

Political and Constitutional Reform Committee

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Written evidence published by the Committee to date for the inquiry into *Lessons from the process of government formation after the 2010 general election*

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LPGF 02	Dawn Oliver, University College London
LPGF 03	Professor Robert Blackburn, King's College London
LPGF 04	Hansard Society
LPGF 05	Letter from Mr David Laws MP
LPGF 06	Peter Riddell, Akash Paun and Catherine Haddon, Institute for Government

Written evidence submitted by Mr Graham Clowes (LPGF 01)

I am submitting this comment in my personal capacity as a voter. I am only answering one question as follows:

9. What are the implications, if any, of the fact that these proposals lack a popular mandate?

Not one voter actually voted for this Government. The coalition's programme has not been voted upon by the electorate and consequently the current Government cannot be said to have any mandate to pursue the programme they are following. This may not have been so bad had the coalition programme simply drawn from each of the participants manifestos, and to a certain extent this is what happened. However, the actual programme which has been pursued subsequently has consisted of initiatives which were neither in the party manifestos or indeed the coalition's published programme.

The result is that, at a time when the public has little confidence or respect for the political process (due in part to the expenses scandal), the current Government are bringing the system further into disrepute by pursuing a programme for which they have no mandate.

A government in Asia or Africa, who received no votes and pursued an agenda which had no mandate via the ballot box would be branded as a dictatorship or banana republic. We would suggest they were undemocratic, but this is the situation we find ourselves in currently. The implication is that the system is being abused and is not delivering the choice of the British people. The outcome is that confidence in the British electoral system diminishes further eroding the trust the British people have in the establishment.

I do however understand why a coalition has emerged, and appreciate that it is not viable or practical to call a rerun of an election simply because one party has failed to achieve a majority of seats. However, where a coalition emerges I believe that a standard five year term is too long. I understand that systems exist whereby a Government can be dissolved before the end of a five year term – but this is reserved for extreme situations and not within the control of the electorate. The five year term for a programme which does not have a mandate from, and potentially the confidence of, the electorate serves to undermine the integrity of the system.

The nature of any coalition government programme inevitably must be a compromise. It has to be created after an election so will not carry a mandate from the electorate. Therefore there should be a shorter term - maybe two years. This will enable the coalition to set out its programme and begin work – it will also enable the electorate to pass its judgement on that programme. If the programme is appropriate the coalition would be re-elected, and if so a five year term would be appropriate. This would however require that the coalition proposes a joint programme and stands for election that basis. It may be that the partners in a coalition arrangement may wish to stand separately at the two year point – but if that was the case then one could argue that the coalition was not sustainable in the first place. This early election requirement would also ensure that the policies pursued by any coalition would not be too extreme.

13 September 2010

Written evidence submitted by Dawn Oliver, University College London (LPGF 02)

9. *What are the implications, if any, of the fact that these proposals lack a popular mandate?*

As long as the proposals are put forward as being in what the proponents honestly believe to be the general or public interest, and the population will acquiesce, the lack of a mandate does not matter.

I do not consider a popular mandate to be essential for proposals for constitutional change. What is essential is that any proposals should be put forward in what the proposers honestly consider to be the public interest and should not be motivated by desires for partisan political advantage. That does not preclude a political party or MPs from proposing changes that would advantage particular sections of society: if that were not the case women would never be able to propose sex equality legislation and ethnic minorities would not be able to propose anti discrimination legislation. But the justification for reform proposals – indeed for any government policy – must be that it will promote general public interests. The mandate ‘principle’ (not really a principle at all) is supposed to promote the public interest principle, but of course it cannot be guaranteed to do so. A mandate can indicate popular consent to a new policy, and government by consent/acquiescence is an important principle of the UK constitution. However the fact of the matter is that no government for many decades has won the votes of a majority of those who voted in an election, given the fact that most constituencies are won on three or four etc cornered fights and the winning candidate seldom wins a majority of the votes cast. Thus winning an election does not necessarily grant a government a ‘mandate’.

11. *Should the head of government or Cabinet require the endorsement of the House of Commons, by way of an investiture vote?*

No. This would be too formal.

I consider it a positive aspect of our constitutional arrangements that politicians operate within a culture of responsibility and not just by rules, whether of a legal or purely conventional/political kind.

