations and combinations within them. It is inevitable that they write up what the nature of the agreement is, whether it is a coalition or support for a minority government. There are precedents which we have seen written up in the Constitution Unit's report. People are now seeing different ways of formalising these agreements. We have the examples of Scotland and Wales. I just do not think it is viable to have an agreement that does not have some solid written element to it.

Q13 Dr Whitehead: There is the circumstance under which the incumbent Prime Minister stays on, as it were, as chief adviser to the Sovereign, over and above his political imperative to form a government; but at what point does the leader of the next largest party get invited to be involved in the process or get invited to the Palace?

Lord Turnbull: Only when the Prime Minister has concluded that he cannot form a government himself. I think we can take this one stage further: I do not think that in his role as adviser to the Sovereign he can simply go to the Palace and say: "I cannot make it work; you will have to try someone else." I think it is incumbent upon the Prime Minister to present to the Sovereign an alternative arrangement which he believes is going to work and that has been agreed. In other words, it would be a dereliction of duty for the outgoing Prime Minister to leave a limbo in which the Queen has got to try and make a decision. The last thing you want is the Queen to be presented with trying something out which may not command political support. It has happened in her dominions and it has been controversial, but it would be most regrettable if it happened here.

Q14 Dr Whitehead: Does that mean that the leader of the next largest party following the result of the election, as it were, simply has to wait in the wings, or does the leader of the next largest party have any role in that particular process in your view?

Lord Turnbull: He may be arguing that he can form an administration, but I think it is clear that the incumbent Prime Minister in a sense has first refusal in this process. He can see whether he can find an arrangement that would produce support for himself and his party. This is what happened in 1974: even though Edward Heath was not the leader of the largest party, he was the incumbent. Until that process had run its course, only then was the opportunity offered to the leader of the next party.

Lord Butler of Brockwell: If I can just endorse that, the leader of the second largest party might be having discussions with other political parties, but it is important that the Queen is not involved until the Queen can be sure that the person she invites to form a government has got the best possible chance of doing that. That is something which the outgoing Prime Minister has got a duty to advise her on.

Lord Turnbull: There may be circumstances, for example, where the Prime Minister decides if he or she will submit a Queen's Speech, but without any certainty that it is going to be carried, and yet may wish to proceed with that. Does the Sovereign have a particular role at that point in perhaps saying, "That does not look like it is going to work; could we please call somebody else."

Lord Butler of Brockwell: The answer to that question is "no"¹. If the incumbent Prime Minister decides to present a Queen's Speech, then he has a right to do that, and wait for the outcome of Parliament. I think the fact is that for nearly 200 years a Prime Minister, as a result of an election, has not faced Parliament and been voted down on a vote of confidence; but one can imagine circumstances in which the Prime Minister might want to try that out.

Q15 Dr Whitehead: There may be alternative circumstances where the incumbent Prime Minister may go to the Palace and say: "This is an awful mess, is it not; there is no overall result; why do we not have another general election?" At what point does the Sovereign have a hand in that sort of situation?

Lord Turnbull: That was dealt with in 1950 with the so-called "Senex letter" of Sir Alan Lascelles—he wrote under the pseudonym—which sets out some conditions under which a second dissolution could be denied. In other words, if the Sovereign thought there was a possibility that someone else could produce a workable majority, then they should be given that chance, rather than someone saying: "Can I have another election in a few weeks' time?" I think there are strong pressures against someone asking for a second election, saying, "I did not quite win last time but let me have one more go." Those principles have been around for 60 years.

Q16 Chairman: Is the letter to *The Times* in 1950 under a pseudonym Senex, which we now know is Alan Lascelles, a constitutional document that now guides us?

Lord Turnbull: In a strange way, it is, yes; people have accepted the logic of the arguments that he put forward.

¹ *Note by witness:* I should like to make clear that in my second answer to Q14, when I said that no Prime Minister who had lost an Election has faced Parliament and been voted down for nearly 200 years, I was referring to Elections in which another party has gained an overall majority. It would have been more correct to say "nearly 150 years". I am advised that the first occasion in which a Prime Minister in such a situation resigned without facing Parliament was Disraeli in 1868. In situations when no other party had an overall majority, Salisbury faced Parliament in 1886 and 1892 and Baldwin did so in 1924.

Lord Butler of Brockwell: I think that things have moved on in this respect, as Lord Turnbull said. There is a factor which protects the Queen from having to get into that position of refusing the incumbent Prime Minister a further election; and that is there is evidence that the British people so dislike being taken to the polls that if they were forced to have another general election they would heavily punish the person they saw as responsible for it. I think it very unlikely in those circumstances that the Prime Minister would say, "May we have another general election, Ma'am?" and hope to do well in it. I do not think it is likely that in practice the Queen would these days be put in a position of having to refuse a general election.

Q17 Dr Whitehead: There may be other circumstances, to put a final scenario, that the incumbent Prime Minister does not look like he or she is going to be able to form a government, but it is not necessarily the case perhaps in the Sovereign's and others' opinions that the party of that incumbent Prime Minister might be able to form an administration. At that point the Sovereign might conceivably say, "Yes, perhaps someone could have a go from your party at forming an administration but it is not you, Prime Minister."

Lord Butler of Brockwell: Again, I do not think that the Sovereign ought to be put in that position, or would be put in that position. It would be the duty of the politicians to work it out, and of the incumbent Prime Minister to go to the Sovereign and say: "I do not think I can form a viable government in partnership with other parties, but it has been made clear to me that if there was another leader of my party it would be possible." I think in those circumstances the right course would be for the Prime Minister to stay on while the procedures for producing another leader went through, and until he could go to the Queen and say: "There is another leader. The other parties have indicated that they will support the party in those circumstances, and I advise you to send for that person." That might take three weeks or so. That is when you would get into the position of possibly quite a long delay.

Lord Turnbull: This would be hugely controversial. Supposing Labour had two more seats than the Conservatives, and the Liberals said: "We will form a government with you but not with your leader; you find another leader." What the Conservatives would be saying is, "Are you serious that this country should be led by someone who did not stand in the election as a potential Prime Minister, who was not tested in any of the debates, as opposed to someone who has gone through that process and is only two seats short and possibly has a lot more votes?" That particular example you have given of whether a leadership switch can be made is, I think, a very difficult one.

Q18 Chairman: Where would the Palace get its advice in this situation, from you or from whom?

Lord Turnbull: Our successor, I think is the answer. The Palace can get advice from wherever it likes, but it should definitely include advice from the Cabinet Secretary.

Lord Butler of Brockwell: I think it is known that the Palace does have other constitutional advice. As Lord Turnbull says, it can take advice from anybody.

Q19 Dr Palmer: We have an element of deliberate ambiguity in the British constitution, starting with the fact that we do not have a constitution; but I thought that what Lord Turnbull said was interesting, that the Prime Minister has a responsibility for advising the Sovereign on what steps to take even if those steps are to replace him. There will be situations where there is a legitimate difference of opinion on who might have a stable majority. I am thinking of the marginal cases where a couple of dissident MPs in a potential majority could be expected perhaps to vote against, but their intentions are not entirely clear—you are aware of the type of situation. In that situation, are you really saying that the outgoing Prime Minister has a responsibility to say, “Oh, I think that Fred is the one who is likely to come out best with this”? Would it not be more a question of Parliament testing it in a series of votes?

Lord Turnbull: I think you are right. The way I look upon the election is that it creates an electoral college. As Lord Butler has said, it does not determine an outcome directly. Unlike the US, the electoral college is the legislature, and ultimately these propositions have got to be tested there. You can see where support really lies, who is bluffing and who is not. Ultimately Parliament may have to perform that role.

Lord Butler of Brockwell: I think that it would not simply be a matter of the incumbent Prime Minister expressing an opinion; I think the incumbent Prime Minister would be expected to have some evidence, i.e., in statements by the other parties that they would support an alternative head of government.

Q20 Chairman: Is this not history now that parties elect their leaders by various different processes, all of which take quite some time?

Lord Butler of Brockwell: I think it is history—exactly—that the incumbent Prime Minister will simply express an opinion as between two people.

Q21 Chairman: I meant history in the sense of being no longer applicable.

Lord Butler of Brockwell: Exactly. The Sovereign should not be expected to act on that and there would be procedures to resolve the issue, as you say, by parties undertaking their own election.

Q22 Dr Palmer: To complete my point, I do not think the Sovereign can reasonably be expected to form a view on the opinion of each individual backbencher on whether they are going to follow their party’s preference for one leader or another. Someone is going to have to take the initiative to decide the order in which potential governments are tested in the House of Commons. Am I right in saying that your understanding is that the initiative basically rests with the current Prime Minister, and after that the Sovereign can look at alternatives?

Lord Butler of Brockwell: Yes, but on the basis of as good evidence as the incumbent Prime Minister can produce. You are right in that it might fail. Let us say there was a backbench revolt and the person whom the incumbent Prime Minister had advised the Sovereign to summon brought a Queen’s Speech, and that Queen’s Speech was defeated, and then the process would have to go on again. The essential thing would be that it would be for the politicians and the House of Commons to work it out, and the Sovereign should stay above that frame.

Q23 Mr Heath: Can I just put it to Lord Turnbull that he came up with two mutually contradictory statements in consecutive answers? He correctly stated the view that Parliament is effectively the electoral college for determining the administration; but in a previous answer he postulated a quasi presidential view, that nobody who had not been presented to the country as the potential Prime Minister could possibly be considered by that college on the grounds that they were untried and untested in television debate. I am not sure I accept both of those views simultaneously.

Lord Turnbull: I was not saying that the second of those was the true constitutional position; I was saying that is what I would expect, in current circumstances, the Conservatives to be arguing.

Q24 Alun Michael: Can we focus on the role of the Cabinet Secretary, a shadowy role that is illuminated mainly by *Yes, Minister* and *Yes, Prime Minister* perhaps! What role does the Cabinet Secretary play in the process of the formation of a potential government by an incumbent Prime Minister, and would that role be different if the process is being undertaken with the leader of what until then has been an opposition party?

Lord Butler of Brockwell: We are talking about the circumstances of a hung Parliament, I take it?

Q25 Alun Michael: I am asking in general. Obviously it comes more into focus with a hung Parliament.

Lord Butler of Brockwell: The Cabinet Secretary will be the adviser to the Prime Minister, but of course there is a convention that is in operation, for some 15 months before the election; there can be contacts between the opposition parties and the senior Civil Service and obviously between the leader of the opposition and the Cabinet Secretary. Indeed, even outside those conventions, with the Prime Minister’s permission there may be such contacts at other times and frequently are. The Cabinet Secretary would be taking an apolitical role and would be a neutral person who would be available for advice to any party.

Q26 Alun Michael: Is Lord Turnbull willing to give a less planned response?

Lord Turnbull: No! The Cabinet Secretary has available advice of his own. The one person I turned to a lot was the First Parliamentary Counsel who was the repository of a great deal of wisdom and

knowledge on the law and the conventions. It is to them where the Prime Minister will turn to for advice in the first instance.

Q27 Alun Michael: In the event that there is a hung Parliament—and that obviously involves discussions about a government formation rather than a decision by a single leader—does the Cabinet Secretary or the Cabinet Office in any way have a role in the process; and, whether it does or not, should it?

Lord Turnbull: It can do. To some extent this has been pioneered in Scotland where what I would call the old Permanent Secretary of the Scottish Office, head of the executive, has now developed processes for handling the formation of a new government, and it is the same thing in Wales. One of the possibilities canvassed is that in effect the Cabinet Office and its equivalent in the devolved administrations would appoint liaison officers. There would be someone designated to work with each of the other parties and be their point of contact and source of advice. The Cabinet Secretary would undoubtedly stay working with the Prime Minister of the day.

Q28 Alun Michael: In a sense, that is inevitable with the almost inevitability of a coalition government in Wales and Scotland, so those mechanisms are necessary. In the case of the UK government is that role clear? Have there been developments, for instance since 1974 in the development of conventions?

Lord Turnbull: No, the answer is that there have not been, but the work of the Constitution Unit is saying that there should be. One of the key reasons for that is that the width of the no man's land of people other than the two main parties is far larger than it was. Even as late as 1992, there were still only 20 Liberals. Therefore, the probability of being caught in this no man's land must be greater than it was, and therefore we ought to begin thinking about better mechanisms for handling something which has not happened but which probably has a higher probability of happening now than it did 40 years ago.

Lord Butler of Brockwell: I think that the position of the Civil Service is that it could service discussions between the political parties at the request of those parties and with the permission of the Prime Minister. I think both those conditions would have to be fulfilled. I think it is likely they would be fulfilled, but I think they would have to be. The other thing with the Civil Service is that it could service the discussions. It could not advise on the political tactics. It would be a matter of setting agendas, arranging meetings and keeping minutes.

Q29 Alun Michael: I think that is an important answer in the sense that, obviously, these are essentially political and relational discussions, are they not?

Lord Butler of Brockwell: Yes.

Q30 Alun Michael: And therefore there is a danger, if the Cabinet Secretary becomes embroiled in the content as distinct from the process.

Lord Butler of Brockwell: That is absolutely correct. That is the right distinction, I think.

Q31 Alun Michael: The suggestion that the Cabinet Office is producing a Cabinet manual with a section on the process of transition, as I suppose one ought to describe it, how important is a public statement of a shared understanding of provision and principle in these circumstances?

Lord Butler of Brockwell: I think it would be valuable because it is important that if this situation arises there would be a good deal of public understanding about the circumstances; and, for example, understanding about the point that we made at the beginning that the Prime Minister does not automatically lose office because he loses the election. The general public out there probably believe that it is the case that he would, and so there would be a tremendous fuss. I think that public education on this valuable.

Lord Turnbull: I think it is useful, for the reason Douglas Hogg mentioned, to have settled a lot of these principles in advance and mentally rehearsed a variety of different outcomes, because it may be highly desirable to produce an outcome faster rather than more slowly.

Q32 Alun Michael: Does not sod's law in politics indicate that whichever scenarios you envisage, it will be a different one that turns up?

Lord Turnbull: It may well be the case.

Q33 Alun Michael: So could not rules be a constraint as well as a help?

Lord Turnbull: No, I think it is useful for all the players to understand a common set of principles, so that they are not spending time arguing about things that ought to be part of the general consensus.

Lord Butler of Brockwell: I think that Lord Turnbull's use of the word "principles" is better than "rules".

Q34 Mr Tyrrie: I would like to ask you about caretaker arrangements, but before I do, I would like to go back to one remark just for clarification that you made a moment ago, Lord Butler. You said that the Cabinet Secretary, in the event of a hung Parliament is available to advise the leader of the opposition. Does he consider that his role as adviser on these issues is equal, or does he have a primary responsibility to advise the incumbent Prime Minister; and when was such advice last sought and taken?

Lord Butler of Brockwell: I think you are right to qualify what I said. I think his principal duty remains to the Prime Minister, but I would expect that, just as before the election, the leader of the opposition would have access to the Cabinet Secretary. I would expect that the Prime Minister would agree to that continuing after the election as well. The range of advice would be the same: it would be factual rather than policy.

Q35 Mr Tyrie: And it will be factual rather than policy with the Prime Minister as well?

Lord Butler of Brockwell: Correct.

Q36 Mr Tyrie: On the caretaker arrangements, it is now intended that we should spell out in a Cabinet manual what these arrangements are; so even to the relatively informed insider the element of ambiguity, such as it is, will certainly be removed. What sanction is available to a Cabinet Secretary if a Prime Minister decides not to take the advice of the Cabinet Secretary and demands that a decision be taken which, in the opinion of the Cabinet Secretary, is something that goes beyond the minimum required for the conduct of good government during a caretaker period?

Lord Turnbull: I think this is probably rather like an Accounting Officer's direction. It does not have a statutory backing in the way that that does. It is now the accepted practice that those directions which are regular but not frequent are reported to Parliament. It should be known that if the Cabinet Secretary believed that, for example, making a particular appointment was not strictly necessary but was being proceeded with, the minister concerned would be able to say, "I have received your advice; nevertheless, for the following reasons I think it is necessary to proceed with this and I so direct you to proceed."

Q37 Mr Tyrie: If the Cabinet Secretary strongly disagrees he has got to go public, has he not?

Lord Turnbull: I would say "yes".

Q38 Mr Tyrie: How would he go about that: issuing a press release, holding a press conference? What exactly is the mechanism now that we are formalising all of this?

Lord Turnbull: This mechanism is yet to be developed.

Q39 Mr Tyrie: What should be the mechanism, that is the question I am asking?

Lord Turnbull: I think by some means the Cabinet Secretary would say, "When you announce this, Prime Minister, it should be clear that you have proceeded on your authority, and used your judgment" if the Cabinet Secretary did not think this was essential. He is not saying it is wrong; it simply means that it is then clear whose judgment it is that is relied upon.

Q40 Mr Tyrie: You will have to provide your reasons, will you not? It is not enough to say, "I disagree" and then fall silent again.

Lord Turnbull: Possibly, yes.

Q41 Mr Tyrie: I am trying to eliminate this ambiguity with this word "possibly" creeping in. Now we have a Cabinet manual it seems to me that this level of ambiguity is going to be quite problematic.

Lord Turnbull: I think the idea that only essential business is conducted during an election is not one of the things that will be new in this manual. This exists

already. I am pretty sure it is in the existing Ministerial Code. It is a question that could have been asked at any time in the last 20 years actually.

Q42 Mr Tyrie: I am asking it now because we are publishing a Cabinet manual, and you correctly referred a moment ago to the fact that you can go to the First Parliamentary Counsel for advice. Would not a logical course be for you to obtain advice and publish it?

Lord Turnbull: I do not think I favour publishing the advice the Cabinet Secretary receives because ultimately you get advice from various points, but if it came to it he would have to say why he thought, as in a Cabinet Office issue, this was not a proper public action, and the minister concerned would have to say why he thought it was.

Lord Butler of Brockwell: I would suggest that the simplest mechanism is like the direction given to an accounting officer. The Cabinet Secretary should ask the Prime Minister to give a direction, or the Permanent Secretary should ask the Secretary of State to give a direction, and that direction should be reported to Parliament. That is what happens in the case of an accounting officer, and that is what I would expect would happen in this case.

Q43 Mr Tyrie: One last question: with all this written down in this manual, were such a decision to be taken which might have adverse effects on some party in the country or some group, which may be very upset about it, who know the decision was taken in this way against the advice of the Cabinet Secretary, are any of these issues in this Cabinet manual now going to be subject to judicial review?

Lord Turnbull: I do not know the answer to that. I would very much hope not.

Q44 Chairman: Triumph of hope over experience!

Lord Turnbull: None of this would be relevant to an election. A judicial review would be rather pointless because it would all come about afterwards.

Q45 Mr Tyrie: The decision may affect a group or an individual in a big way and he or she may be very upset about it.

Lord Butler of Brockwell: I think there are two lines of defence for an aggrieved citizen in those circumstances. The first line of defence should be Parliament; that this is reported to Parliament, and Parliament takes action on it. If that does not work, then I think it is perfectly open to a citizen to apply for judicial review on the grounds that the decision was not a decision that a reasonable person should have taken.

Q46 Mr Tyrie: The assessment of reasonableness would be based on the advice given by the Cabinet Secretary to the Prime Minister that was overridden on a direction.

Lord Butler of Brockwell: Possibly. I have used a word that you did not want used! I think this is a legal matter really and it would be for lawyers to say whether a judicial review would be likely in the circumstances.

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Q47 Mr Tyrie: There are many advantages in writing these things down, Lord Butler, but one of the disadvantages is that the lawyers tend to get more involved.

Lord Turnbull: One of the advantages is that it raises the cost to all those involved of proceeding on a disagreed basis, and therefore it is less likely that these things happen.

Mr Tyrie: I understand.

Q48 Mr Turner: I am really going back to the beginning. We are saying that on some occasion which may happen in the future we are talking about not four days but four weeks with a question mark over who is the Prime Minister, is that correct?

Lord Butler of Brockwell: Yes.

Q49 Chairman: Is that the same point?

Lord Turnbull: Subject to the caveat that circumstances may be such that the participants realise that they cannot spend four weeks on this issue.

Q50 Mr Turner: They cannot spend four weeks, so they are forced into the corner.

Lord Turnbull: They are forced to take a decision more quickly than that because they realise that damage would be done by the sight of politicians wrangling, making no attempt to reach reasonable compromises; so there are pressures on them. I know it is the case in some other countries that you can take weeks, but if you are facing the position where there are important decisions to be taken, there will be strong pressures on everyone not to take four weeks. It may take more than four days but I very much doubt it is going to take four weeks.

Chairman: I am very conscious of the time. We can pick up in the next session things we have not managed to get through in this one.

Q51 Rosie Cooper: Does the Civil Service function, indeed, is it required to function differently in a coalition government, and how would civil servants handle their obligations to ministers of different parties?

Lord Butler of Brockwell: This is of course not tested in recent times, but the Civil Service serves the Crown, which is represented by the government of the day. A permanent secretary would be responsible to his or her minister, whichever party that minister came from; and through that minister to the Cabinet; so that is the way I would expect the system to work.

Q52 Rosie Cooper: You do not see any difficulties in there?

Lord Butler of Brockwell: Of course there might be practical difficulties, but in other countries they get round them, and in Scotland they get round them.

Lord Turnbull: The Civil Service is constantly reminded by its colleagues in local government that they do this every day of the week.

Q53 Rosie Cooper: Looking at extrapolating that a bit to the difference between the Cabinet Office and Number 10, how would those respective roles be different in a coalition government, especially because Number 10 essentially serves the Prime Minister?

Lord Butler of Brockwell: Correct. Just as in a department the staff of Number 10 support the Prime Minister now, the staff of the Cabinet Office support the Cabinet as a whole, as does the Cabinet Secretary; but clearly the Cabinet Secretary has a particular relationship with the Prime Minister as the chairman of the Cabinet.

Mr Hogg: I wanted to go back to a situation which may well occur when the Prime Minister of the day, the incumbent Prime Minister, does not have the ability to form a majority government. From your description of his role the incumbent Prime Minister is the facilitator; he has got to suggest to the Monarch an arrangement that might work. That suggests an accommodating nature on the part of the Prime Minister which not all of us immediately recognise so far as the incumbent Prime Minister is concerned.

Chairman: Or some previous Prime Ministers.

Q54 Mr Hogg: No doubt some previous ones as well, but we are talking about the incumbent one. That being so, is there anybody to whom the Monarch can turn in the event that the incumbent Prime Minister proves less successful as a facilitator than we might all wish, for example the Cabinet Secretary?

Lord Butler of Brockwell: No, there is not. The Prime Minister is the Sovereign's principal adviser, and it must be through the Prime Minister that this advice comes. What we have described is what we regard as the national duty of the Prime Minister.

Q55 Mr Hogg: Who is going to remind the Prime Minister of the national duty?

Lord Butler of Brockwell: I do not think there is any reason to suppose that this Prime Minister would not fulfil his national duty.

Q56 Mr Hogg: That is your considered opinion, Lord Butler!

Lord Butler of Brockwell: That is my considered opinion.

Q57 Alun Michael: You said a few moments ago that a Prime Minister should be forced to accept that there is a heavy price to be paid for proceeding other than by agreement. This was in relation to matters of judgment. Given that weaknesses of personality apply on either side of the divide, is it not necessary for there to be an equally heavy price to be paid by a Cabinet Secretary who strays into making a political judgment in expressing that disagreement?

Lord Turnbull: It is part of the culture and ethos honed over many years that the Civil Service led by the Cabinet Secretary is impartial; and somebody who is seen not to be impartial I think would pay a price and would lose the confidence of whoever came next. Part of the Civil Service code says you are not only impartial—in other words you will serve other

people who may form a government—but in your present role you have to give assurance to whoever aspires to this, that you will serve them.

Q58 Alun Michael: The point I am making is that we all hope that the highest levels of the code will be observed by politicians and by civil servants, but it does not always happen; and therefore when you are taking the Cabinet Secretary into the area of having to exercise a judgment, which is what this amounts to, it may get close to the point, depending on the circumstances, that Lord Butler made very clear: the

expectation on the Cabinet Secretary and the Cabinet Office is the support of the exercise, and the decision-making process not entering into the political judgments themselves.

Lord Turnbull: There was a predecessor who was dubbed “The Deputy Prime Minister”, and that is a position that no Cabinet Secretary should really ever want to be in. I think that is an important sanction.

Lord Butler of Brockwell: A predecessor as head of the Civil Service, not as Cabinet Secretary.

Chairman: At that point we can thank you both very much indeed and invite our next group of witnesses.

Witnesses: **Professor Robert Hazell**, Constitution Unit, UCL, **Mr Peter Riddell**, Senior Fellow, Institute for Government, and **Professor Vernon Bogdanor**, Professor of Government, Oxford University, gave evidence.

Q59 Chairman: Professor Hazell, Mr Riddell and Professor Bogdanor, welcome. Perhaps I could start by asking you—at least two of you if not all three of you were here for all or part of the preceding session—whether you have comments or any differences of view to express from what you have heard so far, starting with the issue of whether there is clarity about what the processes are in the circumstances we have described when a general election does not produce an overall majority for any one party.

Professor Bogdanor I think there is not full clarity about the position of the Prime Minister in such circumstances. It seems to me that the Prime Minister derives his authority to advise the Queen from the fact that he has the support of Parliament, which of course he normally has. If there is a hung Parliament and the view of the new Parliament has not been tested, in my judgment the Prime Minister does not have the authority to advise the Queen on a successor. He might be asked by the Queen for a recommendation and he might give a recommendation, but that cannot be binding. Otherwise a Prime Minister, if he could advise in those circumstances, could advise something entirely mischievous. He is also not in a position to seek a second dissolution in these circumstances. There is a very fundamental principle that lies behind the whole issue namely that we have a parliamentary system of government, and it is for Parliament to decide who should be the next Prime Minister. The role of the Queen is obviously to endorse that view. I think a good slogan might be: it is Parliament which chooses, Parliament decides; and the Queen then sends for the person whom Parliament has decided should be the next Prime Minister.

Q60 Chairman: But that is not the actual order of events, is it, because Parliament does not have the opportunity to decide until a Prime Minister brings a Queen’s Speech before Parliament, and so there is a period in which what Parliament is going to do is to some degree or other speculative? You are not challenging, are you, the right of the incumbent Prime Minister, to see whether he can create circumstances in which he can win a vote of confidence at the Queen’s Speech debate, are you?

Professor Bogdanor Certainly the Prime Minister has every right to meet Parliament and to challenge Parliament to reject him. I think it was said in the previous session that this had not happened for 200 years, but in fact it did happen after the 1923 election when the Conservatives, who were the largest party but without an overall majority, decided to meet Parliament. There was a hiatus of six weeks and the Conservatives were defeated on the Queen’s Speech, and as a result there was a Labour minority government. It also happened in earlier times in 1892 and in 1886: in each case the purpose was to test whether Parliament would support the Prime Minister. In 1924, it was to show the public that the centre party—the Liberals—were putting into power a Labour government. An incumbent Prime Minister can, if he so wishes, test the water in Parliament.

Mr Riddell: Can I make a point, in relation also to the question that Mr Hogg raised at the end of the previous session with Lord Butler and Lord Turnbull, and that is the distinction between advice and information! There is plenty of information going around at the same time. Indeed, if you look back at the memorandum that Lord Armstrong of Ilminster wrote, when he was Principal Private Secretary to Ted Heath and then Harold Wilson in 1974, which I am sure you have all seen, it is a fascinating account, because he makes it quite clear over that weekend in February 1974 that he was in frequent communication with Lord Charteris at Buckingham Palace, discussing what was going on. There are plenty of sources of information. Therefore, if a Prime Minister was seen—going back to Mr Hogg’s question—as giving partisan or special advice, the Monarch would know perfectly well that there are other opinions around, and indeed the Cabinet Secretary had been quite active. I think it is fair to say that it is envisaged in the manual that the Cabinet Secretary would have a special role in providing, not advice in the technical sense of saying who should be the next person, but information on what was going on.

Q61 Mr Hogg: I will ask Professor Bogdanor, if I might: you said, and I understand entirely, that a Prime Minister who has not won the election in the

conventional sense, has lost his or her authority to advise the Prime Minister (sic). That is what you began by saying. That leaves the question open to whom should the Monarch actually turn for advice as opposed to information, which is Mr Riddell's point?

Professor Bogdanor I said that the Prime Minister has lost the authority to advise on who a successor should be until he has the endorsement of Parliament. The Queen no doubt will consult her private secretary on what the political situation is, and he may consult with political leaders or others as he chooses; but it is for the politicians to sort out the result, and the role of the Queen is to endorse the outcome decided upon by politicians.

Q62 Mr Hogg: But the Queen in this context is instigating the process, is she not? : Because she is looking to her private secretary at this point to take soundings from within the political community.

Professor Bogdanor She might do that, but of course there is no vacancy until the Prime Minister either resigns or is defeated; and when that happens, if it happens, then it is for Parliament to decide who the successor should be. It is for the politicians, crudely, to sort it out, and for the Queen to endorse that solution. That is what happened in 1974, and in 1929 and in 1923–24 when we had hung Parliaments. In no case was the Sovereign involved in an active way. The politicians made the decisions themselves. Perhaps even more pertinently, it has happened in New Zealand, which introduced proportional representation in the 1990s, with the effect that every parliament has been a hung parliament; but the Governor General has not been actively involved in the process of government function. The politicians have decided who the next Prime Minister should be, and the role of the Governor General has been to endorse the decisions made by the politicians. I think the fear that the Queen might be actively involved is misplaced.

Professor Hazell: Chairman, in answer to your first question whether there is sufficient clarity, my answer would be that there is not public clarity about the procedure. There is not very good media or wider public understanding about the processes that would be followed, which we have heard canvassed in the previous session. I strongly support the Cabinet Office initiative in producing a Cabinet manual, and I would like to pay tribute to Sir Gus O'Donnell and his Whitehall colleagues for the work that they have done on that and for the first fruits, which I think we are about to see disclosed to the Committee today in the draft chapter on elections and government formation. I think it is a very strong start; it is clearly written, it sets out broad principles, not detailed rules; and it does help to clarify some of the central conventions of our constitution. It is not at all easy to do that. So any criticisms which I or perhaps colleagues might express I hope will be subject to that very strong welcome for the new Cabinet manual. It is an excellent initiative and I think that the new draft chapter is a very strong start.

Q63 Chairman: Are we to assume that it will be in force at the time of the next General Election?

Professor Hazell: I very much hope that the draft chapter—and I think it is the reason why the Cabinet Office have brought this chapter forward early, is that it should be in place in time for the next election. Peter Riddell may want to say something about the media's understanding of the procedures. I think it is highly desirable to have this guidance in the public domain before the next election.

Peter Riddell: Can I add on that with my Institute for Government hat, where I work two days a week? I produced a report with a colleague of mine, Catherine Haddon, on transitions and one result of that is that we have been going around Whitehall and the political parties and the private sector discussing the transition process. Also, more generally, with my journalist hat and something that has come back from that is the degree of misunderstanding and confusion about what the procedures are, and therefore the vital necessity—in answer to your question—that it should be clarified before the campaign happens, so that everyone knows publicly. It is a long time since 1974; there are a few people around from that era—some people got re-elected to Parliament that weekend—but it is generally not known, and there is both ignorance and danger in the world of 24-hour news, of sovereign funds potentially dumping sterling and things like that. But the rules should be absolutely clear—and I share Professor Hazell's view that the Cabinet Office has done a very good job on this, and I think there are aspects of the document which will be released which are desirable. The mere fact of releasing that chapter actually goes a long way towards it. There are aspects of a caretaker convention which Mr Tyrie raised earlier, which we might discuss because I think there it needs to be much clearer; but in general this is a big step forward.

Q64 Mr Heath: We have heard a lot of stress on the role of Parliament, quite rightly—that Parliament actually determines who the new administration is—but it is not the case that Parliament actually does this in an extraordinarily imperfect way; that the administration has to be formed first, the Prime Minister has to go to the Palace; creates an administration and that brings forward the Queen's Speech, and it is on the programme of policies that the House determines whether it will support the administration, rather than bring forward a Prime Minister Designate, which would greatly assist the Monarch, it seems to me, in making a choice. Is there a case for an entirely different way of Parliament approaching this issue of actually getting to the nitty-gritty very early on and saying, "Who is the person that we will support, that we will put forward as Prime Minister Designate for the Palace to determine?"

Professor Hazell: There is a possible alternative procedure which Parliament could adopt and we have seen it in action in Scotland. It is called an Investiture Vote and in the Scottish Parliament after an election and after choosing the Presiding Officer

the first business of the new Parliament is to nominate a First Minister, who is then appointed by the Crown to be First Minister; but this is a matter for the House. If the House chose as its first major piece of business to have an Investiture Vote instead of a debate on the Queen's Speech then it could choose the new Prime Minister in the manner which I think you are suggesting.

Peter Riddell: I think there are a lot of attractions in that. After all, it was proposed by the current Prime Minister—although I do not think it has got anywhere—in the original Green Paper that there would be a vote on the dissolution of Parliament and we will see whether this happens in the next month or whenever. I think there is equally a symmetrical point that there would be to clear up any ambiguity—in effect, of course, the vote and the Queen's Speech Vote does it; but to deal with concerns over a delay it might well be to have a vote, effective confidence in the new government, which you would have earlier to shorten any delay; but in effect the no confidence and the Queen's Speech Vote. But of course that, even on the current timetable, is three weeks after an election.

Professor Bogdanor: There is a case for change but it would alter the political dynamics. Our current system makes it much easier to sustain a minority government. I suspect that the Scottish system makes it more difficult, although of course we do now have a minority government in Scotland. Nevertheless, it is easier to sustain a minority government in Westminster because to get a government out you need, as it were, a positive majority against it, which is sometimes difficult to achieve when you have a number of minority parties. There was general agreement in Scotland after the last election to sustain a minority government because of special circumstances. But I think the proposed change would alter the political dynamics very significantly.

Peter Riddell: Could I disagree with Professor Bogdanor on one point? I think that is true once the government is in place; but it is to start off with that everyone knows that this is a government which commands the confidence of the Commons is different to what may happen later on as, for example, happened in the minority administration in the late 1970s and of course in the last two years of the Major Government when it was very difficult, even though it was technically a minority. I think it is very different to start with.

Q65 Mr Tyrie: You have given some nice words to us about the draft chapter and I agree, I think it is a step forward to have something that is written down. If one reads it carefully one can see that it is quite vague actually, in places itself—the language is pretty vague. In particular it is vague about whether the caretaker period should continue after an election until it is clear that a Prime Minister can command a majority in the House, in the same form as it is now established, as it already is currently established, that the caretaker arrangement should continue beforehand. Would anybody like to comment on that?

Peter Riddell: Can I just say on that, I think this is a very urgent issue. In the presentations I have been doing on the Transitions Report around Whitehall with the senior management of various departments I have had several questions asked, “What happens if there is a hung Parliament? The Secretary of State comes back; what can he do?” There are ambiguities there and serious ambiguities that the election purdah guidelines which the Cabinet Office puts out which cover exactly the issues raised, appointments and so on, the very interesting answer that Lord Turnbull gave on an Accounting Officer, I think that the proposals in the draft manual do not go far enough. They still leave too much discretion. I think that if we got into that awkward situation we should have very clear-cut rules. Whilst I welcome most of what is in that chapter basically the election purdah rules should be extended to cover until we have a new government formally inaugurated, which is exactly what happens in Australia, Canada and New Zealand and with them the emphasis is post-election rather than pre-election and they have—it is in the appendix to our Transitions Report—their purdah rules applying from the dissolution of Parliament—in some cases the announcement of dissolution—until a new government is inaugurated, which is usually up to a week after the election, even when it is a certainty.

Q66 Mr Tyrie: For the sake of clarity, can I read out the key sentence in paragraph 20: “As long as there is significant doubt whether the government has the confidence of the House of Commons, it would be prudent for it to observe discretion about taking decisions, as per the pre-election period.” The set of questions I was asking the former Cabinet Secretaries was what happens when the Cabinet Secretary concludes that an appointment here or an appointment there might be imprudent?

Peter Riddell: I think the wording needs to be stronger, Mr Tyrie. It should become exactly the same practice as happens during an election period, which is to say anything unnecessary, or consultation with the opposition parties.

Q67 Mr Tyrie: Do you think we also need to set down what the sanction is: that is, that the Cabinet Secretary should be required to make public his dissent and give his reasons, should a decision be taken which he thinks is imprudent or not essential to the good conduct of government business? Was that a “yes” to that?

Peter Riddell: Yes, it was a yes to that. It was not an issue I confess I had thought about until Lord Turnbull made his comments, but of course that is implicit in any disagreement on something as fundamental as that. I am not sure that you need to set it down but I certainly accept what Lord Turnbull said, that that would be the response.

Professor Hazell: I strongly agree with what Peter Riddell has said and I would like, if I may, to offer some suggestions as to how the caretaker convention could be made stronger. First, I think we should call it that and the government should announce that it is operating as a caretaker government if it is an

24 February 2010 Professor Robert Hazell, Mr Peter Riddell and Professor Vernon Bogdanor

incumbent government which is staying in office in a new Parliament, where it is not yet clear who can command the confidence of Parliament. I think it should be made clear in the guidance about the caretaker convention and not simply a vague phrase like “it is prudent to observe discretion”; but clear that this covers any major policy, it covers any major public appointments and it covers any major government contracts. There also needs to be guidance on how to consult the opposition parties if that is deemed desirable. Such requests I think should be routed through the Cabinet Office and the Cabinet manual should state that. If the Cabinet Office here want to look for models of more clear-cut guidance there are very strong models in Australia and in New Zealand. In closing I would simply like to say Chairman I hope that this Committee might give its cross-party support to a stronger caretaker convention being in the manual because I think the Cabinet Office might be receptive to that.

Q68 Dr Palmer: I have an unease about what you have just said. Are you not in danger of enshrining paralysis in the constitution? We have all said that there may be several weeks during which it is not entirely clear who is going to form the government. During those weeks there may be quite urgent decisions to be made, either financial or something else, on which there may be a degree of consensus between the major parties, which is not present on who should be the Prime Minister. In other words, even if you are not sure whether the Opposition can form a new government they might accept that in order to satisfy the markets or whatever certain policy steps had to be taken, that if we actually had guidance that said you cannot take major policy decisions that would be bad.

Peter Riddell: No, because it is covered. All this is talking about is non-essential. There is no dispute that if there are problems with financial markets or indeed a terrorist attack or foreign policy then that would go ahead, but with a degree of consultation. There is no suggestion that exactly what you have described, Dr Palmer, would not be covered. Indeed, if you look at the overseas examples, there is a classic example in New Zealand with Prime Minister Mr Muldoon, who refused to devalue and then he was forced to after two days; and now there is a full acceptance and practice to cover exactly what you are describing.

Q69 Mr Hogg: With consultation between the major parties?

Peter Riddell: Yes.

Q70 Alun Michael: Do I understand correctly that you are not talking, as I thought Professor Hazell was saying, about no decisions being taken but about explicit processes of consultation to allow decisions to be taken?

Professor Hazell: Absolutely. I am sorry if I was unclear about this. The incumbent government remains the lawful government; the essential business of government must be carried on and it is only non-urgent decisions which, wherever possible,

should be put on hold. If decisions have to be made then if time permits—if they are important decisions which might tie the hands of a future government—the other parties should be consulted. But there may be a terrorist incident which may require Cobra immediately to be set up, immediate decisions have to be made, and I think that one would understand in that kind of emergency—

Q71 Alun Michael: So it is a graduation from immediate decisions to ones where if there is perhaps a lack of decision it might not be absolutely essential it should be taken but, for instance, the work of a government agency would be frozen for a period of weeks if decisions are not taken. You are saying that in that case it is appropriate consultation that needs to be in place so that the business of government does not freeze entirely.

Professor Hazell: Indeed. Forgive me; this is very well written up in Australia and New Zealand where they have had a caretaker convention in place for at least 15 years or so, and there are very good examples given in the documentation about how it works, showing the kinds of decisions that have to be made, that are made; the kinds of decisions that can be put on hold, the kinds of decisions on which they consult the opposition parties. It is perfectly workable.

Q72 Alun Michael: Going back to an issue that you talked about a few minutes ago, about the question of an inaugural vote: is there not a danger in that, that you end up with effectively a confidence vote being taken on a name, an individual, a personality, rather than at the moment the confidence vote is on the programme—because that is the situation with the Queen’s Speech, you either agree or do not agree the programme. Is not what you are saying there rather a move to a more presidential style rather than decision-making which is formally at least focused very much on the programme of government?

Professor Hazell: The underlying principle throughout has to be who can command the confidence of Parliament.

Alun Michael: Yes, but is it not a question of the confidence of Parliament on a programme that is going to be taken forward, which is the situation at the moment, rather than a vote. I say this having experienced the fragility of minority governments and the importance therefore of being clear that what Parliament and government exist for is for the taking of decisions, rather than on a popularity contest, as it were.

Q73 Chairman: If I could add to Mr Michael’s question, there could be a situation in which some members of a party were prepared to consider the possibility of someone being Prime Minister but only if certain items were not included in his programme.

Professor Bogdanor: In this sort of situation presumably a coalition agreement would be drawn up, and made public and it would have to be endorsed by the parliamentary parties concerned.

Chairman: In effect you are saying that they would withhold their vote from him in this personal, this inauguration vote unless they had previously agreed what the principal content of the Queen's Speech was going to be.

Q74 Alun Michael: If I may, that is the danger I was trying to point to of muddling whether we are voting on programme or on personalities. It seems to me that it is quite a fragile suggestion.

Professor Hazell: In terms of who can command the confidence of Parliament I would suggest that it is always going to be a blend of the two, and the only reason for stressing that that is always the underlying principle is the difficulty sometimes placed upon the Crown is that the Crown is being asked to divine who can command the confidence of Parliament after taking certain soundings. If Parliament were able clearly to declare, "This person commands our confidence; we have had an Investiture Vote and please, Ma'am, this is the person we nominate"—

Q75 Alun Michael: With respect, I understand that side of the argument but I am trying to test out the other side of the argument. The other side of the argument is that at the moment whereas the fate of an individual may stand or fall by the confidence vote in the programme, the Queen's Speech Vote, that at least makes it clear that we are voting on the purpose of Parliament, which is to decide on the future programme, the legislative programme which will be considered by Parliament, and the government is to take forward a programme of action. Is it not dangerous to do what I think you are suggesting, which is to separate merely the choice of an individual from the programme that is meant to be delivered? The Chairman asked the question there, the formation of a coalition may depend very much on agreement on the programme to be pursued.