Compliance with a culture of responsibility/sociality is demanded by the general population and is widely reflected in press and media comment. Politicians are conscious of this. The public and press reaction to the expenses scandal illustrates this.

My understanding of general public opinion is that MPs of all parties, and any government, single party or coalition, and opposition parties ought not to act in a partisan way and ought to exercise their judgment as best they can in the public interest, honestly and without being improperly influenced by selfish considerations.

After the election it was obviously not possible for the coalition partners to insist on implementation all of their manifesto commitments. The population generally realises and accepts this. Our electorate is fairly sophisticated in these matters.

If matters such as the formation of a coalition or of a single party government required endorsement of the HC, then the focus might be on the letter of the rules rather than the spirit of the constitution, which assumes inclusiveness, trustworthiness and good faith, and punishes lack of trust heavily through public opinion. That would not be right – unless and until the culture of the constitution changes so that the general interest is considered not to exist but to be a myth. There is currently no sign of such a shift.

It would not be good for the country if combinations of parties which lack a majority could prevent the formation of a new government if the previous one no longer had a majority by

refusing endorsement. E.g. if there were two main but minority parties and say three or four smaller ones, the position could be reached where no government could be formed because the smaller ones vetoed every permutation, seeking to bargain for special deals. For instance, if Labour had formed a government in May on the basis of an investiture vote after doing deals with the nationalist parties that their regions/nations would receive special funding, that would have been a very partisan outcome and contrary to the general interest principle.

2 October 2010

**Written evidence submitted by Professor Robert Blackburn, King's College London
(LPGF 03)**

Professor Blackburn is Professor of Constitutional Law, and Director of the Centre for Political and Constitutional Studies, King's College London

Introduction

1 Earlier this month I forwarded to the Committee my article on “The 2010 General Election Outcome and Formation of the Conservative-Liberal Democrat Coalition Government”, giving a history and constitutional analysis of the five days in May, when the outcome of the election was uncertain and negotiations were taking place between the political parties on the formation of the new government. In this Memorandum, I offer some thoughts on the political circumstances and constitutional framework within which the events of May 2010 took place and the implications of what happened. My aim is to help inform the Committee's deliberations and contribute to their lines of inquiry on the lessons to be learnt from what occurred.

Aspects and special features of the 2010 election and its outcome

2 The UK system of parliamentary government is majoritarian in culture. Generally under our simple plurality voting system, there is an overall majority in the House of Commons for one party, giving its leader the right to enter 10 Downing Street. Therefore, the fact of the hung Parliament and the coalition it produced is of considerable political and historical significance, and what happened in May 2010 will serve to mould ideas and expectations about the future.

3 It is almost 80 years since the last peace-time coalition was formed, and it is 65 years since the end of Winston Churchill's coalition formed for the purposes of fighting the Second World War. It is the only coalition government to have been appointed during the reign of Queen Elizabeth II.

4 The arithmetic of the 2010 election result could hardly have thrown up a more difficult political and constitutional equation for the parties to deal with.

UK GENERAL ELECTION RESULT, 2010

	Votes (000s)	% vote	Seats won
Conservative	10,703,744	36.1	306
Labour	8,606,518	29.0	258
Liberal Democrats	6,836,198	23.0	57
SNP	491,386	1.7	6
Green	284,823	1.0	1
Independent	229,021	0.8	1
Sinn Fein	171,942	0.6	5
Democratic Unionist	168,216	0.6	8
Plaid Cymru	165,394	0.6	3
SDLP	110,970	0.4	3
Alliance	42,762	0.1	1
Speaker	22,860	0.1	1

5 This hung Parliament was of a markedly different nature to the previous occasion in

February 1974, where the two main parties were virtually even – the Conservative government gaining 297 seats, to Labour’s 201 – with the Liberals fielding a very small band of MPs, just 14. In 1974, because there were 23 other MPs (7 SNP, 2 Plaid Cymru, 12 members for Northern Ireland constituencies, and two independent Labour MPs), the Liberals could not offer either the Conservatives or Labour an overall working majority.

6 In 2010, by contrast, the Liberal Democrats were fielding a much larger parliamentary team of 57 seats. A figure of 326 parliamentary seats was needed for an overall majority, leaving the largest party, the Conservatives, 20 short. If the Liberal Democrats entered into an arrangement with Labour (the party with which they had the closer ideological affinity), their combined voting power in the Commons was greater than that of the Conservatives, 315 to 306. This would leave the regional and other Members holding the balance of power, though the Green and SDLP Members could be expected to vote with Labour, and the Unionists with the Conservatives. The SNP and Plaid Cymru Members would generally support Labour too, so pressures behind a “rainbow” or “progressive” alliance behind Labour remaining in office was certainly feasible.

7 The state of public opinion on events in May 2010 came against a backdrop of popular disengagement from politics, ambivalence over voting intentions, and a strong expectation that there would be a “hung” Parliament. Yet precisely what were the rules on government formation in situations of no single party gaining an overall majority in the House of Commons was the subject of widespread confusion and misunderstanding in the country and the media. In some respects this was aggravated by the Cabinet Secretary initiating novel procedures and ideas about government formation.

8 Popular expectation in the UK is that the transition of government after polling day is swift. In normal conditions the Prime Minister’s resignation and appointment of the opposition leader as successor takes place at Buckingham Palace the next morning, immediately followed by the new premier entering 10 Downing Street, minutes after the outgoing Prime Minister has left the premises with furniture vans by the back door. But in May 2010 no such immediate climax occurred, leaving the 24-hour mass media and country in a state of suspense over five days, Friday 7th to Tuesday 11th May. The 24 hours news media, a political fact of life since the 1990s, added to the sense of national drama and pressure on resolution on who would be Prime Minister.

9 A feature throughout this period was the intense confidentiality surrounding the communications and meetings between participants. There were virtually no off the record briefings to the media about the substance of the meetings or how the negotiations were going, in contrast to the normal state of affairs where the media and politics are closely intertwined. The only politicians actively involved in the negotiations who talked at all to the media beyond the formal statements or public utterances outside the Cabinet Office or other inter-party meeting places were on the Labour side.

10 A final observation to be made of the pressures wrought by public opinion and the media on government formation in 2010 relates to the televised party leaders’ debates, the first ever of their kind in the UK. Presidential in character, these high profile events served to invest the Liberal Democrat leader Nick Clegg with a far higher public profile and popularity. This will have been a key factor in David Cameron’s decision to embrace him as Deputy Prime Minister in the coalition. Indeed, so personal is Mr Clegg to the formation of the coalition government that no provision has been made in the coalition documents, discussed below, for the appointment of a new or different Deputy Prime Minister in the event that Mr Clegg resigned, died, or was deselected as Liberal Democrat leader.

The constitutional framework for government formation

11 The UK has a traditional constitution, where historical precedent tends to guide future conduct, particularly in areas where the legal basis for executive action – including government formation and prime ministerial appointment - is the royal prerogative. Therefore prior to the 2010 election a consideration of the events of February 1974, the last occasion when an electoral outcome produced no overall majority, was one way of answering the question of what were the constitutional rules under a hung Parliament in 2010.

12 A summary of what happened in February 1974 is as follows. The incumbent Prime Minister leading a Conservative government was Edward Heath, and the result of polling day on February 28, 1974, in terms of parliamentary seats won, had been Labour 301, Conservative 297, Liberal 14, SNP 7, Plaid Cymru 2, Northern Ireland parties 12, Others 2. So no party had won an overall majority, and any Labour claim to have the strongest mandate was offset by the fact that the Conservatives nationally won almost 300,000 more votes than Labour, or a 37.9 per cent share of the total vote compared to Labour's 37.1.

13 Mr Heath chose to remain in office over the weekend, and proceeded to attempt to form an agreement with the Liberal leader Jeremy Thorpe that would sustain him in government. He had meetings with Mr Thorpe at 10 Downing Street on the Saturday at 4pm and on the Sunday at 10.30pm, and indicated his preference for a coalition, with Mr Thorpe being offered a seat in Cabinet. Any possible deal foundered, however, after meetings of the Liberal parliamentary party and the Conservative Cabinet on the Monday morning, with Mr Thorpe's Liberal colleagues refusing to support any deal without a commitment from Mr Heath to enact proportional representation, and the Conservative Cabinet being unwilling to go further than offer a Speaker's Conference on electoral reform. On Monday early evening, Mr Heath visited the Queen at Buckingham Palace to tender his resignation, and Harold Wilson was invited to form his third Labour administration.