Peter Riddell: Mr Michael, after all it is the Prime Minister who forms the government.

Q76 Alun Michael: For a purpose.

Peter Riddell: For a purpose, absolutely, but it is the Prime Minister who is invited to form a government—that is how the system works—and who appoints the members of the Cabinet and so on and so forth; so it is bound to be through an individual. But in a sense, as Professor Bogdanor was saying, you would have prior negotiations between the parties who would say either not that individual or not that bit of programme, or whatever in order to get the majority.

Q77 Alun Michael: But then is it not healthy that as at the moment we have a vote on which the fate of the individual hangs, understood; but it is basically clarity about a programme to be pursued by the government—

Peter Riddell: I think you perceive a distinction without a difference. If at the end of the Queen's Speech debate an amendment is passed and the Prime Minister resigns, in practical terms the distinction does not apply.

Professor Bogdanor: There might or might not be a case for changing current arrangements but I do not think the argument that Professor Hazell used a moment or two ago, the question of doubt, is likely to be one of them. In no previous hung Parliament has there been any doubt, and were there ever to be doubt the Queen could give a particular person an exploratory commission as she did in different circumstances with Lord Home in 1963; Lord Home did not kiss hands but was asked to consider whether he could form a government. This was not a question of whether he had parliamentary support but whether he could form a Cabinet. If he had gone back and said, "I am afraid I cannot" I do not think that would have been regarded as a humiliation for the Queen. I think in normal circumstances with a hung Parliament it would be perfectly clear who is likely to have the support of Parliament if an incumbent Prime Minister is defeated; the natural course would be to send for the Leader of the Opposition and to ask him to try and see if he had the support of Parliament. Then it would be up to him either to negotiate an arrangement with other parties or to test the water in Parliament. And for the reasons given by Lord Butler in the previous session, people would not welcome a rapid second election; I think many of the smaller parties who hold the balance would not welcome it either because they tend to be weaker financially than the larger parties. So I suspect that the extent to which there is likely to be doubt is vastly exaggerated.

Chairman: I am rather anxious, particularly because one of the purposes of this session is to increase clarity, that we do not spend too long on something that quite clearly is not going to happen in this timescale: namely, that Parliament changes its procedures in the manner that some have suggested, but to get back to what we do know is going to be in place and indeed what preparations might be made for this circumstance possibly arising, because those things are happening, and we know from the Cabinet Office draft chapter that that is so. With that warning, can I turn first to Dr Alan Whitehead?

Q78 Dr Whitehead: I wonder to some extent whether there really is the clarity that Professor Bogdanor has suggested normally applies, even in the case of a hung Parliament. For example, in the February 1974 election there appeared to be early clarity about a Labour majority; overnight results and further developments suggested that that was not the case. The incumbent Prime Minister was holding fast in office at that time. Subsequently, a number of Ulster Unionists declared that they should have been counted in the Conservative camp, therefore giving the Conservatives the position of the larger party than Labour. Matters changed on a day by day basis. Under those circumstances at what point

would the Sovereign be advised to say, “Actually, the Leader of the Opposition ought to be called in to form a government”? And bearing in mind what we have said about the position of the caretaker government and the role of the incumbent Prime Minister, at what point does the Sovereign effectively say, “The game is up; I am going to call on the Leader of the Opposition to come along and try and form a government”?

Professor Bogdanor: That is a very fundamental point, if I may say so. I think there is a great gap between public perceptions and the constitutional rules. I can cite the example that you gave of 1974. I believe the public took the fairly straightforward view that Edward Heath had lost the election. He had enjoyed a majority, he called an election and he had lost that majority; but the constitutional position, as we have seen, is that he was entitled to meet Parliament either as a minority party or with arrangements with other parties. There was certainly some feeling—perhaps not very strong—that the Queen ought to intervene, that the Queen ought to do something, but it was not the Queen’s role to intervene; it is for Parliament to decide and the Queen then to endorse. I think that this difference in public perception is one important reason to publish the Cabinet Manual. I think that the public do have a right to know what the position is. Someone once defined democracy as “government by explanation” and I believe there has been insufficient explanation. I believe there is a further area where there is a difference between public perception and the constitutional position, because if a coalition were agreed in a hung Parliament situation—suppose in 1974 there had in fact been a coalition between the Conservatives and the Liberals—one could imagine many voters, perhaps some who had voted Liberal saying, “I was not myself in favour of such a coalition and had I known that the Liberals would form a coalition with the Conservatives I might have voted rather differently.” If there is to be a coalition, this should be signalled clearly before the election and not after the votes have been counted to keep an incumbent government in power. So I think that there is a great divergence. The public believe that it is they the public who choose the government. That of course is normally the case. In a hung Parliament situation the public do not unequivocally choose the government, it is Parliament that chooses the government and I think that this can raise considerable tensions, which needs to be resolved.

Peter Riddell: In that case of course the Liberal Party did not do a deal, and with my journalist hat I was actually covering Jeremy Thorpe, the Leader at the time, and I remember exactly that weekend very clearly. So the political realities intervened. The key distinction is between clarity about the constitutional process, that people do not think it is unfair, and the political realities, which in most cases, as Lord Turnbull said earlier, are going to mean that the process will be completed quite quickly. They only took a weekend. I think if they had had mobile phones then they would probably have had it a day earlier. The difficulty was that they could not get in touch with people a lot of the time

in 1974. In most cases it will happen quite quickly because the political dynamics will come in. But the need is for people to understand what the process is behind that. That is why I think that all three of us are totally agreed on the need for public clarity before the campaign starts.

Q79 Dr Whitehead: The draft Cabinet document that we have mentioned states that if the Prime Minister and government resign at any stage, in particular the person who appears to be most likely to command the confidence of the House—most likely to command the confidence of the House, and not tested at that stage—will be asked by the Monarch to form a government. Jeremy Thorpe, as it happens in 1974, I think tramped over three fields in order to secretly get to Westminster to discuss a deal.

Peter Riddell: He was being chased by people like me at the time!

Q80 Dr Whitehead: Indeed, yes. But the suggestion in the Cabinet paper is indeed, as it were, the Monarch, upon the resignation of the government, assuming the incumbent Prime Minister then resigns, has to divine to some extent which way the wind is blowing and what the various forces are, prior to Parliament having assembled to make its own decision.

Professor Bogdanor: That is a misleading suggestion, if I may say so. I take your argument, Dr Whitehead, and I think the Cabinet paper is unclear on this point is unclear. In those circumstances that you have defined the Queen would naturally call for the Leader of the Opposition. I think the only circumstances in which she would not is if two or perhaps more parties had signed a coalition agreement which had been endorsed by their parliamentary parties and which showed that they could command a majority in Parliament under some alternative leader—it is highly unlikely but it could happen—and if there was absolutely cast-iron evidence that such a government could survive not just a vote on the Queen’s Speech but for a longer period. Then the Queen might be justified in not calling for the Leader of the Opposition. But it would need to be not the Queen divining but absolutely solid evidence—not just a hope. One saw that in Canada in 1926, a famous precedent where it seemed that there was an agreement but it collapsed within four days. In normal circumstances the Queen would call the Leader of the Opposition and the Leader of the Opposition would then test his strength in Parliament.

Q81 Dr Whitehead: I think you would agree that solid evidence could, for example, be that actually the opposition parties would probably support the formation of a government but not with the present, shall we say, cast or the head of that particular party continuing to be the Prime Minister or leading Cabinet members. That is a process of saying, “We will put you in power if we can have some role in the selection of who it is actually heading up that

Government.” There could be quite firm evidence that that was the case. Would that come within the guideline?

Professor Bogdanor: That would be for the politicians to sort out. This was suggested in 1974. It was said by some that possibly the Liberals might support a Conservative Government led not by Edward Heath but by, shall we say, William Whitelaw. That is then for the politicians to sort out. Presumably under current circumstances where there is a long procedure for leadership elections, which include the parties outside Parliament, the current Prime Minister would meet Parliament and seek a vote of confidence but give a promise that he would resign as Party Leader; he would institute the procedure for electing a new Leader, which could take three or four weeks, and after that, he would resign as Prime Minister. Then it would be for the other parties to consider whether to support the incumbent on that basis. The Queen would not be involved; it would be Parliament that decides.

Q82 Chairman: There are one or two things I want to make sure we cover. I want to test another aspect of the 1974 scenario, which is of course that between February and October 1974 it was possible for a government to take over and so to organise national affairs that it gave itself the best chance of acquiring a majority at an election in a matter of only six months’ time. Is it incumbent on the Sovereign to grant a dissolution in circumstances like that, or is it politically more difficult—or perhaps economically more difficult, given our present economic situation—for such a thing to happen now?

Professor Bogdanor: There has been no refusal of a dissolution by the Queen in the 19th or 20th centuries and in the Parliament of 1974 it was already clear because of the rejection of the arrangement between the Conservatives and the Liberals that an alternative government was almost certainly not viable in that particular Parliament. There have been one or two occasions in Commonwealth countries where dissolutions have been refused and they were in two circumstances. Firstly, where a Prime Minister had lost the authority to seek a dissolution—that happened in South Africa in 1939 when a Prime Minister who had lost the support of his Cabinet and of Parliament sought a dissolution. The second situation would be the one I outlined earlier, where there was absolutely cast-iron evidence that an alternative government could survive in the House of Commons for some period of time, and that today would have to be in the form of a written coalition agreement endorsed by the parliamentary parties concerned.

Q83 Chairman: So are you saying that the only restraint on that course of action being followed, that is to say a government taking power with a minority, in circumstances where the other parties did not want another election, cutting taxes, spending money in order to try and create a favourable atmosphere and then having an election

in a few months’ time, in those circumstances they are only restrained by how the public would perceive such actions they were in now.

Professor Hazell: Chairman, I think that that political self-correcting mechanism is hugely important. As Professor Bogdanor has already said, most of the political parties cannot readily afford a second election—possibly all of them—and if a minority government were to call a second election hard on the heels of an earlier General Election, for which the electorate did not wholly see the point, then they would be likely to be punished at the polls. So I think that those political correcting mechanisms are as important a safeguard as the constitutional rules.

Peter Riddell: Could I add one point? The suggestion which the Prime Minister made for a formal vote on dissolution would cover a lot of those issues in a sort of minority administration, say, as there was between February and October 1974. If all the other parties are combined and if you had had a dissolution vote to vote against a dissolution, even if the Prime Minister had sought one, that would have been a discipline in those circumstances. I mean, there is merit in that suggestion, even though it has not been pursued, which would act as a discipline against that happening. But I think in practice the conventional dissolution, as Professor Bogdanor has rightly said, has never been refused. There is a clear understanding that a Prime Minister, a party that has lost the majority cannot ask for a second election, and that is quite explicit in the manual, and I think that is right. Beyond that I think that it is very difficult to write anything down. However, having a formal dissolution vote in the Commons might well be a safeguard.

Professor Bogdanor: Chairman, in the circumstance you outlined, if the other parties do not want a dissolution it is for them to make public through an agreement, endorsed by their parliamentary parties, that they are prepared to act together to allow the current Parliament to be viable for a period of time. That would be the clear public test; the Queen ought not to be asked to make a decision to refuse a dissolution on anything less than that.

Chairman: We have just a few minutes before we have an interesting session to find out what preparations are actually being made. Could I ask Rosie Cooper to cover some points that she covered in the earlier session about the role of the Civil Service if you do have a coalition government.

Q84 Rosie Cooper: Essentially I am sure you remember the question, which was how the obligations and how the Civil Service function in a coalition government and how they serve ministers of different parties.

Professor Hazell: Perhaps I could answer as a former civil servant. The Civil Service will continue loyally to serve the government of the day, whether it is a majority government, minority government, coalition government or any variation on those. There are again encouraging models of good practice, particularly from New Zealand, about how the Civil Service can respond to minority

governments, minority governments that include ministers who are outside Cabinet, and who were not in their case even bound by collective responsibility, and the Civil Service is able to adapt and serve their ministers and the government as a whole very effectively. I do not think that we should get unduly alarmed about the different demands place on the Civil Service, as long, again, as the rules are clear—and this is a chapter of the Cabinet manual perhaps yet to be drafted—I am sure that the Civil Service will be able to serve the government very effectively.

Peter Riddell: And look at Scotland. Even within the UK Scotland moved from the Scottish Office being part of the UK administration—it was still a unified Civil Service in theory probably more than practice—and the culture of the new Scottish Executive has adapted precisely that. We now have a minority administration of course rather than a coalition, but for eight years of the coalition they adapted. It does involve differences of behaviour, differences in behaviour, differences in culture but it can happen. In many respects it is very interesting—and when I was doing my transition project, talking to people in the Scottish Executive—how actually quite straightforward it was to adapt.

Q85 Rosie Cooper: Just a quick one, talking about the Cabinet Office and Number 10. I asked the question before and there is a textbook answer to it, but do you see any tensions there in how a civil servant will handle Number 10 and the Cabinet?

Professor Hazell: There are always tensions at the centre of government because the centre of government is always a very busy place and sometimes a frenzied place. Again, I think that we wait to see the draft chapter of the Cabinet manual, which will set out very clearly the rules; the rules are already clear in the Civil Service Code and the Ministerial Code, and at most times they are followed. Going back to an earlier question about whether any of this is justiciable I beg to disagree slightly. I do not think that the Codes or, in particular, the new Cabinet manual will be or should be justiciable. We have not seen the introduction to the Cabinet manual but I expect it to contain a clear statement that this is guidance and if these issues ever came before the courts I would be very surprised if the courts were willing to rule on them.

Professor Bogdanor: I hope these matters would not be not justiciable. With a coalition, there would be a need for some machinery to resolve disputes, disagreements or conflicts between the parties involved. That would be a matter for the Party Leaders to work out with the Civil Service. There was, I think, such machinery in the case, not of a coalition, but the Lib-Lab pact in 1977 to 1978 because if one has such an arrangement, then in addition to the normal conflicts in Cabinet government between one minister and another there may be inter-party conflicts between the parties forming the coalition.

Q86 Chairman: You could say that that machinery existed to resolve conflict because it was not a coalition and therefore matters did not go to the Cabinet in which both of the parties were represented. But it does lead into a point on which Professor Hazell has done quite a lot of work, which is the issue of whether when you have discussions about a potential coalition; or, if you have an agreement between parties, there is a role for the Civil Service in supporting the other parties which are partners in that process. If you go back to the Lib-Lab pact that was in the form of one Civil Service, but whether there is actually a greater role that needs to be played in the interest of good government in helping to manage, not politically but in terms of carrying out government, these sorts of negotiations or relationships.

Professor Hazell: Very briefly, if I may, I think it is helpful to break that down into two stages. First, immediately after an election if the outcome is not clear and there are then negotiations between the political parties as to who can command confidence in the new Parliament, and the parties want advice from the Civil Service about aspects of their policy programmes in terms of their feasibility or their costing, or whatever, then I think they should be entitled to approach the Cabinet Secretary and seek that advice and, as the draft chapter indicates, he would then seek the consent of the Prime Minister to supply civil servants to offer that advice, and I hope that the Prime Minister in those circumstances would generally agree. Coming to a situation where perhaps a minority government is in office and it is supported by one or more minor parties, those minor parties might be small—they might be very small indeed—and they might therefore have very little policy capacity to advise them on what could be crucial issues leading to crucial votes, and in those circumstances I think it is highly desirable for them to be given more policy capacity than is available currently through the Rules in this house known as Short Money, and to cut through any difficulties in this House about giving disproportionate support to a small party I would like to see the Civil Service loaning people on secondment to that minor party or parties who are supporting the government.

Peter Riddell: Also if you look at the Scottish experience, in 2007 Sir John Elvidge, the Permanent Secretary there, made preparations for after the election—crucially *after* the election—to second civil servants originally with the idea of potential coalition partners and that they would be involved in advising purely to get the processes working, and indeed temporarily I think somewhere involved were the Greens because there was a suggestion of the Greens being involved with the SNP, but that process had been considered and looked at in Scotland where they would be in the coalition forming process actually temporarily seconded to work with the Opposition parties.

Chairman: Thank you very much indeed.

Witnesses: **Sir Gus O'Donnell KCB**, Cabinet Secretary and Head of the Civil Service, and **Stephen Laws**, Cabinet Office, gave evidence.

Q87 Chairman: Sir Gus, Mr Laws welcome; we are very glad to have you with us this morning. The purpose of this session is primarily to try to bring some clarity to the processes which follow a General Election, particularly in circumstances where no party has an overall majority. You have sent to us just last night the draft of the chapter which deals particularly with some of those circumstances for a Cabinet manual and we are grateful for that. That is due to be published shortly, although there are still some discussions going on. It actually does raise the issue to what extent a rather well praised document, which is still in process of preparation, can be effectively in force at the time of the election. But perhaps I could start by just asking you whether you think there is sufficient clarity either amongst those most closely involved or more widely in the media and public about what the processes are in certain circumstances.

Sir Gus O'Donnell: Yes. Could I just say a few brief opening remarks as well, Chairman? Thank you. First of all, I would like to thank the Committee for this opportunity—I think this is a very significant event—and this session I think is very well timed in the sense of I have always been someone who has argued that we need more clarity in these things. I think that establishing the clarity early will be very useful and hence the draft chapter that you have before you will, I hope, go a long way towards that. I am grateful to the Committee for agreeing that we can publish this; but it is, I stress, a draft, and we are very keen to get views on this. It is a draft of a chapter that the Prime Minister asked me to prepare as part of the Cabinet manual—this is the New Zealand version, which is rather elegant, and I will be going over to New Zealand to talk to them about their version as well. We have worked on this with the Queen's Private Secretary to produce this draft chapter. I would just like to say that it is work in progress but it has benefited from excellent comments from a number of professors—some are here: Bogdanor, Brazier, Hazell and Hennessy—and comments from Peter Riddell and my former Cabinet Secretaries have all given me very useful comments. I think that that note by your own Lucinda Maer is a very good background note. I am keen to get your comments and I also will be passing the note to the Public Administration Select Committee and the Leaders of the main parties who are represented in Parliament. The purpose of the chapter was to bring together existing conventions and legislation but there are two parts to which I would like to bring the Committee's attention. First of all, paragraph 19 explains that the Prime Minister can ask the Cabinet Office—and I stress, I think in the draft it says Cabinet Secretary but I think in this sense it will be Cabinet Office in general—to support both the Government and Opposition parties in their discussions about forming a stable government. Just to say that I have discussed this with the Prime Minister and he has indicated to me that he would support that use of civil servants; so that means we would be ready to do this in the event of a hung Parliament. Secondly, I know you had some discussions about what you call the caretaker

principle and at paragraph 20 the draft proposes—and again this is new—that the rules covering the election period would be extended beyond the election, to the post-election period when we do not have a stable government. So we would extend it beyond that period. I know that there may be other issues you want to raise about that and I am very happy to come back to that. In terms of your question, Chairman, about do we have the capacity to handle these sorts of issues and is there enough media understanding, I would say it is worth remembering that these things are quite rare. I joined the Civil Service in 1979, over 30 years ago, and I have had the experience of one change of administration, the 1997 one—that is it. In terms of the Civil Service, people who have been there quite a few decades have not seen many changes of administration and they certainly have not seen a hung Parliament situation. So can we assume that the Civil Service is up and ready for this? No. That is why I am doing a lot of work on preparing for all possible outcomes, so I think that is important. We have looked back to history and that is why I have been consulting with my illustrious predecessors who have been very helpful on all of this—and I know you spoke to Robin Butler and Andrew earlier. So in terms of media perceptions and are they there, again I think that it is important for us to provide as much clarity as we can and I think the purpose of this draft chapter is to get it out there and to explain some of these issues where there has in the past been some confusion and to try, as far as we can, on the basis just of what is existing conventions, to explain what we think would happen in the event of a hung Parliament.

Q88 Alun Michael: I am very interested in what you say in paragraphs 19 and 20 and it brings us to a point that came out in earlier discussion. *Yes, Minister!* and *Yes, Prime Minister!* are fictional but they do highlight the challenge of drawing the line between the political exercise of judgment and the exercise of judgment by permanent officials, particularly the Cabinet Secretary. That is not covered here, and perhaps it cannot be in the sense that judgment is judgment, by definition, but how would you see these arrangements described in paragraphs 19 and 20 to be clear in terms of where the line is drawn between what is appropriate and what is not?

Sir Gus O'Donnell: You are now getting directly into what people call the caretaker convention. This is very interesting, and I have looked very closely at what is in the New Zealand manual and what Professor Hazell has said. I think the existing election guidance has worked quite well through the period and we have had good experiences of there being an understanding on all sides that no important decisions should be made during that period. When you think about firming it up, if you look at what the New Zealand manual says, it says—and I quote—“No hard and fast rules are possible”. That is what they have in their manual, and they say: “Final decisions rest with the Prime Minister.” That is two parts of their convention and I think they are

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right in that. There is an interesting question about can we explain it in more detail but I think it will be hard to come up with hard and fast rules. New Zealand has not and I do not know of any other administration that has. So we will be looking to be as specific as we can but within this area where we recognise that there is some judgment; but at the moment we are exercising that judgment and have done so during every previous election campaign period, so we are quite used to doing that.