14 Reflecting on the process that had been followed, Mr Heath in his memoirs expressed the view, "I had a clear constitutional duty to see if I was best placed to carry on that responsibility". Rumbblings of Labour disquiet and murmurings of unconstitutional conduct had emanated from some quarters in the Labour party, but the Opposition leader, Harold Wilson, was content with Mr Heath's position. At Mr Wilson's meeting with the Labour parliamentary committee on the Friday, it was "resolved that none of us would make any news comment, claim or forecast over the weekend. The Conservatives still formed the Government. They had to decide whether to resign or seek to carry on."

15 Stated as simply as possible, the constitutional conventions on government formation (including in situations of a hung Parliament) were and are, firstly, that the incumbent Prime Minister has the first opportunity to continue in office and form an administration; secondly, that if he is unable to do so (and resigns, or is defeated on the Address or in a no confidence motion at the meeting of the new Parliament) then the Leader of the Opposition is appointed Prime Minister; and thirdly, it is for the political parties to negotiate any inter-party agreement for government among themselves without royal involvement. This is precisely what happened in 2010, as indeed it had happened previously in February 1974.

16 During the year preceding the election in 2010, a few constitutional specialists, including myself, explained this constitutional framework in a variety of publications and sessions with the press. Thus in my letter to *The Times* on 28 November 2009, I wrote,

Sir,

If there is a hung Parliament after the next general election, there will be no constitutional crisis (Daniel Finkelstein, “How to stop the Queen picking the next Prime Minister”, Opinion, Nov 25; and Mark Oaten MP, “We must head off the possible constitutional crisis if the result of the next election is close”, Letter, Nov 27).

There is already in existence an established procedure and basis for the resolution of who will be Prime Minister after a general election that produces a House of Commons with no overall majority for a single party. If this occurs after the 2010 election, the situation will be –

- *The incumbent Prime Minister has the first opportunity to continue in office and form an administration.*
- *If he is unable to do so (and resigns, or is defeated on the Address at the meeting of the new Parliament), then the Leader of the Opposition is appointed Prime Minister.*

... If no single party obtains an overall majority at the election, Gordon Brown is entitled to see if he can remain in office with the support of the Liberal Democrats to ward off a defeat on the Address (or no confidence motion) at the first meeting of the new Parliament. He would, of course, enter into talks about agreeing to implement some Liberal Democrat policies such as constitutional and voting reform as the price of survival in office.

But if, as the Liberal Democrat leader Nick Clegg suggested in a BBC interview (Andrew Marr Show) last Sunday, the Liberal Democrats only wish to negotiate with the party which received “the strongest mandate” at the election (it was ambiguous as to whether he meant more seats won or more national votes cast), Mr Clegg will indeed be in a position to force Mr Brown to resign and allow David Cameron into 10 Downing Street..

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Similarly, the constitutional position was set out in a widely distributed pamphlet co-authored by myself, a senior member of the Hansard Society, and two members of the House of Commons Library.

17 An important distinction to be drawn in interpreting the constitutional conventions on hung Parliaments is to realise that the right of an incumbent Prime Minister to remain in office and attempt to form a working Commons majority with others outside his party, does not mean or translate into a constitutional obligation upon third parties to do a deal with the incumbent Prime Minister or even to enter into any negotiations with him and his party. In other words, in 2010 it was open to Gordon Brown as incumbent Prime Minister to make overtures, but it was for the Liberal Democrat leader Nick Clegg to decide with whom he would forge an agreement for government.

18 In this context, the public statement made by Nick Clegg in a television interview on 22 November 2009 that he would regard the party with “the strongest mandate” as having won the election and therefore the one with which he would enter into negotiations first, was a highly significant political development, and indeed a portent for how the election outcome would eventually unfold in terms of the negotiations between the parties during the five days of 7th and 12th May. The emphatic way in which the Liberal Democrat leader presented his view to the public, later characterised as “the Clegg doctrine”, went as follows.

ANDREW MARR: Can I ask you about the opinion poll this morning, which suggests that we may be closer to a hung parliament than we all thought. Is your position that it would be the sort of morally right thing, if there was that condition, to back the party which got the biggest number of seats or votes, or what? ...I'm asking about your sort of philosophical approach to a situation where nobody had an overall majority... Would you feel it was the right thing to offer your support first to the party which had done best?