Q89 Alun Michael: Can I put the point that came up earlier as well, the point where it was suggested that there needs to be, in effect, danger in a Prime Minister taking decisions on which there is disagreement with the advice to the Cabinet Secretary. Is there not a need also for there to be an equal and equivalent constraint on the Cabinet Secretary in not gratuitously withholding agreement to a particular decision? It is a judgment in both cases.

Sir Gus O'Donnell: That is absolutely right and there have been various people who suggested the Muldoon precedent where there is the whole question about devaluation and the like. I discussed this with Robin Butler, it is worth noting that if we had had the New Zealand caretaker convention it would not have made any difference to that case, and that is what I think the New Zealanders have told me. It does not answer that problem; you are still faced with this judgmental issue. If we get to a situation where a Prime Minister wanted to do something during that period where there was not all-party agreement then where we would have to go is in the area of a direction; we would have to say, "That can only be done, Prime Minister, if you direct me to do it," and we would make that direction available in the normal way to Parliament.

Q90 Mr Tyrrie: Just to clarify that point, after that direction has been issued, elicited, Lord Butler was suggesting that this should follow the procedure that is used by Accounting Officers. That would be for the Accounting Officer to ensure that the NAO are informed and of his reasons, which would enable the Comptroller and Auditor General or the Chairman of the PAC or both to make that public.

Sir Gus O'Donnell: Yes.

Q91 Mr Tyrrie: What arrangement for publishing the reasons for the disagreement with the decision do you envisage?

Sir Gus O'Donnell: As you know, currently what often happens in these cases is that there is a letter from the Permanent Secretary to the minister making the decision and a letter from the minister. So the letter from the Permanent Secretary will say, "For the following reasons, Minister, I would require a direction to do what you are asking me to do," and laying out the pros and cons; then the minister would say, "Thank you for your advice but I have decided, boom, boom, for the following

reasons." We would normally put those two letters, as you rightly say, to the NAO. In a period where we do not have a Parliament—it is an interesting one—again we are in the stages where it is for us to think about what are the right principles that should govern this. Personally, I would like the principle that we should publish those letters immediately and if we cannot publish them to Parliament because we do not have a Parliament to publish them to, we would just publish them on a government website or make them publicly available.

Q92 Mr Tyrrie: That sounds a sensible approach, if I may offer a view. One other question, very quickly. Your paragraph 20 refers to the caretaker arrangements after the election continuing—it was a point to which you referred in your initial remarks. Could you clarify that those caretaker arrangements will be in the same form as ones before the election?

Sir Gus O'Donnell: Yes, that will be our presumption—simply to take what you have in the pre-election guidance and roll it forward. I would certainly be saying to civil servants to carry on in that mindset post-election but pre-stability.

Q93 Mr Tyrrie: One last procedural point, given that this is the first time we will ever have had an election where we have before us a manual, and given that the election is likely to be May 6—but I of course accept in your covering letter that you cannot know that and you say that it depends on when the election takes place—when do you think you can get the manual in full published?

Sir Gus O'Donnell: The manual in full published? The idea is to publish this draft straightaway if the Committee accepts that. We are working on the draft. I have given the Chairman a list of the chapter headings. I would hope to have this ready for just after an election to put to the incoming administration, whoever it is—

Q94 Mr Tyrrie: So this is not going to be ready for an election?

Sir Gus O'Donnell: No.

Q95 Chairman: Does that mean that some of the principles that it enunciates and upon which you have enlarged already will or will not be what you follow at that time?

Sir Gus O'Donnell: The ones in this draft, the reason for publishing it now, is because I think that these are hugely important and that we get them established now; and in the absence of commands otherwise I will certainly be following this one.

Q96 Mr Tyrrie: So it will be fully operational even though not fully published?

Sir Gus O'Donnell: This one will be published—this chapter will be published, which gives us the bit about a hung Parliament; but the other chapters which relate to things like devolution arrangements and all those other things will be available post-election.

Q97 Mr Tyrrie: So on what date will this chapter be finalised and made fully operational?

Sir Gus O'Donnell: In a sense it is partly down to how many comments we get and the Committee's own views on it. So I have deliberately said that I want this to come to you as the Justice Committee and I accelerated the work on this chapter so that we could have this conversation now because I think it is hugely important that we get clarity ahead of an election. We will get those comments together and I would want to try and get this finalised before the start of an election campaign, but of course as Mr Tyrrie has said I do not know when that is, so I will work diligently as rapidly as possible.

Chairman: Do you not? Are you sure you do not know?

Q98 Mr Heath: So when we read in paragraph 20: "... it would be prudent for it to observe discretion about taking significant decisions", we can interpret that as being Civil Service speak for a rather sterner injunction than it would appear to be?

Sir Gus O'Donnell: Yes, I think that is right.

Mr Hogg: Will it be re-drafted?

Mr Heath: Yes, why do you now actually say it?

Q99 Chairman: I think you could take an instant comment from the Committee that it might be helpful if that paragraph made clearer that what you are really talking about are the caretaker arrangements which existed prior to the election, or something at least as firm as that.

Sir Gus O'Donnell: At least as firm as that; absolutely. Personally, the stronger this is the better from my point of view to have clarity on that.

Q100 Mr Heath: It is not clear at the moment that the same arrangements apply as would apply during the election period.

Sir Gus O'Donnell: Exactly, and that is why I wanted to bring it to the Committee's attention because this is new. The point of the manual really is to codify existing practice but I want to say that here is something where we are suggesting something new, so I think it is legitimate for people to give us their views. If we get a strong view that we should firm this up and it is a cross-party consensus on that then I would be very happy to move to that.

Q101 Mr Heath: Can I ask one specific example of the sort of decision that I would anticipate not being taken in a period of uncertainty, and that is changes to machinery of government. Would it be your view that it would be wrong for a Prime Minister not yet confirmed by the Parliament's agreement at the Queen's Speech to make significant changes to the machinery of government in that period?

Sir Gus O'Donnell: You raise a really interesting question there. I think the principle behind what you are saying has to be right, that you want there to have been an organisation for a stable government that can command the confidence of the House before you move to machinery of government

changes. The question is at what point do you know you have a stable government that commands the confidence of the House?

Q102 Mr Heath: When Parliament says so.

Sir Gus O'Donnell: In that case then it would be presumably post the Queen's Speech Vote; is that what you mean?

Q103 Mr Heath: That is what I am putting to you as a suggestion and because this is the first thing that Prime Ministers like to tinkle with—in my view in a completely inappropriate way but that is beside the point. What I am asking is, is this something which this convention could actually avoid happening because of the disruption to the Civil Service and the costs involved?

Sir Gus O'Donnell: The only reason I am being slightly hesitant here is because at the moment the rule on the machinery of government, as you know, is that the Prime Minister determines machinery of government changes. If the Prime Minister were to decide that he wanted to make machinery of government changes straightaway because it would then be clear who the Secretaries of State were for the various departments—so your first reshuffle, as it were—the Prime Minister might want to do that very quickly and that would create the tension. So I think that this is a subject that will need to be teased out.

Q104 Dr Palmer: I am very glad that you have brought this to our attention because, as you say, it is obviously a new point. I have severe reservations about it. If you think about the reasons why we have a purdah period, my understanding is that it is overwhelmingly because it is thought to be undesirable that the government should use its position of incumbency to affect the judgment of the electorate just before a General Election, so that they should not be able to halve VAT the day before an election and that kind of thing. Those reasons for purdah basically do not arise once the election has taken place. Obviously there could be another election but that is not the immediate issue. Given the possibility which, as you say, would be unusual in our recent history, of a period of uncertainty of who is going to perform a durable government, I would really like to ask you whether you think it is desirable that the Civil Service plays a greater role in constraining how the government acts. In the previous session we had witnesses saying that in an emergency, terrorism or whatever they could act anyway; but there is a second level for things which are not an emergency but which are part of the normal process of government, and especially if there is not a great controversy about those decisions I am very uneasy about the idea that the Civil Service raises its game and starts saying, "We actually need a formal exchange of letters on this because it is still sort of purdah."

Sir Gus O'Donnell: This is not a power grab. What we are talking about here is during this period if there are terrorist events or crises the previous Prime Minister remains the Prime Minister, we all know

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that, and so the government gets on with it. If there are contentious issues what the guidance would say is, "Let us try and reach all-party agreement on those." If there are minor issues that everybody agrees on then they can go ahead anyway, so I do not think we would be constraining things in that sense. I suppose what it is trying to guide against is those areas where you might have a situation where a government had gone into an election, had come out of it with many less seats than another party and it was looking as if that other party might be the one that was most likely to govern in a stable way, but the Prime Minister would still be the Prime Minister, as we know, and the Prime Minister might then decide to do something quite major. In those circumstances I would be uncomfortable with that and I think that this convention could stop that sort of area: for example, signing a very big contract, making a big machinery of government change. Those are areas where I think this convention would help us.

Q105 Alun Michael: I have just one question there—whether it is the size of the contract or the controversial nature of the contract or the political nature of the decision that would be the element.

Sir Gus O'Donnell: Sorry, not the size; if there is a big contract that everybody agrees on, you are absolutely right.

Q106 Alun Michael: What I am concerned about is the unintended consequences. The intended consequences that you have described are entirely acceptable, I think. So would you accept that there is a danger of inertia within government actions and a danger of inertia most of the time, which leads to the "if in doubt do nothing" approach; whereas actually very often the issue is that you have a responsibility to take a judgment rather than doing nothing? If you are going to strengthen or clarify the Delphic words in relation to prudence in paragraph 20, do you also not have to strengthen the words that follow about the normal and essential business of government? I say this because I have seen decisions during the purdah period which were not in any sense political but where delay can be damaging either to an agency or perhaps to the industry that is affected by a decision. So if you are going to maintain the balance you need to strengthen both of those sentences or clarify both of those sentences, do you not?

Sir Gus O'Donnell: Indeed. When we refer to the pre-election guidance we talk about the issues of—paragraph 11—a decision: "... provided that such postponement would not be detrimental to the national interest or wasteful of public money." I think those are really important.

Q107 Alun Michael: Where would the threshold come there because the national interest is a very high threshold? Something that could be damaging, as I say, to the operation of a government agency or to an industry, if it was affected by a decision, could be quite important and significant for that industry but not damaging to the greater national interest.

Sir Gus O'Donnell: Yes, but if it was damaging to the industry and they were a supplier to us that might well be detrimental to value for money—value for public money.

Q108 Alun Michael: Indeed, that is the sort of judgment that has to be balanced.

Sir Gus O'Donnell: Indeed, which is why this allows for the fact that you could make such decisions. One of the issues that we work very hard on in the run-up to an unknown election date—by definition it is unknown—is to try and make sure that we are not in the position of having to make those kinds of decisions. So contracts are sorted out early or extended for short periods; so we do try our best to get ourselves in a situation where we are not faced with these sorts of decisions when we are in this period of political uncertainty.

Q109 Dr Whitehead: Could I return you to the guidance that is issued concerning the person who will be asked by the Monarch to form a government? As paragraph 17 in the draft guidance states: "If the Prime Minister and government resign at any stage." I was interested that you drew our attention particularly to paragraph 19 in the draft chapter where you emphasise that: "It is open to the Prime Minister to ask the Cabinet Secretary to support the government's discussions with opposition or minority parties . . ." And, indeed, if opposition parties ask for that support as well that will be given. After which point presumably if the Government then resigned the person who appears most likely to command the confidence of the House in the view of the Monarch would be advised by you?

Sir Gus O'Donnell: An interesting question. The constitutional principle, which I think Professor Bogdanor may have pointed out, is that the Queen does not necessarily have to take the advice of the Prime Minister—there is not a constitutional principle to that effect. I believe that it is the responsibility of the Prime Minister to ensure that the Monarch remains above politics and that when the Prime Minister resigns it is very apparent who the Queen should be calling to produce the next, hopefully, stable government. I think that is the way I see that.

Q110 Alun Michael: I am presuming, however, that paragraph 19 implies that it is not clear, that should it be suggested by the Prime Minister that you should support the discussions with opposition minority parties to form a government, or indeed the Opposition suggests the same, then presumably at that point it is not clear who is going to form the Government and discussions therefore perhaps need to be undertaken, facilitated by yourself, at which point if the government resigns the Monarch may say, "Who is it that has the likely confidence of the House?" and the House not having met to decide that you would be presumably the only person at that point who would have that information.

Sir Gus O'Donnell: That is precisely why it is the Prime Minister's responsibility not to resign until that situation is clarified.

Q111 Chairman: What is your view of the time pressures in that situation? Do you accept the media view really which is that all this has to happen in 24 hours or 48 hours at the most? Or is it possible to conduct it in an orderly way over a slightly longer period?

Sir Gus O'Donnell: I think it is and there has been some confusion about this. A lot of people talk about markets being very jittery and the fact that there is not a clear outcome being a problem. It is worth saying that first of all it would not happen out of the blue; we have lots of opinion polls, we have political betting sites, we have spread betting. The markets will have moved very close to understanding what the outcome is. The uncertainty that will be removed is what the actual outcome is versus what was expected by the markets. So that is the difference that you will get there, which I would suggest—unless the polls and the betting are completely off for some reason—is usually quite small, although I stress that I lived through 1992 where the difference between what people actually said when they put their X on the balance paper and what they said when they came out in an exit poll was very, very different. So I think we all need to be very careful—and I will be more than anybody else—in presuming any particular outcome. Like I say, I think the markets will have moved a long way; I think what the markets will be looking for is the achievement of a government that is stable, that can carry through the key decisions that are needed; will carry through and succeed in terms of the Queen's Speech; and of course there will be some important decisions. There is a strong cross-party consensus that the deficit needs to be reduced significantly and there are some decisions there. So what the markets will be looking for is whether we achieve that stable government which could take these important decisions? If it takes a little bit longer to achieve that stability I think they will be patient, but there is no real question in my mind that what they will be looking for is something stable. If you bought market stability by rushing out and getting something which actually did not last very long then you would get a lot more market instability, I would say; so you are looking for something where there is a government which can command the confidence in the House in the important decisions.

Q112 Mr Hogg: Sir Gus, on this point—and it really arises from paragraph 19—I see that the Cabinet Office, with the authority of the Prime Minister, will support the parties in their discussions. But, for example, addressing the question of reducing the deficit, it is clearly going to be necessary to form a view of reductions across departments. That is not exclusively a matter for the Cabinet Office and I can well imagine that parties would take the view that they would need to have access to individual departmental plans and budgets before they could form a view as to the kind of policies that they might be prepared to support, either as a part of a coalition or as some form of less direct support. What support are you contemplating will be given to the parties in those discussions addressing the problems of

individual departments so that the parties know what they want to sign up to department by department?

Sir Gus O'Donnell: This is a very good point and let me stress, first of all, we are not talking about support for the political negotiations between parties as to whether it turns out to be a minority government or a coalition or particular Members in Cabinet or anything like that; we would leave that entirely to the political parties to do and I regard that as their responsibility. And this is new. This process was used during the recent Scottish elections—I know a very different system—and I would envisage us, as far as possible, being able to provide objective factual advice to the parties on whatever they felt was necessary to achieve the—

Q113 Mr Hogg: But is it Cabinet Office level or allowing them to go to, let us say, Defra, for example, and talk with Defra officials about what would be realistic reductions to spending?

Sir Gus O'Donnell: Indeed. At the moment we are in a situation where the Prime Minister has allowed discussions to take place with Permanent Secretaries of the various departments with the parties; those are taking place but they are within a very restrictive framework. I think you are absolutely right; there may be questions which would be much more substantial which we would face in those circumstances.

Q114 Mr Hogg: How do you propose to deal with that situation?

Sir Gus O'Donnell: It will really depend upon how much detail the parties want. Having established this principle that the Civil Service can support, if the Prime Minister accepts—and, as I say, what this guidance says is that it is up to the Prime Minister and it could be that another Prime Minister might say no; but this guidance says that it is up to the Prime Minister and the current Prime Minister has said yes. I think we will need to come up with some guidelines for the Civil Service—I will need to come up with some guidelines in conjunction with my Permanent Secretary colleagues about what constitutes the right level of support to give because obviously we will be supporting the different parties, but it may be that we will be supporting a party which may turn out to be in opposition to the government. So I think we have some quite difficult practical issues to sort out as to how we make this work. Certainly one of the things that I have been doing is talking to John Elvidge in Scotland about how they managed this and how you manage the Chinese walls between the different groups.

Q115 Chairman: That is still of course part of the same unified Civil Service of which you are Head.

Sir Gus O'Donnell: Absolutely, yes, it is; Scotland Wales and England, all there. There is of course a separate Northern Ireland Civil Service, but, yes, absolutely a unified Civil Service.

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Q116 Chairman: Are you prepared for the complications that will arise if a coalition was formed?

Sir Gus O'Donnell: One of the things I think we learnt from the Scottish case, where they went through various possible scenarios, I think it is fair to say that certainly the public were not expecting a minority government to be the outcome. What I have learnt from that is that we need to prepare for all possible outcomes, so I think there is quite a lot of work we have to do here; and, yes, a coalition would be an obvious part of what we have to prepare for.

Q117 Chairman: Sir Gus, we will try and make sure that the evidence from this session is printed early so that it can continue to inform the discussion. However, I want to give you the opportunity to tell us, if you wish to do so, whether you have had occasion to have any discussions with the Prime Minister to deal with issues of bullying in Downing Street.

Sir Gus O'Donnell: You go from the sublime to the ridiculous!

Q118 Chairman: Not if it is real.

Sir Gus O'Donnell: I have made a number of statements on this issue and let me be clear again. I have never talked to the Prime Minister about his behaviour in relation to bullying Number 10 staff, but of course I talk to the Prime Minister about how to get the best out of his civil servants; I have said that lots of times. I have not called for investigations; I have not given verbal warnings.

Q119 Mr Tyrie: I regret having to ask these questions and I am disappointed that you are in the position of having to answer them, quite frankly. What you have just said is a reiteration of what has been described as a carefully drafted Whitehall statement, and these allegations are still being made. I wonder if I could give you an opportunity to clarify the scope of the repudiation you are making. Perhaps I can do that best by just reading out what Nick Robinson said in response to the BBC. He said that your latest statement “leaves open the possibility, indeed the likelihood that you did talk to Gordon Brown about the Prime Minister’s behaviour towards his staff, as Andrew Rawnsley insists.”

Sir Gus O'Donnell: I cannot be clearer. I have said that I have not talked to the Prime Minister about his behaviour with respect to bullying Number 10 staff.

Q120 Mr Tyrie: What about other behaviour?

Sir Gus O'Donnell: I do not talk to him about behaviours; I talk to him about how to get the best out of his staff.

Q121 Mr Tyrie: Conduct, treatment of staff?

Sir Gus O'Donnell: This is getting into semantic angels on the head of a pin. When I said to the Prime Minister, “You really get the best out of your staff when you congratulate them for really good pieces

of work” he said “Yes” and I make a point when I discuss with him of saying that, “It is really important that you show your support to the Civil Service” and he has done. When he talked to Civil Service Live, a really important conference, he went out of his way to put on the record, very clear, his support for the Civil Service. He has been a very strong supporter of the Civil Service and that I think is witnessed by the fact that for the first time in over 150 years we have in front of the House now a Constitutional Reform and Governance Bill, which has the clauses in it which will make statutory the Civil Service values. That is the huge prize which people on this Committee could help us deliver. It has cross-party support. Please, if there is one thing you could do for me it is to make sure that those clauses on the Civil Service go through before the House dissolves.

Q122 Mr Tyrie: It is a passionate statement but one in answer to a question I did not ask. I would like to ask one more question.

Sir Gus O'Donnell: I am looking for your support, Mr Tyrie; will I get your support on that Bill?

Q123 Mr Tyrie: Unfortunately we do the asking of the questions here. Have you at any time discussed the conduct towards the Civil Service or the treatment of civil servants—the treatment that has been allegedly meted out to them—by Mr Whelan or Mr McBride; have you discussed their conduct with the Prime Minister at any time?

Sir Gus O'Donnell: I am not prepared to get into conversations about individuals because it is ridiculous. If individuals come to me with issues it is important that I, as the Head of the Civil Service, maintain confidentiality.

Q124 Mr Tyrie: And the conduct of advisers?

Sir Gus O'Donnell: With advisers I think it has been fairly clear, people have reported quite widely that episode with Mr McBride, and I have made it—

Q125 Mr Tyrie: Have there been complaints by civil servants about their conduct?

Sir Gus O'Donnell: I am not going to get into individual complaints; it would be wrong, because we regard it as very important to maintain confidentiality. I think that is important.

Q126 Mr Hogg: Sir Gus, what you said in response to Andrew Tyrie is that you have talked to the Prime Minister about how he could get the best out of civil servants. I think what the Committee might like to know is what caused you to raise this discussion with the Prime Minister, when you did it and whether before you had this interesting discussion with the Prime Minister other individuals—I do not want to know who—had come to see you with the implication that such a conversation might be useful.

Sir Gus O'Donnell: This is a conversation I have had with every Prime Minister to whom I have been Cabinet Secretary.

24 February 2010 Sir Gus O'Donnell KCB and Stephen Laws

Q127 Mr Hogg: We are concerned, Sir Gus, with this one, if you do not mind.