NICK CLEGG: Oh, I think it's just an inevitable fact, it's just stating the obvious, that the party which has got the strongest mandate from the British people will have the first right to seek to govern either on its own or reach a ...

ANDREW MARR: Well that's not, that's not been the case in the past...Ted Heath, for instance, as you know, discussed with the Liberal Democrats first before throwing in the towel. So we could have a situation where Gordon Brown was coming to you and saying ...

NICK CLEGG: No, I start from a very simple first principle. It's not Gordon Brown or David Cameron or Nick Clegg, who are sort of kingmakers in British politics. It is the British people. So the votes of the British people should determine what happens afterwards. You know that is what should happen in a democracy... It's whichever party - whether it's the Liberal Democrats, Labour or the Conservatives - have the strongest mandate from the British people. It seems to me obvious in a democracy, they have the first right to seek to try and govern either on their own or with others.

The Cabinet Secretary's intervention

19 Shortly before the 2010 election, the Cabinet Secretary started to prepare a "Cabinet Manual" describing the structure and operation of central government, including a chapter on electoral outcomes. A draft form of this chapter was shown to the House of Commons Justice Committee as evidence in its short inquiry into constitutional processes following a general election, and its content was discussed with the Cabinet Secretary Sir Gus O'Donnell at an evidence session held on February 24, 2010.

20 On hung Parliaments, the draft Manual reads,

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...

21 However it appeared from other parts of the draft Manual, and became clear during the Cabinet Secretary's evidence session with the Justice Committee, that a major purpose lying behind the new draft Manual was not simply to describe existing convention but to create new expectations and processes.

22 The first change in conventional practice desired by the Cabinet Secretary was to establish and extend the principle of a "caretaker" prime minister and government. Currently, between the public announcement of an election and polling day, a period of "purdah" has been said to exist, when the government will refrain from initiating any significant new government policy, executive action, or expenditure of public money, particularly if it represents a commitment that will bind the post-election government. Its democratic logic is essentially one of fairness: that a popular act could be seen as stealing

an advantage over the other parties; and particularly if a change of government is in prospect, the decision is rightly one for the new government to take.

23 The Cabinet Secretary told the Commons Justice Committee that he wished to now extend this “discretion” on the part of a government into the post-election period “when we do not have a stable government”. This would include any period of inter-party negotiation, as in fact occurred between 7th and 11th May 2010, and could extend considerably further, not just until the meeting of the new Parliament and Queen’s Speech, but arguably for several months thereafter if a minority government’s position in the House of Commons was considered politically fragile with a real possibility of losing a confidence motion or a second general election being called.

24 The new principle drafted on Sir Gus O’Donnell’s instruction for the draft Cabinet Manual was,

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 on.

25 The second change sought by the Cabinet Secretary was for the civil service to take over the hosting of any post-election inter-party negotiations. The draft Cabinet Manual included a paragraph stating,

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.

The precise details on the nature of support envisaged were unclear at the time the draft Manual was shown to the Justice Committee, with Sir Gus O’Donnell agreeing in discussions with members of the Committee that “we have some quite difficult practical issues to sort out as to how we make this work”.

26 During the five days in May, the actual support given by civil servants from the Cabinet Office appears to have consisted of making a room available at 70 Whitehall for the Conservative-Liberal Democrat talks and serving sandwich refreshments. It is thought there may have been one civil service intervention from the Treasury in giving some factual background information. No support appears to have been given for the Labour-Liberal Democrat talks, which were held in the House of Commons, although it is believed the Permanent Secretary at the Foreign and Commonwealth Office made his office available for the private meeting held between Mr Brown and Mr Clegg during the afternoon of Sunday 9 May.

27 One net consequence of the Cabinet Secretary’s initiative was to remove 10 Downing Street as the forum for the incumbent Prime Minister’s talks with the third party, as Mr Heath had had in 1974, as well as the regional parties. Some claim the Prime Minister thereby lost a valuable psychological advantage in terms of maintaining initiative and momentum over events.

- the precise details of its support given to the negotiations;
- what instructions were issued by the Cabinet Secretary to his staff on the matter;
- what requests were made by members of the negotiating teams in all three political parties; and
- how useful members of the respective negotiating teams found the civil service support and for what purposes.