Sir Gus O'Donnell: But it is a conversation I have had with both Tony Blair and with Gordon Brown. It is to my mind hugely important as part of my job as Head of the Civil Service to understand the relationship with the Prime Minister and his staff and the Civil Service as a whole, and to make sure that that is as effective as it can possibly be.

Mr Hogg: I understand that entirely, Sir Gus, but there are two points—

Chairman: Order!

Mr Hogg:—the timing and did individuals come to see you beforehand.

Chairman: Order! Rosie Cooper.

Q128 Rosie Cooper: I just want to put on the record that any Chief Executive working with a Chairman of any organisation—in this case the Prime

Minister—part of their day-to-day discussion will be how to get the best out of the organisation they represent. I am astounded that this should be seen as anything extraordinary. In my former life I did it all the time.

Sir Gus O'Donnell: Like I say, it has gone somewhat from the sublime to the ridiculous, but I would say that the really important thing that the Committee has talked about is a hung Parliament; so I am very grateful for the comments that you have made. I would be really keen to get more comments from all of you on the specifics because I purposely have kept this and labelled it as draft because I think the points that have been made today have been really useful.

Chairman: We are very grateful to you for this session today. I am glad you thought it was sublime—I think that is slightly overdoing it!—but I do think it was important that these issues were clarified. Thank you very much.

Written evidence

Letter to the Chairman of the Committee from the Cabinet Secretary, 23 February 2010

CABINET MANUAL—ELECTIONS AND GOVERNMENT FORMATION (CHAPTER 6)

As you know the Prime Minister announced in his recent speech (Towards A New Politics—2 February 2010) work underway in the Cabinet Office to create a Cabinet Manual. The Cabinet Manual will be the first, comprehensive account of the workings of Cabinet Government and will consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document.

Although considerable work is required, it is my intention that the Cabinet Manual will be ready for the Government after a General Election in 2010 (depending, in part, on when the election takes place). I attach an outline of the proposed chapters (Annex A).

In advance of my evidence session tomorrow, I attach an early draft of the chapter on Elections and Government Formation for your consideration (Annex B). The chapter covers a range of issues, including the dissolution of Parliament, arrangements for “*purdah*” and hung Parliaments. This document is a work in progress and I would be grateful for your comments in developing this chapter.

Following my evidence session tomorrow I intend to share this draft chapter with the leaders of political parties represented in Parliament for their comments. I also intend to lay a copy of the final chapter in libraries of both Houses.

Gus O'Donnell

Annex A

CABINET MANUAL: PROPOSED CHAPTERS

1. The Monarchy and Privy Council
2. The Executive: the Prime Ministers and Ministers
3. Collective Cabinet decision making
4. Ministers and Parliament
5. Ministers and the law
6. Ministers and the Civil Service
7. Relations with Devolved Administrations and Local Government
8. Relations with Europe and International Institutions
9. Elections and Government Formation
10. Official information

Annex B

CHAPTER 6: ELECTIONS AND GOVERNMENT FORMATION (DRAFT)

This Chapter covers the dissolution and summoning of Parliament, Parliamentary general elections, Government formation, hung parliaments, restrictions on Government and other activity during the electoral period.

Principles of Dissolution and summoning of Parliament

1. Parliaments are dissolved when they expire after a period of five years under the Septennial Act 1715 (as amended by the Parliament Act 1911). This five year period is counted from the date of the first meeting of Parliament after a Parliamentary general election. No proclamation or other formality is required for a dissolution under the Act, but a proclamation will then be needed to summon a new Parliament.

2. The Monarch may also dissolve Parliament by proclamation at any time before it has expired and the same proclamation will also summon a new Parliament and name the date on which it is to meet. Proclamations are issued by Her Majesty in Council. In practice in modern times, Parliaments have been dissolved in this way following a request from the Prime Minister.

Finalisation of Parliamentary business

3. The Prime Minister may request dissolution from the Monarch whether or not Parliament is currently sitting.

4. Parliament often sits for a few days, known as the “wash up” period, after the announcement of the election (after the Monarch has granted the Prime Minister’s request for a dissolution). In this period Parliament will be able to finish any outstanding business. Some business has to be completed before the dissolution, depending on the time of year. In particular any money voted to the Government but not appropriated has to be appropriated by the date of the dissolution, and it may be necessary to do other business to keep Government working while Parliament is unavailable because of the dissolution. Other business will be the subject of negotiations between the parties in Parliament and is likely to be completed in the limited time available only if it is agreed.

5. At the end of the wash up, Parliament may either be prorogued and then dissolved, or just dissolved. Prorogation brings a Parliamentary session to an end. It is the Monarch who prorogues Parliament on the advice of Her Ministers. The normal procedure is for commissioners appointed by the Monarch to prorogue Parliament in accordance with a royal proclamation. The commissioners announce the prorogation to both Houses in the House of Lords and give Royal Assent to any Act.

6. It is not necessary for Parliament to have been prorogued in order for it to be dissolved. In 1992, 1997, and 2005 Parliament was dissolved following prorogation, but in 2001 and from 1974 until 1992, Parliament was dissolved while adjourned but without a prorogation.

General elections—House of Commons

7. At the same time as the proclamation which summons a new Parliament, an Order in Council is made requiring the issue of writs for the election of a new Parliament (a writ is a formal written order). Writs are issued under Representation of the People Act 1983 by the Clerk of the Crown in Chancery to Returning Officers, and require them to cause elections to be held and to return the writ with the election result for their constituency. The election is held 17 working days after the proclamation and issuing of writs. Traditionally, Parliamentary general elections have taken place on Thursdays.

8. Appendix A to this document sets out the process and a more detailed election timetable (which derives from the 1983 Act). Periods of time in the timetable are reckoned in working days and exclude Saturdays, Sundays, Christmas Eve, Christmas Day, Good Friday, Bank Holidays in any part of the United Kingdom and any day appointed for public thanksgiving or mourning. Candidates must submit nomination papers not later than the sixth working day after the date of the proclamation. Polling day is the eleventh working day after the last day for delivery of nomination papers.

Meeting of the new Parliament

9. Recent practice has been for Parliament to meet on the Wednesday following the election. Previously, there was a longer interval of about twelve days between polling day and first meeting.¹

10. The first business of the House of Commons when it meets is to elect or re-elect a Speaker and then for members to take the oath. Normally the Queen’s Speech outlining the Government’s legislative programme, will be in the week after Parliament meets and that is when the business of the new Parliament properly begins.

Government activity between the announcement of an election and polling day

11. Once the Monarch has agreed to a dissolution and the Prime Minister has announced an election there are constraints on the way Government should conduct business. The Government retains its responsibility to govern and Ministers remain in charge of their Departments, although when Parliament is dissolved they are no longer Members of Parliament. Essential business is carried on. However, it is customary for Ministers to observe discretion in initiating any action of a continuing or long-term character once the election has been announced. Decisions on which a new Government might be expected to want the opportunity to take a different view from the incumbent Government should be postponed until after the Election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.

12. Other options include making a decision time-limited or subject to a temporary arrangement, or consulting with the opposition parties. The observance of discretion does not involve hard and fast rules: much depends on the circumstances. As soon as a General Election is announced, the Cabinet Office issues guidance to Departments on their activities during the election period.

¹ House of commons select committee on the modernisation of the House of Commons *Revitalising the chamber: the role of the back bench member* (HC 337, 2006-7) have recommended reverting to the practice of there being around 12 days between polling day and first meeting. <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmmodern/337/337.pdf>

13. Between the announcement of the date for a general election and polling day, there are also restrictions on the degree to which some forms of activity may be carried out by civil servants and Government departments. The guidance to Government departments issued in 2005 is available at [http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/electguide.pdf].

The principles of Government formation

14. Governments hold office by virtue of their ability to command the confidence of the House and hold office until they resign. A Government or Prime Minister who cannot command the confidence of the House of Commons is required by constitutional convention to resign or, where it is appropriate to do so instead, may seek a dissolution of Parliament. When a Government or Prime Minister resigns it is for the Monarch to invite the person whom it appears is most likely to be able to command the confidence of the House of Commons to serve as Prime Minister and to form a government. However it is the responsibility of those involved in the political process—and in particular the parties represented in Parliament—to seek to determine and communicate clearly who that person should be. These are the principles that underpin the appointment of a Prime Minister and formation of a government in all circumstances.

15. If an incumbent Government retains a majority in the new Parliament after an election, it will continue in office and resume normal business. If the election results in a clear majority for a different party, the incumbent Prime Minister and government will immediately resign and the Monarch will invite the leader of the party that has won the election to form a government. Details on the appointment of Ministers can be found in Chapter 2.

“Hung” Parliaments

16. Where an election does not result in a clear majority for a single party, the incumbent Government remains in office unless and until the Prime Minister tenders his and the Government’s resignation to the Monarch. An incumbent Government is entitled to await the meeting of the new Parliament to see if it can command the confidence of the House of Commons or to resign if it becomes clear that it is unlikely to command that confidence. If a Government is defeated on a motion of confidence in the House of Commons, a Prime Minister is expected to tender the Government’s resignation immediately. A motion of confidence may be tabled by the Opposition, or may be a measure which the Government has previously said will be a test of the House’s confidence in it. Votes on the Queen’s Speech have traditionally been regarded as motions of confidence.

17. If the Prime Minister and Government resign at any stage, the principles in paragraph 14 apply—in particular that the person who appears to be most likely to command the confidence of the House of Commons will be asked by the Monarch to form a government. Where a range of different administrations could potentially be formed, the expectation is that discussions will take place between political parties on who should form the next Government. The Monarch would not expect to become involved in such discussions, although the political parties and the Cabinet Secretary would have a role in ensuring that the Palace is informed of progress.

18. A Prime Minister may request that the Monarch dissolves Parliament and hold a further election. The Monarch is not bound to accept such a request, especially when such a request is made soon after a previous dissolution. In those circumstances, the Monarch would normally wish the parties to ascertain that there was no potential government that could command the confidence of the House of Commons before granting a dissolution.

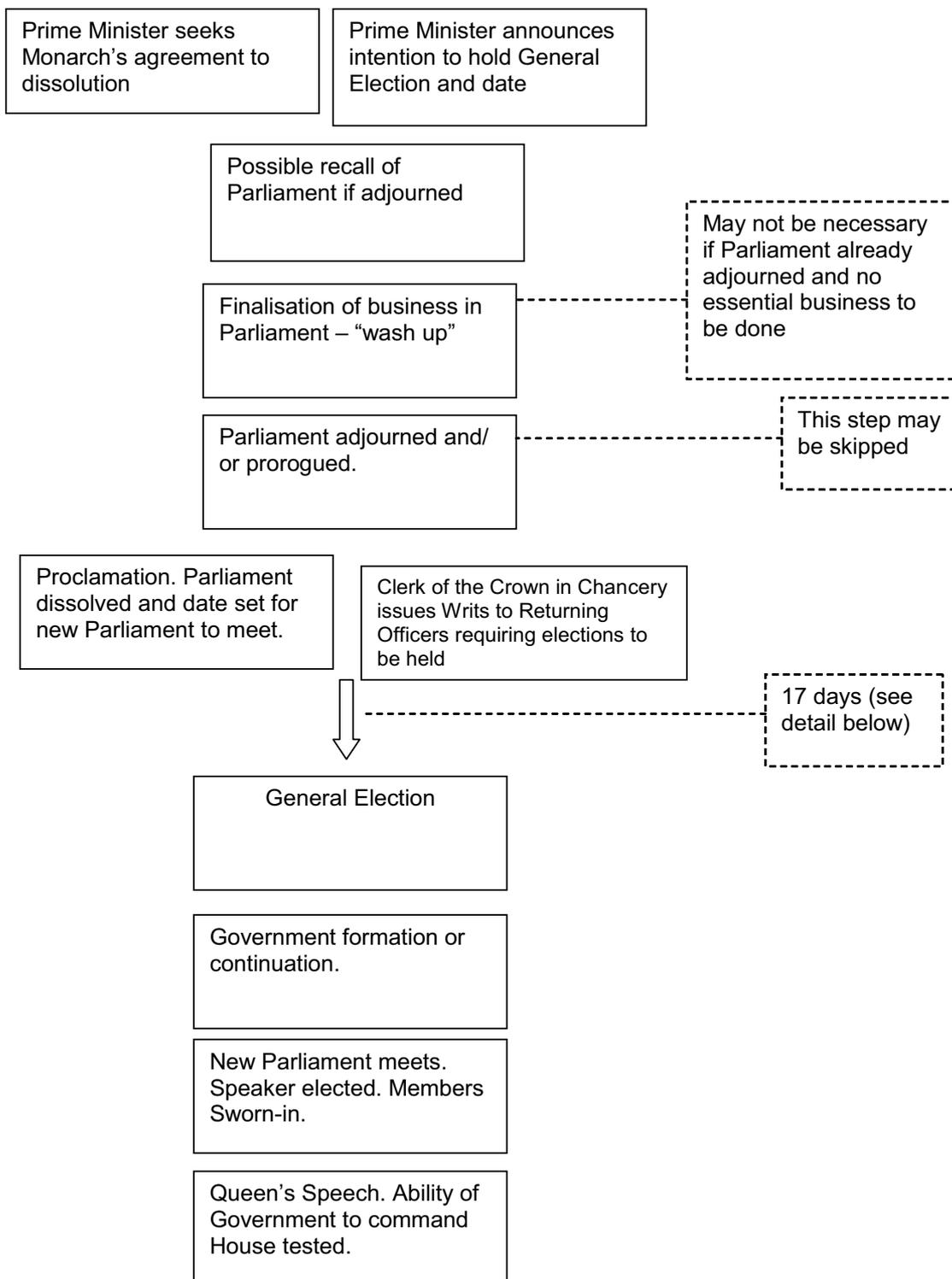
19. It is open to the Prime Minister to ask the Cabinet Secretary to support the Government’s discussions with Opposition or minority parties on the formation of a government. If Opposition parties request similar support for their discussions with each other or with the Government, this can be provided by the Cabinet Office with the authorisation of the Prime Minister.

20. As long as there is significant doubt whether the Government has the confidence of the House of Commons, it would be prudent for it to observe discretion about taking significant decisions, as per the pre-election period. The normal and essential business of government at all levels, however, will need to be carried out.

Change of Prime Minister or Government during the life of a Parliament

21. A change of Prime Minister may occur as a result of retirement, incapacity, death, or resignation. A change in the party or parties which form the basis of support for the government in the House of Commons may also occur during the life of a Parliament. In appointing a new Prime Minister, as at other points, the Monarch invites the person whom it appears is most likely to command the confidence of the House of Commons to serve as Prime Minister and form—or continue—a government. It is for those involved in the political process—and in particular the parties represented in Parliament—to seek to determine and communicate clearly who that person should be, and to find a way to ensure there are arrangements to ensure continuity while that process finds a successor for the Prime Minister. There is no requirement for a dissolution and election to occur.

Election and Government formation



ELECTION TIMETABLE—EXAMPLE

<i>Milestone</i>	<i>Days</i>
Proclamation summoning new Parliament/ dissolution of old Parliament/issue of writ	Day 0
Receipt of writ	Day 1
Last day for publication of notice of election (4pm)	Day 3
Last day for delivery of nomination papers/ withdrawals of candidature/appointment of election agents (4pm)	Day 6
Statement of persons nominated published at close of time for making objections to nomination papers (5pm on Day 6) or as soon afterwards as any objections are disposed of	
Last Day for requests for a new postal vote or to change or cancel an existing postal vote or proxy appointment (5pm)	
Last day to apply to register vote	Day 11
Last day for appointment of polling and counting agents	Day 15
Polling day (7am to 10pm)	Day 17
Last day to apply for a replacement for spoilt or lost postal ballot papers (5pm)	

Source: House of Commons Library briefing.
<http://www.parliament.uk/commons/lib/research/briefings/snpc-04454.pdf>

GLOSSARY

To include:

<i>Term</i>	<i>Definition</i>
Adjournment	The process which brings an end to a sitting in either House (eg at the end of a day or before a recess—see below). The Houses usually adjourn only in accordance with a resolution to do so. In some cases the Standing Orders allow for other methods of adjourning. The Standing Orders may fix the time for the next sitting, or that may be varied by the motion. The expression is also used to describe the period while a House is adjourned.
Dissolution	The process which terminates a Parliament and, by convention requires the summoning of a new Parliament, so triggering a general election for membership of the House of Commons.
Prorogation	The process which brings an end to a session of Parliament. Parliament is suspended for a period by a Monarch. Typically Parliament is prorogued annually and then reassembles for a new Session a few days later. It has often been the practice to prorogue Parliament before dissolving it.
Recess	A period while the House is adjourned between sittings for longer than provided for by the Standing Orders (eg over a holiday period—the Easter recess, the Christmas recess).
Wash up	The period between when the Prime Minister is granted dissolution by the Monarch and the subsequent prorogation or dissolution of Parliament.
Writ	A formal written order.

**Memorandum from Professor Robert Hazell, the Constitution Unit, UCL and Peter Riddell,
Institute for Government**

**OPENING THE DOOR TO THE SECRET GARDEN—A PLEA FOR REVISED PUBLIC
GUIDANCE ON HOW GOVERNMENTS ARE FORMED AND OPERATE**

EXECUTIVE SUMMARY

In this submission, we examine the gaps in ministerial and executive guidance in the UK which have been revealed in the course of our work on preparing for a possible change of government, and the possibility of a hung parliament. The British public, the media and financial markets are ill prepared for a hung parliament, and there is an urgent need for greater clarification and publication of the unwritten conventions which apply, in order to avoid potentially damaging uncertainty and misunderstanding in the media and financial markets.

We have examined the ministerial guidance available in comparable Westminster systems: Australia, Canada, New Zealand, and Scotland. This is presented in tabular form in section 2 of our submission, with more detail about each country in Appendix 1. As a result of this comparison, we find that guidance in the UK is seriously lacking in several areas: guidance materials are often thin, difficult to locate, out of date, or simply non-existent. Given the forthcoming election and the uncertainty of the result, there is a serious need for drawing together, updating and in some cases drafting guidance on key aspects of executive practice.

In particular, the United Kingdom should consider

- Drafting guidance on the role of the Crown in government formation.
- Drafting more detailed guidance on the caretaker convention.
- Revision of the guidelines on transitions ahead of general elections.
- Drafting an induction guide to ministerial life.
- Updating current guidance documents, and if possible clarifying and consolidating them into one document.

The need for clearer guidance on the role of the head of state in government formation, on what happens if there is a hung parliament, and on the caretaker convention is particularly urgent. Guidelines on these issues should be published before the general election campaign starts, if necessary ahead of the completion of work on a more comprehensive statement. If a draft is available, the relevant sections could form guidance for the election campaign. These documents should be made publicly accessible; and their drafting and revision subject to consultation.

A Cabinet Manual should be comprehensive, covering the same broad subjects as the New Zealand Manual; acceptable to Ministers, who must find it a useful and practical guide; written in plain language, principle not rule based; and based upon consultation, so that it commands wider legitimacy, and will be accepted and used by future governments.

1. INTRODUCTION: THE CASE FOR REVISION AND CONSOLIDATION OF MINISTERIAL GUIDANCE IN THE UK

1.1. The British public, media and financial markets are ill-prepared for a hung parliament, in which no single party has a majority of seats in the House of Commons. Our aim in making this submission is neither to predict nor to advocate a hung parliament, a minority administration or coalition, but to argue for urgent public clarification of certain unwritten conventions and understandings that will apply if no party wins an overall majority at the forthcoming general election. Our focus here is on the procedures for the formation of governments.

1.2. Our concern arises from the work we have been doing on minority administration and transitions over the past year.² The discussions and seminars held following the publication of our reports on these two subjects, as well as public comments made by leading politicians and commentators about the impact of a possible hung parliament, have highlighted widespread ignorance about the constitutional and political position in this eventuality.

1.3. There is a serious danger of speculation and instability in financial markets if such an outcome begins to look probable. Warnings about the dangers of a hung parliament could become self-fulfilling, producing the jitteriness and worse in the media and the markets that they are seeking to avoid. The Financial Times reported on 8 February about the heightened fears in the government bond market that the coming election could produce a hung parliament. Much of this concern rests on the assumption that a minority administration would be indecisive and be unable to take decisive fiscal action, which is not bound to be the case. There are also fears about delays and uncertainties in the formation of any minority government. A Bloomberg report on 20 January quoted a senior financial analyst saying that the four days of negotiations after the February 1974 general election had created “real uncertainty”. He added: “One could imagine that today’s market will be flying around a lot on the uncertainty. If the result is unclear, the real-money investors

² See “Making Minority Government Work: Hung parliaments and the challenges for Westminster and Whitehall”, December 2009, edited by Robert Hazell and Akash Paun, published by the Constitution Unit and the Institute for Government; and “Transitions: Preparing for Changes of Government”, October 2009, by Peter Riddell and Catherine Haddon, published by the Institute for Government.

will be holding back waiting for information, leaving the market to the traders”. In these circumstances there is bound to be debate about who governs until a new administration is formed and what role the monarch is playing.

1.4. There are well-established conventions for dealing with such a situation, understood by most of the main players, but less so by those outside. They were applied after the February 1974 election, and were re-examined ahead of the 1992 election when many politicians, and pollsters, expected a similar outcome, which did not, in the event, materialise. However, these conventions are largely unwritten and uncodified, partly because of a desire on all sides to keep the monarch out of essentially party political negotiations. But such secrecy and insider understandings will no longer work in an era of 24 hour news and instant comment on the internet, let alone interlinked global financial markets.

1.5. The unwritten and implicit have to be made written and explicit. In most cases, this need not amount to any change in long-established constitutional understandings, though there are areas of ambiguity which need to be clarified. This should be via a Cabinet Manual, as in other comparable Commonwealth countries, notably New Zealand. Such a manual should cover the rules for the formation of governments and caretaker conventions to include the period after an election until a new permanent government is in place.

1.6. We therefore strongly welcome the announcement by the Prime Minister on 2 February that Sir Gus O’Donnell, the Cabinet Secretary, has been asked “to lead work to consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document”.

1.7. However, this process is inevitably likely to take some time and may not be completed until after the election campaign starts, probably around Easter if there is a general election on 6 May, as widely expected. It is therefore vital either that work on the sections affecting the formation of governments and caretaker conventions is accelerated, or that a separate statement on these matters is issued by the Cabinet Office before the end of March. This would reaffirm the existing implicit understandings and clarify some present uncertainties. In particular, there is ambiguity about the length of the pre-election “purdah” period, when departments avoid making controversial announcements, appointments and contract decisions which cannot be put off. At present this ends on polling day, but, as in Commonwealth countries with formal caretaker conventions, such as Australia, Canada and New Zealand, this period should be extended until a new administration is appointed or re-appointed. We offer in sections 5 and 6 of this submission possible drafts of the convention on government formation, and the caretaker convention.

1.8. Any Cabinet Manual, or “single written document”, bringing together “existing unwritten piecemeal conventions”, should not be the property of any single political party. The process of redrafting should be under the control of the Cabinet Secretary, but there should be consultation outside Whitehall, involving Parliament and others, to ensure wider public and political acceptance. Completion of discussions and drafting will take time, and if this process cannot be completed before the campaign starts, those sections about the formation of governments and caretaker procedures could be published in draft form or as part of an interim public statement before the election campaign starts.

Comparison of Ministerial Guidance Documents in Five Countries

1.9. In preparing this submission we have examined and compared ministerial guidance documents in four other Westminster jurisdictions. On the basis of this comparison, we find that the United Kingdom is seriously lacking in several areas. There are a number of powerful reasons why the UK government should consider updating, revising and consolidating the key guidance documents on executive practice.

1.10. First, the imminence of the general election, and the attendant financial uncertainty referred to above. Given this uncertainty, the principles and rules governing executive conduct should be as clear as possible. At present, they are not. It needs to be made explicitly clear, if a general election results in no one political party attaining a majority, who governs until a new government can be formed; what role the monarch plays in determining who the government should be after an inconclusive election; and, at a more basic level, what the daily responsibilities of a Minister are, and what resources are available to him or her. Strangely, there are few if any guidelines on these matters in the UK.

1.11. Second, actors in the executive branch—ministers and officials—need guidelines on “best practice”. Existing rules are often insufficient or obscure; informal practices come to supplement or supplant existing rules. Good guidelines for executive practice should be capable of being beneficial to any political party (or parties) in government. Governments need to govern: we argue that updating, revising and consolidating their practical working guidelines will enable them, not constrain them.

1.12. Other Westminster jurisdictions have codified many areas of government practice: the UK lags behind in this respect. New Zealand provides a useful standard: its *Cabinet Manual* (supplemented by two other documents) is a model of what the other Westminster jurisdictions ought to follow. The *Cabinet Manual* provides comprehensive, cohesive and clear advice on a number of key aspects of executive action. It is publicly available, and broadly accepted by a wide range of actors in NZ politics: politicians across the spectrum, officials, academics and the public. Other countries, while not providing as coherent and comprehensive guidance as NZ, have also codified key areas of executive responsibility, and have done so without apparent cost to government flexibility.

1.13. Finally, there is the democratic argument: the practices of the executive have for too long been conducted in secret. Guidelines provide transparency and accountability. They may help explain to the public how and why decisions are made at the executive level. Guidance documents on executive practice are maps for executive action—not cages. The public will benefit from publication of these maps, without unduly constraining the actions of governments which need the flexibility to meet new situations.

Scope of the exercise

1.14. What constitutes “key aspects of executive practice”? Our trawl through ministerial guidance documents included guidance on:

- An outline of the constitution.
- The role of the head of state.
- Cabinet processes and procedures.
- Ministerial responsibilities (individual/collective) and ethics.
- Ministerial relations with the civil service and arm’s-length bodies.
- Executive relations with Parliament and the legislative process.
- Elections, transitions and government formation.
- Administrative decision-making.
- Freedom of information.
- Day-to-day administration.

1.15. For each jurisdiction, a search was done on key executive websites to determine what guidance documents were publicly available, using the checklist above. Cabinet Offices and academics in these jurisdictions were also asked for advice about the guidance documents. But we acknowledge that there may be gaps in the material covered; and conversely, that some documents may have been given more weight than they bear in practice.

2. A COMPARISON OF MINISTERIAL GUIDANCE IN FIVE WESTMINSTER COUNTRIES

2.1. This section summarises what guidance documents are available to Ministers in New Zealand, Australia, Canada, Scotland and the United Kingdom. There is also a set of tables which follow. These should be treated as rough maps to bring out some of the differences between the UK and other Westminster jurisdictions. They differ in terms of coverage; depth and breadth (principled/procedural; general/detailed); the audience for whom they are intended; the degree of formality; and their overall coherence. More detail on each jurisdiction’s coverage can be found in the country descriptions in Appendix 1.

Ministerial Codes and Cabinet Procedures

2.2. All jurisdictions have a document devoted to formal cabinet processes and procedures. These documents usually set out in detail matters such as preparing cabinet committee papers, format, consultation, and rules on confidentiality and security. All five countries have a ministerial code, which sets out the rules of ministerial responsibility, ministerial conduct, conflicts of interest, and so on.

2.3. These two kinds of documents are the centrepiece of executive guidance (especially the ministerial code). These guidelines were the first to be codified, and they relate to the central institutions of executive government.

2.4. The content of these documents is “lore, not law”. They set down working practices, not rigid rules which must be followed to the letter, or which could be litigated. They are the instruments of the Prime Minister (or First Minister): he, or she, is the ultimate arbiter of the content and judge of any purported breach.

An Outline of the Constitution

2.5. NZ, Australia, and to a lesser extent Canada also provide an outline of their respective constitutions in their key ministerial guidance documents. NZ provides the most comprehensive outline, but it is by no means legalistic.

The Role of the Head of State

2.6. Only NZ offers comprehensive guidance on this, no doubt as a result of the adoption of proportional representation in 1996, making government formation a more contentious and drawn-out matter. Recent events in Canada show the difficult situations which can arise when there is no clear guidance.

Ministerial Relations with the Civil Service and Arm's-length Bodies

2.7. All jurisdictions have codified civil service values and principles. However, guidance on the relationship between Ministers and arm's-length bodies (executive agencies, "quangos", non-departmental public bodies, and so on) remains, at best, scattered. NZ again has comprehensive advice; Australia and Canada offer brief guidance. In the UK, the relationships between Ministers and arm's-length bodies may be too variable and complex to be dealt with by a broad statement.

Executive Relations with Parliament and the Legislative Process

2.8. All jurisdictions have guidance on executive relations with Parliament and the legislative process.

Elections, Transitions and Government Formation

2.9. All countries provide guidance on elections. But the guidance provided ranges from brief to very detailed. For instance, only Australia, NZ and Canada³ provide detailed information for Ministers about the caretaker convention. NZ alone appears to provide broader guidance on transitions ("transitions" here referring to a government's loss of confidence or change of Prime Minister at mid-term) and government formation. The caretaker convention in NZ can apply mid-term if the government loses the confidence of Parliament.

Guidance on Administrative Decision-Making and Judicial Review

2.10. All jurisdictions, with the apparent exception of Scotland, provide guidance on administrative decision-making.

Guidelines on Access to Official Information

2.11. All jurisdictions provide guidance on access to official information: this is usually an introduction to freedom of information legislation.

Induction Guide on Ministerial Life

2.12. All jurisdictions, with the exception of the UK, have a generic guide setting out the practicalities of ministerial life (e.g. the role of civil servants within a ministerial office), sometimes written in a formal manner, sometimes in plain unadorned speech. Some of these are not made publicly available (Scotland, NZ).

Comprehensiveness, Coherence and Availability

2.13. Two more general observations on executive guidance documents in Westminster jurisdictions can be made. First, many but not all guidance documents on executive practice are now available via the websites of these jurisdictions' executives.

2.14. Second, some jurisdictions offer comprehensive and coherent guidance; some jurisdictions consolidate guidance into one location and/or document, while others have guidance spread over a large number of documents and over various websites. The NZ Cabinet Office has the most coherent and unified set of documents relating to executive practice, with its Cabinet Manual (supplemented by the Cabinet Guide and the Ministerial Office Handbook) covering more key aspects of executive practice than any other comparable document or set of documents. These are all located on a specific website.

2.15. In terms of comprehensiveness, coherence and accessibility, the guidelines and documents listed on Australia's Department of the Prime Minister and Cabinet website come in at a close second. Again, all these documents were found on a specific website.

2.16. Scotland has a relatively coherent set of documents, but on a narrow range of topics. However, the Scottish government website is less straightforward to navigate. Searches were required to find guidance for the same range of executive practice guidance as NZ and Australia: documents were scattered across the websites rather than being drawn conveniently together on a single webpage.

2.17. Canada is similar to Scotland: what is offered is relatively comprehensive but its key executive guidance documents are spread out over a number of different websites and not consolidated.

2.18. Least cohesive and least comprehensive is the UK. There are a large number of documents, but some very noticeable gaps. These guidance documents are spread across different locations; many are directed at civil servants rather than Ministers; and differ in depth and coverage.

³ Our understanding is that Canada does provide written guidance on the caretaker convention in the election period. This may be published shortly following an FOI request.

Table 1
WEBSITES OF WESTMINSTER EXECUTIVES

<i>Jurisdiction</i>	<i>Main Executive Website</i>
New Zealand	http://www.dPMC.govt.nz/Cabinet/index.htm
Australia	http://www.dPMC.gov.au/guidelines/index.cfm
Canada	http://www.pco-bcp.gc.ca/index.asp?lang=eng
Scotland	http://www.scotland.gov.uk/About/14944
United Kingdom	http://www.cabinetoffice.gov.uk/ministers_and_government_business.aspx

2.19. Table 2 below attempts to represent visually what areas of executive practice are covered by each jurisdiction's "central guidance document", by which is meant the following:

NZ	<i>The Cabinet Manual</i>
Australia	The Cabinet Handbook
Canada	<i>Accountable Government: A Guide for Ministers and Ministers of State</i>
Scotland	<i>The Scottish Ministerial Code</i>
United Kingdom	<i>The Ministerial Code</i>

Table 2: Areas of Executive Practice Covered by Central Guidance Document

Area of Executive Practice	New Zealand	Australia	Canada	Scotland	United Kingdom
The Constitution	Y	N	Y	N	N
Head of State and relations with Cabinet					
Description of Head of State's role/powers	Y	N	Y	N	N
Ministers					
Powers and functions of the Prime Minister	Y	Y	Y	Y	Y
Ministerial responsibility	Y	Y	Y	Y	Y
Ministerial conduct	Y	Y	Y	Y	Y
Ministers and state machinery					
Relationship with civil service	Y	N	Y	Y	Y
Relationship with arm's-length bodies	Y	N	Y	N	N
Ministers and the law	Y	N	N	N	N
Cabinet decision-making	Y	Y	Y	Y	Y
Elections, transitions, and government formation					
Elections	Y	N	N	N	N
Transitions	Y	N	N	N	N
Government formation	Y	N	N	N	N
The caretaker convention	Y	Y	N	N	N
The Executive and the legislative process					
The legislative process	Y	N	Y	Y	N
Parliamentary relations	Y	N	Y	Y	Y
Access to official information	Y	N	N	N	N

Table 3: The Minimum Necessary Guidance for Cabinet and Ministers

Aspects of Executive Practice	New Zealand	Australia	United Kingdom
The Constitution	Cabinet Manual	[A Guide on Key Elements of Ministerial Responsibility] (Key Elements Guide)	NONE
Head of State and Cabinet relations			
Description of HOS role/ powers	Cabinet Manual	[Key Elements Guide]; Federal Executive Handbook	NONE
Ministers			
Powers and functions of PM	Cabinet Manual	[Key Elements Guide]; Standards of Ministerial Ethics	Ministerial Code
Ministerial responsibility	Cabinet Manual	[Key Elements Guide]; Standards of Ministerial Ethics	Ministerial Code
Ministerial conduct	Cabinet Manual	[Key Elements Guide]; Standards of Ministerial Ethics	Ministerial Code
Ministers and state machinery			
Relationship with civil service	Cabinet Manual	[Key Elements Guide]; APS Code of Conduct	Ministerial Code; Civil Service Code
Relationship with arm's-length bodies	Cabinet Manual	[Key Elements Guide]	NONE
Ministers and the law/administrative decision-making	Cabinet Manual	[Key Elements Guide]	The Judge Over Your Shoulder
Cabinet decision-making	Cabinet Manual; Cabinet Guide	[Key Elements Guide]; Cabinet Handbook	Ministerial Code; A Guide to Cabinet and Cabinet Committee Business
Elections, transitions, govt. formation			
Elections	Cabinet Manual	Guidance on Caretaker Conventions; Cabinet Handbook	General Election Guidance 2005; Directory of Civil Service Guidance
Transitions	Cabinet Manual	NONE	NONE
Government formation	Cabinet Manual	NONE	NONE
The Executive, Parliament and the legislative Process			
Relations with Parliament	Cabinet Manual	[Key Elements Guide]	Ministerial Code; Guide to Parliamentary Business
The legislative process	Cabinet Manual	[Key Elements Guide]; Legislation Handbook	Guide to Making Legislation
Official Information	Cabinet Manual	Freedom of Information 1982: Fundamental Principles and Procedures	Freedom of Information Guidelines
Practical and administrative guidance	Ministerial Office Handbook	NONE	NONE

2.20 Table 3 attempts to show the minimum number of documents necessary in order for Cabinet and/ or Ministers to have a basic understanding of key aspects of executive practice. In some cases, what is required as a “minimum” is a fine line to draw: the UK *Ministerial Code* does draw attention to the ministerial relationship with the civil service, but it is comparatively thin, and would be best bolstered by the *Civil Service Code*. Similarly, although there is a description of the roles and powers of the head of state in the Australian guidance documents listed, these significantly make no mention of the Governor-General’s role in government formation.

2.21 The Australian *Guide on Key Elements of Ministerial Responsibility* is in square brackets to indicate its now defunct status (discussed further below). Its absence has made executive guidance in Australia far less comprehensive and more difficult to follow.

2.22 As can be seen from Table 4, in the case of New Zealand, only three “documents” are necessary: the *Cabinet Manual*, the *Cabinet Guide* (in fact a webpage, or set of webpages) and the *Ministerial Office Handbook*.⁴ In Australia, the number of basic documents is higher, standing at around seven to eight documents. The UK has the most number of documents, standing at eleven at least; but this number should probably be higher, as there are two additional areas of executive action which require guidance: the devolution settlements, and relations with Europe and the European Union.

Table 4
MINIMUM NECESSARY GUIDANCE FOR CABINET AND MINISTERS BY NUMBER OF DOCUMENTS

<i>New Zealand</i>	<i>Australia</i>	<i>United Kingdom</i>
Cabinet Manual	[A Guide on Key Elements of Ministerial Responsibility]	Ministerial Code
Cabinet Guide	Cabinet Handbook	A Guide to Cabinet and Cabinet Committee Business
Ministerial Office Handbook	Federal Executive Handbook	Civil Service Code
	APS Code of Conduct	Directory of Civil Service Guidance, vols 1–2
	Guidance on Caretaker Conventions	Executive Agencies: A Guide for Departments;
	Legislation Handbook	Public Bodies: A Guide for Departments
	Freedom of Information 1982: Fundamental Principles and Procedures	The Judge Over Your Shoulder
		General Election Guidance 2005
		Guide to Parliamentary Business
		Guide to Making Legislation
		Freedom of Information Guidelines

3. MINISTERIAL GUIDANCE IN THE UK

3.1 The most salient characteristic of the key guidance documents on executive practice in the UK (see Table 5) is their fragmented and piecemeal nature. While the majority of the guidance documents listed can be found on the UK Cabinet Office website (for more on this, see Appendix 3 below),⁵ these are not gathered together in one place and the location of some documents is counterintuitive. The second salient characteristic about the available documents is that the majority are aimed at civil servants, not Ministers. Finally, the guidance varies in comprehensiveness and depth: from very detailed to broad and principled.

Table 5
KEY MINISTERIAL GUIDANCE DOCUMENTS IN THE UK

<i>Text</i>	<i>Length</i>	<i>Location</i>
Ministerial Code	28pp	http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx
Guide to Cabinet and Cabinet Committee Business	44pp	http://www.cabinetoffice.gov.uk/media/98307/guide_to_cabinet.pdf
Civil Service Code	2pp	http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_code.aspx
Directory of Civil Service Guidance, vols 1–2	71pp; 57pp	http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_guidance.aspx
Executive Agencies: A Guide for Departments	20pp	http://www.civilservice.gov.uk/Assets/exec_agencies_guidance_oct06_tcm6-2464.pdf
Public Bodies: A Guide for Departments		http://www.civilservice.gov.uk/about/resources/public-bodies.aspx
The Judge Over Your Shoulder	48pp	http://www.tsol.gov.uk/Publications/judge.pdf
General Election Guidance 2005	40pp	http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/electguide.pdf

⁴ There are also two important documents issued by the State Services Commissioner that provide additional guidance around elections and government formation. These are primarily for the public service but also for political parties and ministers to be aware of. These publications can be found at: <http://www.ssc.govt.nz/display/document.asp?NavID=114DocID=6694> and <http://www.ssc.govt.nz/display/document.asp?NavID=114DocID=6835>

⁵ <http://www.cabinetoffice.gov.uk/>.

<i>Text</i>	<i>Length</i>	<i>Location</i>
Guide to Parliamentary Business	n/a	http://www.cabinetoffice.gov.uk/parliamentary-clerk-guide.aspx
Guide to Making Legislation	n/a	http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html.aspx
Freedom of Information Guidelines	28pp	http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/publication_scheme/pdf/foi_guidelines.pdf
Devolution	n/a	http://www.cabinetoffice.gov.uk/devolution.aspx

3.2 The *Ministerial Code* is the central guidance document for executive practice. Previous versions of the Code were a mixture of principle and procedure,⁶ but in its current 2007 incarnation, the Code focuses strongly on the ethical facets of ministerial work. Procedural matters present in previous versions (such as Cabinet and cabinet committee business or the publication of Green and White papers) have been removed. The *Code* currently sets out a general statement about the responsibilities of Ministers; Cabinet responsibility; appointments; ministerial relations with departments; ministerial relations with civil servants and special advisers; constituency and party interests; private interests; the presentation of policy; ministerial relations with Parliament; travel; and the seven principles of public life. The standard format is to set out a general principle governing the area in question, and then provide some elaboration. The *Ministerial Code* is the creature of the Prime Minister: revisions to it may be drafted by the Cabinet Secretary, but it is ultimately the Prime Minister who authorises the *Code*'s publication.

3.3 The *Guide to Cabinet and Cabinet Committee Business* provides detailed information on Cabinet procedure. The content is “informative” rather than procedural and the Guide itself contains several flowcharts to explain various processes.

3.4 Although there is guidance on the relationship between Ministers and the civil service (in the form of the *Ministerial Code*, the *Civil Service Code*), guidance on broader “state sector” relations is weaker to non-existent. *Executive Agencies: A Guide for Departments* and *Public Bodies: A Guide for Departments* are directed at civil servants and are more concerned with implementation.

3.5 A number of guidance documents for civil servants have been gathered together and published in the *Directory of Civil Service Guidance*. The *Directory* consists of two volumes, one volume setting out briefly where guidance on various matters is to be found (e.g., copyright or machinery of government changes); the other being a compilation of already-published guidance documents. The guidance in the two volumes offered is useful. However, the *Directory* itself has not been updated in some time, the most recent version being published in 2000 under the direction of Sir Richard Wilson (then Cabinet Secretary). Thus, some of the matters covered in the *Directory* are out of date—for instance, the section on freedom of information notes that the Freedom of Information bill has yet to be enacted.

3.6 *Guide to Parliamentary Work* is directed towards officials; the main ministerial guidance on executive-legislative relations is a short section in the *Ministerial Code*. The *Guide to Making Legislation* is also directed at officials, setting out the various stages of the legislative process. It is written simply and is useful and informative.

3.7 *The Judge Over Your Shoulder* provides detailed guidance on administrative decision-making and the possibility of judicial review, but at 48-odd pages this is not a lightweight document. (Of course most administrative decisions are made not by Ministers but by civil servants; but Ministers themselves ought to have a modicum of knowledge about these matters).

3.8 The guidance documents on general elections (*General Elections Guidance 2005* is the most relevant document: there are others relating to European elections) are directed towards civil servants and those in agencies and NDPBs. There is no mention of the caretaker convention. The guidance documents mostly cover the period up to the election, but not what happens after an election. There is no discussion of the government formation process, or the head of state's role in this process.