29 Supporting the ideas of the Cabinet Secretary on transition of government arrangements were modifications made under the authority of the royal prerogative to the meeting of the new Parliament. The date for the first meeting of the newly elected Parliament in 2010 was put back one week longer than had been normal under post-1945 constitutional practice. The principal reason for this change, certainly as it was perceived by the media briefed by the civil service, was to facilitate post-election negotiations in the transition of government.

Mr Brown's "constitutional bind"

30 As stated above, the idea of the Cabinet Secretary was that the incumbent Prime Minister should remain in 10 Downing Street as a "caretaker" as long as it took for negotiations leading to a new government and agreed policy programme for office to be concluded. Although originally suspicious of civil service interference, during the five days of negotiations Mr Clegg came to enthusiastically adopt the Cabinet Secretary's views. As expressed shortly after the election,

I come from the perspective that if you're trying to do something very unusual, which is of course creating a coalition in a political culture such as ours which isn't used to coalition, this is very unusual. We were doing it in an extraordinarily compressed timetable. In most other countries where they negotiate coalitions, they take months to do it. We were doing it in a matter of hours and days when everyone was pretty tired after the election campaign. So suddenly to be told out of the blue the Prime Minister was going to you know march off to Downing Street and say, 'I'm fed up with this. You know I'm going to throw the towel in and I'm going to you know march off into the distant horizon', I thought was not the right way of going about things.

31 However our political culture, and the popular expectations of the media and country during the five days in May, was not yet ready or primed for this "caretaker" idea. Gordon Brown found himself in an extremely difficult position of personal and professional embarrassment on Tuesday 11 May, once it had become clear the Opposition leader would become the new Prime Minister. The combination devised by the Cabinet Secretary of displacing Number 10 as the central forum for resolving who would form the next administration, and encouraging the opposition parties to take as long as they wanted in finalising a policy deal, left Mr Brown in a constitutional bind. Some of the mass circulation press were being vitriolic in presenting their view to the public. "Whitehall property scandal – squatter holed up in No 10 – Man, 59, refuses to leave house in Downing Street", ran one of the Sun's front pages during the five days. It was this factor, above all, that motivated Gordon Brown to resign abruptly on Tuesday evening, May 11, even though it seems the Cabinet Office, and Buckingham Palace officials taking their lead from the civil servants, were putting him under some pressure to remain in post until the next day or even longer.

The political parties and their leaders

32 One further noteworthy aspect of the five days of negotiations was the role of internal party procedures. The Conservative and Labour leaders were procedurally free to negotiate as they thought fit, consulting only those they wished to do for tactical advice.

33 The Liberal Democrat leader, Mr Clegg, alone was bound by party rules on the matter, which were –

Conference notes the absence of specific constitutional provisions which clearly define the Party's approach to gaining positive consent to proposals for an important change in strategy or positioning: agrees that:

(i) in the event of any substantial proposal which could affect the Party's independence of political action, the consent will be required of a majority of members of the Parliamentary Party in the House of Commons and the Federal Executive; and

(ii) unless there is a three-quarters majority of each group in favour of the proposals, the consent of the majority of those present and voting at a Special Conference convened under clause 6.6 of the Constitution; and

(iii) unless there is a two-thirds majority of those present and voting at that Conference in favour of the proposals, the consent of a majority of all members of the Party voting in the ballot called pursuant to clause 6.11 or 8.6 of the Constitution.

Thus under party rules, there was this “triple lock” of constraints binding Mr Clegg before entering into any agreement with another party. The resolution governing the procedure was passed by the Liberal Democrat party conference in 1998, at which time there were concerns among activists about its then leader Paddy Ashdown's ideas for closer relations with Tony Blair's New Labour government.

The coalition partners' agreements for government

34 On the substance of the post-election agreements between the Conservative and Liberal Democrat leaderships, four documents were published in May, shaping how the coalition government would operate, two dealing with policy, two with process. Collectively, these documents and the accompanying statements made by the party leaders represent the constitutional principles and working arrangements for the Conservative-Liberal Democrat coalition government.