3.9 Thus, in comparison with the other jurisdictions surveyed, the UK appears to be lacking in important respects. Set out below are the main omissions:

Guidance on the role of the head of state

3.10 The most serious omission in available guidance is the lack of any discussion of the role of head of state, either in the period leading up to a general election, or more generally—for instance, in a situation when the government has lost the confidence of parliament. The lack of guidance about the role of the Sovereign in these areas could contribute to media or public misunderstanding of the political neutrality of the monarchy.

⁶ On earlier versions of the *Ministerial Code* (previously *Questions of Procedure for Ministers*), see Amy Baker *Prime Ministers and the Rule Book* (Politico's Publishing, London, 2000).

The caretaker convention

3.11 There is very thin guidance on the role of an incumbent government in the election period (*General Election Guidance 2005*), and no guidance at all on the role of an incumbent government where a general election has no clear result—i.e., a hung parliament. There is also a question of whether or not the caretaker convention should apply more broadly to any situation where it is unclear who has the confidence of Parliament.

Clear guidance on ministerial relationships with departments, agencies and NDPBs

3.12 The relationship between Ministers, the civil service and departments is set out both in the *Ministerial Code* and the *Civil Service Code*, although some have argued for greater clarification.⁷ But there is only very thin guidance on the relationship that Ministers have with more “arm’s-length” bodies such as executive agencies and non-departmental public bodies (NDPBs). Although there are a variety of relationships between these bodies and Ministers, a broad statement could be made to clarify the general position.

An outline of the constitution

3.13 NZ, Australia and Canada all have descriptions of the constitutional framework within which Ministers work. These descriptions may be brief (Australia, Canada) or they may be more detailed (NZ). The UK has no equivalent; and a mere consolidation of its guidance documents could still leave a reader puzzled about the overall framework.

Europe

3.14 There is no general guidance on the UK’s relationship with Europe and the European Union. Given the growing interconnections between Europe and the UK, this seems an extraordinary omission.

Induction guide on day-to-day ministerial work

3.15 At present it would appear that what is given to a new ministerial incumbent depends very much on the department he or she works in; otherwise Gerald Kaufman’s *How to be a Minister* (1980) remains a DIY guide.

3.16 Finally there is no “narrative” which draws all this information together—this *might* be provided by a discussion of the constitution. There is also a question of audience: to whom is this executive guidance addressed? At present it would appear that most of it is directed at civil servants rather than ministers.

3.17 To end on a more positive note, the guidance on devolution under Ministers and Government Business is good: it is clear, succinct and covers the main points and principles of the devolution settlements. While it is located too many links away from the central website (see Appendix 3), this section is a model of how usefully to provide information on a difficult subject.

4. CODIFYING THE CONVENTIONS ON GOVERNMENT FORMATION AND CARETAKER GOVERNMENT

4.1 The most glaring deficiencies in the UK guidance are the absence of any explanation of the process of government formation; and the brief and inadequate explanation of the caretaker convention, to be found in the UK’s *General Election Guidance 2005*:

During an election campaign, the Government retains its responsibility to govern, and Ministers remain in charge of their Departments. Essential business must be carried on. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long-term character. Decisions on matters of policy on which a new Government might be expected to want the opportunity to take a different view from the present Government should be postponed until after the Election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.

4.2 By contrast New Zealand has a detailed and carefully articulated account of both conventions, in chapter 6 of the Cabinet Manual, entitled Elections, Transitions and Government Formation. Since the introduction of MMP in 1996, they have thought through the application of these principles and recorded them in growing detail.⁸ The Manual sets out the rules on government formation after an election; government formation mid-term; early dissolution of parliament; and the operation of the caretaker convention before and after an election, and mid-term. The key sections of the Manual are in Appendix 2, with the essentials summarised below.

⁷ Better Government Initiative, *Good Government: Reforming Parliament and the Executive*, available at: <http://www.bettergovernmentinitiative.co.uk/sitedata/Misc/Good-government-17-October.pdf>.

⁸ For the evolution of the Manual, see McLeay E, “What is the Constitutional Status of the Cabinet Office Manual?” Public Law Review 1999 March 1999 at 9–17; and Kitteridge R, “The Cabinet Manual: Evolution with Time” paper to 8th Annual Public Law Forum, 20–21 March 2006.

4.3 *Government formation*

- The process of forming a government is political, and the decision to form a government must be arrived at by politicians.
- Once the political parties have reached an accommodation, and a government is able to be formed, the parties will make public statements of their intentions.
- It is not the Governor-General's role to form the government or to participate in any negotiations.
- The Governor-General will abide by the outcome of the political parties' negotiations, and accept the political decision as to who can command the confidence of parliament.

4.4 *Mid-term transitions*

If the government loses the confidence of the House during its parliamentary term:

- the Prime Minister will advise that the administration will resign; and
- a new administration may be appointed from the existing Parliament (if an administration that has the confidence of the House is available);
- or an election may be called; and
- in the interim, the incumbent government continues in office, governing in accordance with the caretaker convention.

4.5 *Early election*

- The Governor General will grant a request for an early election, as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government.
- A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention. A caretaker Prime Minister must consult other parties on an early election.

4.6 *Caretaker convention*

- The caretaker convention applies after an election, until a new government is sworn in; and mid term, if a government loses the confidence of Parliament.
- The incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. It is likely to state that it is operating as a caretaker government.
- If decisions are required on significant or controversial issues, such decisions should: be deferred, if possible; handled by a temporary arrangement (eg extending a board appointment, or rolling over a contract for a short period); or made only after consultation with other political parties.
- Such decisions will be referred to the Minister, who must consult the Prime Minister in cases of doubt, or before approaching other political parties.

4.7 Not all the detail of the New Zealand rules is necessarily transferable to the UK, but the underlying principles are the same. The key points are that the process of forming a government is political, and the decision to form a government must be arrived at by politicians. It is not the Monarch's role to form a government, or to facilitate negotiations. The Monarch may occasionally wish to seek advice from experts, but her prime source of advice must be her responsible Ministers, who will inform her who can command the confidence of Parliament.

4.8 New Zealand has developed the rules in one respect where the UK might wish to follow. This is to provide that the caretaker convention should apply not just during and after an election, but also mid term, if the government has lost the confidence of the House. The Prime Minister continues to be the Queen's principal constitutional adviser, but the caretaker convention would help to ensure that he is doubly careful that his advice will command support across the House. Significant decisions will require consultation with other political parties, to establish whether the proposed action has the support of the majority of the House.

4.9 In New Zealand, the Cabinet Manual makes clear that governments are not bound by the caretaker convention in the period immediately before the election. However, it notes that "Successive governments. . . have chosen to restrict their actions to some extent at this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent. For example, significant appointments have been deferred, and some otherwise unexceptionable government advertising has been considered inappropriate during the election campaign, due to the heightened risk of perception that public funds are being used to finance publicity for party political purposes."⁹

⁹ New Zealand Cabinet Manual, para. 6.9.

5. DRAFTING A CABINET MANUAL

5.1 There are a number of considerations to keep in mind:

5.2 The target audience. Key executive documents are intended first and foremost for Ministers—the Prime Minister and his colleagues. Any draft Cabinet Manual must be acceptable to those in office, or those who could potentially take office. There is no point in drafting guidance which does not meet their approval.

5.3 The tone and language. The Manual may be drafted in a formal style but should not be legalistic. The New Zealand Manual provides a good example (see Appendix 2). The language is simple and informative: it is principle rather than rule based. Each chapter begins with an introduction and general principles, before going into practical details.

5.4 The need for flexibility. The manual provides a guide to how the centre of government works, not a restrictive set of rules. It needs to be drafted throughout to ensure sufficient flexibility for the government of the day.

5.5 The need for consultation. To be useful to successive governments, the Manual needs to command legitimacy outside as well as inside Whitehall. It needs to be shown in draft to the leaders of the main opposition parties, and possibly laid for approval before Parliament, though this does not happen in New Zealand.

5.6 The Manual needs periodically to be revised. In NZ, this occurs every five to six years, which is roughly two parliamentary terms. Any revisions undergo a similar process to the initial drafting procedure, involving consultation with relevant actors, although ultimately it is the Prime Minister who approves the changes. It is also expected that there may be some minor revisions during a change of government—for instance, in order to recognise unusual governing arrangements (e.g., the changes made to the NZ Cabinet Manual sections on collective responsibility in 2001, recognising a coalition partner’s right to “agree to disagree”).

5.7 This consultative process may help in promoting a sense of ownership in the draft manual, which ideally describes accurately in writing the practices of those consulted. Opposition parties may also need to be consulted, although this is at the discretion of the Cabinet Office and the Prime Minister. Academics may be consulted about proposed changes privately, as in NZ.

5.8 It is also worth noting the point made by former PM Helen Clark in the foreword to the Cabinet Manual the “the Cabinet Manual does not effect change, but, rather, records incremental changes in the administrative and constitutional arrangements of executive government. . .”

5.9 The manual should be made publicly available: it is a record of the internal working practices of the executive. This is something that the public ought to know about and have access to.

APPENDIX 1

KEY GUIDANCE DOCUMENTS IN NEW ZEALAND, AUSTRALIA, CANADA AND SCOTLAND

NEW ZEALAND

Key Guidance Documents for Executive Practice in New Zealand

<i>Text</i>	<i>Length</i>	<i>Location</i>
The Cabinet Manual	180pp	http://cabinetmanual.cabinetoffice.govt.nz/
The Cabinet Guide	n/a	http://cabguide.cabinetoffice.govt.nz/
The Ministerial Office Handbook	226pp	Not publicly available. It can be obtained from the NZ Ministry of Internal Affairs, Ministerial Services Section.

All the major guidance documents are found on the NZ Cabinet Office website.¹⁰ Guidance for the NZ public service is on the State Services Commission website.¹¹

The centrepiece of guidelines to executive practice in NZ is the *Cabinet Manual*. At 180 pages of large print (although only about 140 pages have substantive content), it provides cohesive and comprehensive guidance on a wide range of executive activities. It has been described by the current Secretary of the NZ Cabinet Office as “the executive’s own internal practical working guidelines.”¹² It has been publicly available since 1996.

The *Cabinet Manual*, beginning with a note outlining the basics of the NZ constitution, consists of eight chapters. These cover the Head of State; a broad discussion of Ministerial duties and powers; ministerial relationships with the state sector; Ministers and the law; Cabinet decision-making; elections, transitions and government formation; legislation and parliamentary relations; and official information.

¹⁰ New Zealand Cabinet Office: <http://www.dPMC.govt.nz/Cabinet/index.htm>.

¹¹ New Zealand State Services Commission: <http://www.ssc.govt.nz/display/home.asp>.

¹² Rebecca Kitteridge “The Cabinet Manual: Evolution with Time” (8th Annual Public Law Forum, 2006), available at: <http://www.dPMC.govt.nz/cabinet/reports-and-speeches/pdf/the-cabinet-manual-evolution-with-time.pdf>.

There are a number of matters to note about the *Cabinet Manual*. First, the Manual is not simply a code of ethical conduct: it gives guidance on a very broad range of matters. Second, the format is principled and procedure-heavy rather than being rule-based. There is also a coherence about the guidance: each aspect is dealt with in roughly the same depth and tone. Third, key players in NZ politics adhere to the *Cabinet Manual*. One of the first actions of a new administration is an affirmation of the *Manual*: the “leading” political party and those parties with executive responsibilities¹³ agree to be bound by the provisions of the *Manual*.¹⁴ Fourth, the *Manual* has a broad audience: the Head of State, those in the executive, and officials. Finally, while the *Manual* offers coherent and comprehensive advice on executive practices, those who make use of it insist that it is not a legal document: its authority derives from Cabinet. It is descriptive, not normative.

It is hard to put across the depth and quality of the *Cabinet Manual*'s coverage of issues: simply listing the contents does not do it justice. Three examples may illustrate this. The first example is the six-page description of the NZ constitution, written by Sir Kenneth Keith, then President of the NZ Law Commission and later Supreme Court judge. It is elegant and succinct, covering all key matters—sources, amendment, key principles and responsibilities of key actors. The second example is the chapter on elections, transitions and government formation, which includes in detail the principles covering elections (including the caretaker convention), mid-term transitions (for instance, where there is a change of Prime Minister) and dissolutions, and government formation. The third example is the chapter on Ministers and the public sector, which sets out not just the relationship between Ministers and officials, but also between Ministers and different kinds of arm's-length bodies.¹⁵

There may be contingent reasons for this depth—for instance, the comprehensive guidance on ministerial relationships with the public sector may stem from the strong commitment NZ governments have had for the new public management, which stresses clear, transparent relations between “principal” and “agent”. Similarly, the chapter on elections and transitions is the distillation of various experiences faced under proportional representation.

The *Cabinet Manual* is supplemented by relevant updates (“Cabinet Office circulars”), which are set out in the same format and published on the Cabinet Office webpage. These circulars include matters such as guidance on administrative arrangements for multiparty governance, and outlines of the annual legislative programme. Some circulars are incorporated into later editions of the *Manual*. The *Cabinet Manual* is updated every five to six years by the Cabinet Office: proposed revisions may be discussed with relevant parties (for instance, the chapter on legislation is sent to the Clerk of the Parliament; the chapter on Official Information is sent to the Ombudsman and the Privacy Commissioner), although ultimately it is the Prime Minister who approves the changes.

The *Cabinet Guide* is in fact a website devoted to the detail of Cabinet and Cabinet committee procedures. Originally part of the *Cabinet Manual*, it was removed in 2001 and placed online partly to maintain the Cabinet Manual's “principled” approach.

The *Ministerial Office Handbook* provides comprehensive guidance to Ministers and Ministerial staff on administrative and support services. The *Handbook* is not publicly available, although it can be obtained (if necessary) under an Official Information request. It is composed and revised by the Ministerial Services section of the Ministry of Internal Affairs. The Handbook covers such matters as ministerial offices and staff; finances and expenditure; support services; training topics; IT; transport (domestic and overseas); correspondence; protocol; security; and ministerial residences.

AUSTRALIA

Key Guidance Documents for Executive Practice in Australia

<i>Text</i>	<i>Length</i>	<i>Location</i>
Cabinet Handbook	40pp	http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf
[Guide on Key Elements of Ministerial Responsibility]	35pp	http://australianpolitics.com/executive/howard/pre-2002/1998_code-of-conduct.pdf
Standards of Ministerial Ethics	9pp	http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf
Federal Executive Council Handbook	45pp	http://www.dpmc.gov.au/guidelines/docs/executive_handbook.pdf
APS Code of Conduct	n/a	http://www.apsc.gov.au/conduct/index.html
Legislation Handbook	119pp	http://www.dpmc.gov.au/guidelines/docs/

¹³ Since the adoption of MMP, NZ governments are usually multiparty associations.

¹⁴ See, for instance, the National-Maori Party confidence and supply agreement, where the Maori Party specifies that those of its members with ministerial roles will adhere to the provisions of the Cabinet Manual with respect to their ministerial conduct: http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf.

¹⁵ The one matter which NZ is lacking is a code for special advisers, but this is currently being drafted by the State Services Commission.

<i>Text</i>	<i>Length</i>	<i>Location</i>
		legislation_handbook.pdf
Guidance on Caretaker Conventions	12pp	http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.pdf
Freedom of Information Act 1982: Fundamental Principles and Procedures	77pp	http://www.dpmc.gov.au/foi/docs/FOI_principles_procedures.pdf
Foundations of Governance in the Australian Public Service	141pp	http://www.apsc.gov.au/foundations/foundations.pdf

All the major guidance documents are found on the Australian Department of the Prime Minister and Cabinet website (under “Guidelines and procedures”).¹⁶ In terms of comprehensiveness, the “downgrading” of one key guidance document, the *Guide on Key Elements of Ministerial Responsibility*, may have reduced coverage. The only major flaw is the lack of official guidance on the role of the Crown (the Governor-General).

Currently, the key guidance document is the *Cabinet Handbook*, which sets out in detail Cabinet principles and procedures: the organisation of Cabinet; Cabinet conventions and principles; the Cabinet program and business; consultation; appointments; security; and in an annex a brief note on the caretaker convention. Curiously, there is no mention of the role and function of the Governor-General. The *Handbook* is formal in style—legalistic and with numbered paragraphs. It is heavily procedural in nature. This was first published by the government in 1983.¹⁷ The *Federal Executive Council Handbook* (equivalent to the Privy Council) is the Federal Executive Council’s equivalent of the *Cabinet Handbook*.

Previously, the *Cabinet Handbook* was supplemented by the *Guide on Key Elements of Ministerial Responsibility* (“*Key Elements*”). *Key Elements* was intended as a source of quick reference for ministers and staff, setting out in 35 pages key aspects of executive practice. No longer available on the DPMC website, it set out in summary form the basic principles and procedures for government at the Commonwealth (federal) level, each aspect dealt with in 1–3 pages. *Key Elements* covered the Australian constitutional and legal framework; ministries; Cabinet; the Executive Council; ministerial conduct; Ministers’ relationships with departments; administrative decision-making; ministerial facilities and services; parliamentary business; correspondence and travel. The language was plain; the style was informal and informative rather than legalistic. Originally issued by then Prime Minister John Howard, it has apparently fallen into disuse, perhaps because of the change in administrations—although chapter five of the guide has been updated and published as a separate document, *Standards of Ministerial Ethics*. Its absence means that there is no general introduction to executive government in Australia. There are some suggestions that the entire *Key Guide* is being updated.¹⁸

The *Australian Public Service Code of Conduct* also comes with a guide, the *APS Values and Code of Conduct In Practice: A guide to official conduct for APS employees and agency heads*, which sets out the practical application of the *Code*.

Guidelines on Caretaker Conventions provides comprehensive guidance on the caretaker convention—noticeably, it is only seen to apply to government action during the election period, and not in periods where it is unclear where the confidence of Parliament lies. Moreover, there is no mention of the role and function of the Governor-General under either situation.

Finally, attention should be drawn to the excellent *Foundations of Governance*: this provides comprehensive guidance for agency heads (the functional equivalent of permanent secretaries) to help them meet their obligations and responsibilities. It is the Australian Public Service (“APS”) equivalent of *Key Elements*, and is published by the Australian Public Services Commission, the body responsible for the APS. *Foundations* covers such matters as agency head relationships with Ministers; the Australian Constitution; delegation; APS values and code of conduct; whistleblowing; various legal obligations (e.g., anti-discrimination law); financial management and budgets; employment matters; government information; administrative decision-making; criminal liability; security; native land title and environmental issues. Much of the information provided is drafted by various federal agencies and consolidated by the Public Services Commission.

¹⁶ <http://www.dpmc.gov.au/guidelines/index.cfm>.

¹⁷ For a history of the Australian Cabinet Handbook, see Patrick Weller *Cabinet Government in Australia, 1901–06* (UNSW Press, Sydney, 2007).

¹⁸ See *Foundations of Governance in the Australian Public Service* (2009), which still lists *Key Elements* as an important reference document, and states that *Key Elements* is “being revised” at p26; and *Standards of Ministerial Ethics*, which states *Key Elements* will soon be “revised and reissued”.

CANADA

Key Guidance Documents for Executive Practice in Canada

<i>Text</i>	<i>Length</i>	<i>Location</i>
Accountable Government: A Guide for Ministers and Ministers of State	84pp	http://www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2008/docs/ag-gr-eng.pdf
Guide to Making Federal Acts and Regulations	206pp	http://www.pco-bcp.gc.ca/docs/information/publications/legislation/pdf-eng.pdf
Values and Ethics Code for the Public Service	44pp	http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/dwnld/vec-cve-eng.pdf
Access to Information Guidelines—General	n/a	http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13773&section=text
Policies and Guidelines for Ministers' Offices	83pp	http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/mg-ldm/gfmo-eng.pdf
Guidance for Deputy Ministers	n/a	http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/doc-eng.htm#TOC2_2
Guidebook for Heads of Agencies	n/a	http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=guide2/table-eng.htm

The key guidance documents for the Canadian executive are not easily located. Many of them can be found on the Privy Council Office (the Canadian equivalent of the Cabinet Office) homepage, but this requires some navigation.¹⁹ For instance, the key guidance document for executive practice, *Accountable Government*, is found under the rubric “PCO Secretariats/machinery of government secretariat”. But in fact, many documents are provided to new Ministers in an ad hoc manner in briefings by senior officials (for instance, information on conventions, relevant legislation and responsibilities).

The centrepiece of guidance on executive practice in Canada is *Accountable Government: A Guide for Ministers and Ministers of the State*. An 84 page document, it sets out in relatively formal prose the business of being a minister. It covers ministerial responsibility, portfolio responsibilities, standards of conduct, relations with Parliament, and consultation and coordination. In annexes are also set out, amongst other matters, a summary of Canada’s constitutional arrangements (which includes a thin outline of the head of state’s role) and the broad principles and procedures of Cabinet. It is produced by the Machinery of Government secretariat in the Privy Council Office.

The general approach of *Accountable Government* is much like the Australian *Guide to Key Elements of Responsibility*: it is a summary of principles, with detailed guidance found elsewhere—for instance, the annex on Cabinet process is only five pages. Thus while *Accountable Government* does cover a wide range of areas of executive action, detail is often thin. Having said that, *Accountable Government*’s coverage is very broad: it is an invaluable introduction to the work of the Canadian executive.

The *Guide to Making Federal Acts and Regulations* consists of the 1999 *Cabinet Directive on Law-Making* and then more detailed guidance on the legislative process. The *Directive* is the foundation document, setting out the objectives and expectations of Cabinet in passing legislation; the remainder of the *Guide* sets out the processes and procedures by which legislation (and regulations) is developed and enacted. The *Guide* is directed mostly at officials.

The senior public service equivalent of *Accountable Government* is the *Guidance for Deputy Ministers*. “Deputy Ministers” are the Canadian equivalent of permanent secretaries. *Guidance for Deputy Ministers* sets out in detail the responsibilities and accountabilities of Deputy Ministers: supporting Ministers; management of the Department; portfolio management; supporting Ministers in Parliament; responsibilities to parliamentary bodies; and accountabilities to the Prime Minister, Minister, the Clerk of the Privy Council, the Treasury Board and the Public Services Board. *Guidance for Deputy Ministers* while more comprehensive than *Accountable Government* (as it only deals with one kind of actor) is also principle-based rather than legalistic and detailed. There is also a *Guidebook for Heads of Agencies*, of a similar quality.

Some guidelines are found on the Treasury Board of Canada website, the Treasury Board being the body in charge of the federal public service. Guidelines to be found there include the *Values and Ethics Code for the Public Service* (the Canadian equivalent of the *Civil Service Code*) and the *Access to Information Guidelines* (on freedom of information).

¹⁹ PCO website: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&Page=index>.

The executive guidance documents on elections in Canada are not publicly available, although they do exist. Similarly, the Governor-General (Canada's head of state) is given an extensive briefing on his or her role, but this is also not publicly available. There is a very limited discussion of the role of the Governor-General in *Accountable Government*, but no real substance.

Policies and Guidelines for Ministers' Offices provides extensive information on administrative matters for Ministers, including topics like conflicts of interest, security, human resources, pay, benefits, leave, funding, travel, and the official language policy.

SCOTLAND

Key Guidance Documents for Executive Practice in Scotland

<i>Text</i>	<i>Length</i>	<i>Location</i>
Key Information for Ministers	51pp	Not publicly available
Ministerial Code	49pp	http://www.scotland.gov.uk/Resource/Doc/276226/0082926.pdf
Guide to Collective Decision-making	21pp	http://www.scotland.gov.uk/Resource/Doc/244314/0068319.pdf
Civil Service Code	2pp	http://www.scotland.gov.uk/Resource/Doc/76007/0061082.pdf
Freedom of Information Overview	13pp	http://www.scotland.gov.uk/About/FOI
UK General Election and by-election campaigns: Guidance to Scottish Government civil servants	n/a	http://www.scotland.gov.uk/Publications/2008/07/uk-election-guidance
Scottish Parliament Election Guidance 2007	n/a	http://www.scotland.gov.uk/Publications/2007/02/election-guidance2007
Handling EU Obligations	55pp	http://www.scotland.gov.uk/Resource/Doc/274450/0082138.pdf

The key guidance documents on executive practice in Scotland are relatively easy to locate on the Scottish government website.²⁰ Finding more specific guidance (such as information on elections or EU obligations), however, requires a wider search. In terms of comprehensiveness, the Scottish government has slightly more coverage than the UK, but apparently lacks guidance on administrative decision-making; government formation; and the caretaker convention.

The centrepiece of guidance on executive matters is the Scottish *Ministerial Code*. It is very much like the UK *Ministerial Code*, although there is more detail. It covers basic Cabinet procedure; legislation and parliamentary relations; ministerial duties and responsibilities; appointments; ministers and civil servants; constituency and party interests; planning matters; ministerial visits; the presentation of policy; ministerial private interests; and pensions. The First Minister is the ultimate arbiter in determining whether there has been a breach of the *Code*, and what consequences follow. As with the UK *Ministerial Code*, the focus is on propriety rather than “best (executive) practice”.

The *Guide to Collective Decision Making* is a detailed document given over to Cabinet procedure and processes.

The *Ministerial Code* and *Guide to Collective Decision-Making* is supplemented by *Key Information for Ministers*, a “rough guide” to ministerial life. *Key Information* sets out in frank, informal English the practicalities of ministerial life—what a minister's private and diary secretary does, claiming allowances, the key executive bodies and so forth. There is little discussion of principle or convention, although there is a brief section devoted to the civil service code. There is also a section outlining the budget of the Scottish government. *Key Information* was a compilation of material prepared ahead of the 2007 Scottish election and was not published at the time. The Scottish Government is currently reviewing the material provided to new Ministers. *Key Information* is an excellent document, which might be used as a model for other government developing guidance for new ministers.

These three documents are key: the other documents listed in the table above are what is available on the Scottish government website and cover key areas of executive practice (e.g. *EU obligations and Freedom of Information* overview). The Scottish *Civil Service Code* is virtually the same as the UK version; except that it has been amended to state Scottish civil servants owe their loyalty to the Scottish government.

²⁰ The Scottish government website: <http://www.scotland.gov.uk/Home>. Some of the main guidance documents are found under “About/Cabinet and Ministers”.

The guidance documents on elections are directed towards civil servants and those in agencies and NDPBs: these follow very closely the election guidance given by the UK Cabinet Office in relation to general elections. There is no mention of the caretaker convention. The guidance documents mostly cover the period up to the election, but not what happens after an election. The guidance document on Scottish elections notes (in the same language used in UK CO guidance on general elections) that Ministers are expected to defer, or at least exercise discretion about policy of a long-term character during the election, but there is no discussion of what happens in an extended period of government formation. This is odd, given that proportional representation makes government formation in Scotland much more prolonged, typically requiring a couple of weeks after the election.

APPENDIX 2

EXTRACTS FROM THE NEW ZEALAND CABINET MANUAL²¹

CARETAKER CONVENTION

General

6.16 On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or (after an election) until a government is sworn in following the government formation process. During such periods, the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. However, governments in this situation have traditionally constrained their actions until the political situation is resolved, in accordance with what is known as the convention on caretaker government.

6.17 There are two circumstances in which the government would see itself bound by the caretaker convention:

- (a) After a general election, one of the two arms of the caretaker convention applies until a new administration is sworn in. (See paragraph 6.19.)
- (b) If the government has clearly lost the confidence of the House, the caretaker convention guides the government's actions until a new administration takes office, following either negotiations between the parties represented in the current Parliament or a general election.

6.18 In both situations the government is likely to state explicitly that it is to operate as a caretaker government until the political situation is resolved.

Principles of the caretaker convention

Two arms of the convention

6.19 There are two arms to the caretaker convention:

- (a) where it is not clear who will form the next government (see paragraphs 6.20–6.23);
- (b) where it is clear who will form the next government, but they have not yet taken office (see paragraphs 6.24–6.25).

The principles that apply in each situation are set out below.

Unclear outcome

6.20 Where it is not clear which party or parties will form the next government following a general election or mid-term loss of confidence in the government, the following principles apply to government business (at every level).

- (a) In general terms, the normal business of government and the day-to-day administration of departments and other agencies in the state sector may continue during the caretaker period.
- (b) Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government (subject to paragraph 6.21).
- (c) Matters may arise, however, that would usually require decisions, such as those concerning:
 - 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; and
 - changes to existing policy.
- (d) Decisions relating to those matters should:
 - be deferred, if possible, until the political situation is resolved; or

²¹ The full manual is at: <http://www.cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>

- if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (for example, by extending a board appointment or by rolling over a contract for a short period); or
- if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue. (See also paragraph 6.32.)

6.21 Occasionally a significant policy decision that was made before a caretaker period will need to be implemented during the caretaker period. Usually the implementation of such decisions can proceed during a caretaker period. If the proposed action would be difficult or impossible to reverse, however, it may be appropriate to consult with other political parties about it.

6.22 The caretaker convention colours the whole conduct of government, and requires careful judgement by Ministers, public servants, Crown entities, and other state sector agencies as to whether particular decisions are affected.

6.23 No hard and fast rules are possible. Ministers may need to take into account various considerations (including political considerations), both on whether it is appropriate or necessary to proceed on a matter and on how the matter should be handled. Decisions will also be considered against the background that the incumbent caretaker government has lawful executive authority, until replaced or confirmed in office.

Clear outcome

6.24 Where it is clear which party or parties will form the next government but Ministers have not yet been sworn in, the outgoing government should:

- (a) undertake no new policy initiatives; and
- (b) act on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed.

6.25 Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed.

Decision-making process under the caretaker convention

Departments and other state sector agencies

Day-to-day administration

6.26 The day-to-day administration of departments and agencies in the wider state sector will (in general terms) continue during the caretaker period. However, departmental officials and board members and employees of other state sector agencies should always take into account the fact that they are operating in a caretaker environment, and exercise special care when making decisions during this time.

Departments

6.27 Most decisions to which the caretaker convention applies are those relating to significant or potentially controversial issues, issues with long-term implications, new policy initiatives, or changes to existing policy. In the usual course of events, these decisions will be referred to the Minister. The Minister will decide (in consultation, if appropriate, with ministerial colleagues and/or the Prime Minister) how the convention applies and how the decision should be handled. The department should be ready to provide advice (if required) on applying the caretaker convention, and the options for handling the decision in terms of the convention. The Secretary of the Cabinet is available for guidance.

6.28 On rare occasions, caretaker convention issues may arise in relation to matters that, under statute, fall solely within the decision-making authority of a chief executive or statutory officer. Where appropriate, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraphs 6.19–6.25) when making those decisions. The Secretary of the Cabinet is available for guidance.

Crown entities, state-owned enterprises, and other state sector agencies

6.29 The statutory provisions governing decision making within Crown entities, state-owned enterprises, and other state sector agencies impose different obligations from those applicable to decision making within departments. Cabinet expects, however, that agencies in the state sector will apply the principles of the caretaker convention (see paragraphs 6.19–6.25) to decision making during the caretaker period, as far as is possible (taking into account their legal obligations and statutory functions and duties). Cabinet also expects that the agencies will discuss with their Ministers any issues that have caretaker convention implications. For general guidance on applying the caretaker convention, the heads of Crown entities or other state sector agencies may wish to contact relevant departmental chief executives or the Secretary of the Cabinet.

Ministerial decisions

6.30 As a general rule, Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted. (See paragraphs 5.11–5.12.) Ministers may wish to discuss with their Cabinet colleagues whether the caretaker convention applies to a particular decision and how it should be handled. If Ministers are in any doubt about whether the caretaker convention applies to a particular matter, they should err on the side of caution and raise the matter with the Prime Minister or at Cabinet. If a Minister considers that a matter requires consultation with other political parties, the proposed consultation must be approved in advance by either Cabinet or the Prime Minister. (See paragraphs 6.31–6.32.)

Coordination and the Prime Minister's role

6.31 In cases where any doubt arises as to the application of the caretaker convention, Ministers should consult the Prime Minister. Final decisions concerning the caretaker convention rest with the Prime Minister.

6.32 All approaches to other political parties must be cleared in advance with the Prime Minister or Cabinet. Ministers should ensure that they notify the office of the Prime Minister as early as possible of all matters that may require consultation and action during periods of caretaker government.

Guidance on decisions about expenditure and the Official Information Act 1982

6.33 During a caretaker period, particular attention should be paid to decisions about expenditure, and requests under the Official Information Act 1982.

6.34 In relation to decisions on expenditure, there must always be authority from Parliament to spend money before expenditure is incurred. (See paragraph 5.65.)

6.35 The Official Information Act 1982 continues to operate during a caretaker period. In general, responding to requests for information should be seen as part of the day-to-day business of government, and should be dealt with in the usual way. On rare occasions, requests may raise issues that are likely to be of long-term significance for the operation of government and that require ministerial involvement. In this situation, it may be necessary to consider extending the time limit in order to consult with the incoming Minister. Any such extension must comply with section 15A of the Official Information Act 1982. For more information on the Official Information Act 1982, see paragraphs 8.13–8.51.

GOVERNMENT FORMATION

General

6.36 The process of government formation occurs most commonly following an election, but may be necessary if the government loses the confidence of the House mid-term. The principles and processes set out in paragraphs 6.37–6.42 apply in both post-election and mid-term government formation situations.

Principles and processes of government formation

6.37 The process of forming a government is political, and the decision to form a government must be arrived at by politicians.

6.38 Once the political parties have reached an adequate accommodation, and a government is able to be formed, it is expected that the parties will make appropriate public statements of their intentions. Any agreement reached by the parties during their negotiations may need to be confirmed subsequently by the political parties involved, each following its own internal procedures.

6.39 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).

6.40 Accordingly, the Governor-General will, by convention, abide by the outcome of the government formation process in appointing a government. The Governor-General will also accept the political decision as to which individual will lead the government as Prime Minister.

6.41 During the government formation process, the Clerk of the Executive Council provides official, impartial support directly to the Governor-General, including liaising with party leaders as required on behalf of the Governor-General. The Clerk facilitates the transition between administrations if there is a change of government. The Clerk assists the outgoing and incoming Prime Ministers and provides constitutional advice, as appropriate, on any proposed government arrangements. See paragraphs 1.30–1.34 for further information about the role of the Clerk of the Executive Council.

6.42 Parliament must meet not later than six weeks after the date fixed for the return of the writs for a general election (see section 19 of the Constitution Act 1986), although it may be summoned to meet earlier. If, following an election, a government has not yet been formed by the time that Parliament meets, the

Address in Reply debate may resolve matters as it provides an early opportunity for a confidence vote. If Parliament is in session following a mid-term government formation process, a vote of confidence may also usefully be initiated to demonstrate where the confidence of the House lies.

Outgoing Ministers

6.43 Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is sworn in, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of the entire ministry.

6.44 Section 6(2)(b) of the Constitution Act 1986 may require some Ministers in the caretaker government to resign before the government formation process has concluded, following a general election. Section 6(2)(b) requires any Minister who has not been re-elected to Parliament to resign from the Executive within 28 days of ceasing to be a member of Parliament. In this event, the Prime Minister may ask another Minister in the caretaker government to be acting Minister in the relevant portfolio(s), or may appoint a new Minister to the portfolio(s) (in a caretaker capacity).

6.45 Ministerial Services provides practical assistance to outgoing Ministers in relation to staff, office, and other practical arrangements. The Cabinet Office and Archives New Zealand provide guidance on the storage and disposal of Ministers' official papers. (See paragraphs 8.86–8.99.) The Cabinet Office also seeks information from outgoing Ministers about gifts they have received while in office. (See paragraphs 2.78–2.85.)

Appointment of a new government

6.46 Since the introduction of New Zealand's proportional representation electoral system, it has been the practice for a full appointment ceremony to be held when a government is formed after an election, even when the composition of the government has not greatly changed. The ceremony formally marks the formation and commencement of the new administration and marks the end of the caretaker period.

6.47 Section 6(2)(a) of the Constitution Act 1986 enables a swift transition between administrations. It provides that any candidate at a general election can be appointed as a Minister, before being confirmed as elected, so long as that Minister is confirmed as a member of Parliament within 40 days of being appointed to the Executive. Section 6(2)(a) does not apply to Parliamentary Under-Secretaries, who cannot be sworn in until their election as members of Parliament has been confirmed.

6.48 Further information on the appointment of Executive Councillors and Ministers is set out in paragraphs 1.23–1.24, and paragraphs 2.15–2.17.

APPENDIX 3

UK CABINET OFFICE WEBSITE

ORGANISATION AND ACCESSIBILITY

The website is not easy to navigate. A reader wanting to understand what are the practical working guidelines the executive follows in exercising government power would be hard-pressed to find the basic documents.

Location/organisation: material is somewhat haphazardly organised. Material related to “Ministerial and Government business” is located in a column on the left hand side of the title webpage (three-quarters of the way down). The *Ministerial Code* and *Civil Service Code* are found under “Codes of Conduct”, and not under “Ministerial and government business”—which would seem to be the key area for ministerial guidance. Guidance on freedom of information is found under “publications”, a link located at the top of the CO's title webpage. Some information is not even found on the CO website: the rules for judicial review are found on the Treasury Solicitor's Department website (*The Judge over Your Shoulder*); some information about governance of state bodies is found through a link under “propriety and ethics” on the CO page which links to the civil service webpage on guidance on public bodies (this guidance is directed more at civil servants).

Format: there is inconsistency about format—for instance, the guide to parliamentary business is in HTML (web) format only; the Ministerial code is in PDF format; the topics under Cabinet business are a mixture of HTML, word and PDF formats; some links to documents lead to external websites.

COVERAGE/CONTENT

On the face of it, the structure of the ministerial and government business webpage is quite logical; but coverage is limited. As noted earlier, some guidance is not even available on the CO website itself (e.g., guidance on administrative decision-making). Sometimes the coverage is rather haphazard (e.g., “consultation” only covers the release of statistics; the webpage on the European secretariat only sets out what the secretariat does, but says nothing about the relationship between the UK and Europe).

There are gaps in key areas (at least publicly)—see above.

Some links are dead.

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- Guide to Parliamentary Work—the link to “Europe (Guidance on the Parliamentary Scrutiny of European Union Documents)” is dead:
<http://www.cabinetoffice.gov.uk/parliamentary-clerk-guide/chapter1.aspx>
 - Ministers and government business: the link under “Government Communication” is dead.
http://www.cabinetoffice.gov.uk/ministers_and_government_business.aspx

Again, there is no “narrative” drawing all these matters together. There is surely an argument that a more coherently organised website and/or guidance would be beneficial to the public too. Just to take a topical example, clear guidance posted on what happens during a hung parliament or during government formation might calm an excitable media and nervous financial sector.

February 2010

Supplementary memorandum from Robert Hazell and Peter Riddell
A DRAFT CARETAKER CONVENTION FOR THE UK
MODELLLED ON THAT IN AUSTRALIA AND NEW ZEALAND

This supplementary Memorandum is submitted to make the case for having a proper caretaker convention in the UK. The Cabinet Office might be encouraged to develop better guidance if the Committee expressed its support for a stronger convention.

The current guidance is as follows:

“During an Election campaign the Government retains its responsibility to govern and Ministers remain in charge of their Departments. Essential business must be carried on. However, it is customary for Ministers to observe discretion in initiating any action of a continuing or long-term character. Decisions on matters of policy, and other issues such as large and/or contentious procurement contracts, on which a new Government might be expected to want the opportunity to take a different view from the present Government should be postponed until after the Election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.” (Cabinet Office General Election Guide 2005, Guidance Note G).

The guidance is deficient in three respects:

- It applies only during election periods.
- It offers detailed guidance about public appointments (in the next four paragraphs), but no further guidance about government contracts.
- It contains no guidance about how to consult the opposition parties, if that is required.

In Australia and New Zealand the caretaker convention also applies after an election, until a new government is sworn in. The underlying principle is that a government derives its political authority to govern from commanding the confidence of Parliament. If the government does not enjoy that confidence, it should be careful not to take any decisions which might tie the hands of a prospective government which does enjoy confidence. As the Australians put it, “A caretaker government has legal but not political legitimacy. Its role is to ensure the ordinary business of government continues until the outcome of the electoral contest is clear” (Davis *et al* 2001).

The text of the New Zealand caretaker convention is at pp 28–31 of our original submission. In essence it can be distilled into the following principles:

CARETAKER CONVENTION

- The caretaker convention applies after an election, until a new government is sworn in; and mid term, if a government loses the confidence of Parliament.
- The incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. It is likely to state that it is operating as a caretaker government.
- If decisions are required on significant or controversial issues, such decisions should: be deferred, if possible; handled by a temporary arrangement (eg extending a board appointment, or rolling over a contract for a short period); or made only after consultation with other political parties.
- Such decisions will be referred to the Minister, who must consult the Prime Minister in cases of doubt, or before approaching other political parties.

The immediate need in the UK is to develop an understanding that a caretaker convention should apply after an election, if it is not clear who can command confidence in the new Parliament, until that becomes clear and a new government is sworn in. This period is likely to last only for a few days, but it could possibly last weeks, if recent experience of parliaments in Australia, New Zealand, Scotland and Wales is any guide. In that circumstance it is desirable to have a shared understanding that the incumbent government continues to govern, but subject to a caretaker convention.

This is not just a matter of constitutional nicety, but could be vital to public policy, especially in a financial crisis. In New Zealand the outgoing National party Prime Minister Robert Muldoon faced a financial crisis after the 1984 election. He was urged to devalue the NZ dollar in line with the incoming Labour government's policies. He refused, and since he was legally Prime Minister, Labour were unable to prevail. It was only after three days of political and constitutional wrangling (during which Muldoon's own colleagues went to see the Governor General to urge his dismissal) that Muldoon relented and agreed to devalue. The result of Muldoon's refusal to devalue was later estimated at NZ\$800 million: over 2% of NZ's GDP in 1984.

It was after that crisis that New Zealand developed a proper caretaker convention. We do not want to wait for a similar crisis before we are forced to develop a caretaker convention here. Far better to put the convention in place so that everyone knows the procedure just in case we face a financial or other crisis at the start of a hung parliament. If the Committee gave its cross party support to that principle, the Cabinet Office could work out the details by developing a proper caretaker convention. The convention needs to apply after the election until a new government is sworn in; to cover government contracts and matters such as financial policy; and to explain the procedures for consulting the opposition parties.

REFERENCES

Davis et al, 2001. Davis G, Scales B, Lyn A and Wilkins R, "Rethinking Caretaker Conventions for Australian Governments" *Australian Journal of Public Administration* 60:3, 11–26 Sept 2001.