35 The first of these, published as a simple seven page stapled document on 11 May, was launched by the two party leaders at their media conference the day after taking office. It set out the issues that needed to be resolved between the two parties in order to establish a “strong and stable government”, and said it would be followed in due course by a final Coalition Agreement, covering the full range of policy including foreign, defence and domestic policy issues not covered in the preliminary document. Eight days later on 20 May, a HM Government document gave the further elaboration on the parties' agreements, entitled *The Coalition: Our Programme for Government*.

36 The Coalition Agreement reads and looks like an election manifesto, although its moral authority in terms of representing a democratic mandate for government is open to debate which the Committee may wish to explore with some specialists in political philosophy.

37 The nature and procedures for the Conservatives and Liberal Democrats joint working arrangements were finalised between the party leaders last, and is contained in a document entitled Coalition Agreement for Stability and Reform. It needs to be read alongside the fourth key document of the coalition, the new revised version of the Ministerial Code. Whilst Stability and Reform document goes to the heart of the political partnership of the two parties, the Code has a more formal status so far as the Cabinet Office and machinery of government is concerned.

38 The Stability and Reform agreement is a concise, three page summary of essential working arrangements, under the headings of “composition of the government”, “collective responsibility”, “functioning of the government”, and “support for the government in Parliament”. At the crux of the power relationship between the parties and their respective leaders lies the constitutional fact that the Prime Minister has the executive powers of the royal prerogative at his disposal. These include the key powers of ministerial appointment, transfers, and dismissals; public appointments, including peerages in the second chamber; and control over the agenda and arrangement of Cabinet proceedings. Unsurprisingly therefore, consultation processes with the Deputy Prime Minister feature strongly throughout the Stability and Reform agreement.

39 More complex and politically sensitive is precisely how disagreements are to be managed and resolved, and how each party leader (particularly the Deputy Prime Minister) will deliver the support of his party in parliamentary votes crucial to the life of the coalition government. The well-known principles of collective Cabinet responsibility – confidentiality of proceedings and the public appearance of unanimity - are emphatically endorsed in the Coalition Agreement for Stability and Reform. They are stated to apply “unless explicitly set aside”, and this is mirrored in the new version of the Ministerial Code. The agreement takes into account, however, that demands for collective responsibility must be matched by allowing ministers to present their views and be involved in relevant consultations and discussion.

40 Carefully constructed machinery has been created by the two party leaders to sustain the coalition and swiftly resolve any issues between the two parties. The most senior component in this is the “Coalition Committee”, which has the status of being a formal Cabinet Committee. It is co-chaired by David Cameron and Nick Clegg, and comprises an equal number of Cabinet members from each party. It meets weekly, or as required. Below it is the Coalition Operation and Strategic Planning Group, which is designated an informal working group (not a Cabinet sub-committee), comprising four members, two from each party.

41 Across the new structure of Cabinet Committees established by the Prime Minister, each Committee has a chair from one party and a deputy chair from the other party, and if any unresolved issues arise between members of the different parties on any of the Committees, they are to be referred to the Coalition Committee.

42 So too, the Coalition Agreement for Stability and Reform carefully sets out the principles aimed at securing support for the coalition government in Parliament. “Ministers will be responsible for developing and maintaining a constructive dialogue with Members of both Parliamentary Parties”, the agreement reads, and “the two Parties will aim to ensure support for Government policy and legislation from their two Parliamentary Parties, except where the Coalition Programme for Government specifically provides otherwise”. The document provides that any exceptions allowing dissent must be specifically agreed by the Coalition Committee and Cabinet.

Concluding thoughts

43 Some key political and constitutional lessons to be learnt from the process of government formation at the 2010 election are that –

- In the event of a hung Parliament, it is the political leaders in consultation with their parties (under specific party procedures, where applicable) who by negotiation determine who will be Prime Minister and form the government.
- The House of Commons has no direct role in formalising a new administration, which is a royal prerogative act of the monarch. The Committee may wish to consider whether a formal vote of confidence should now take always place in the Commons, consistent with the proposal for this procedure in the event of a censure motion and alternative government taking office under the terms of the Fixed-term Parliaments Bill [Bill No 64 of 2010-11].
- The monarchy accepts that it has no proactive role to play in government formation, though it closely follows events in order to offer any support necessary, including the ceremonial acts of receiving the resignation of the outgoing prime minister and inviting his/her successor to take office and form an administration.
- The Cabinet Secretary has taken the initiative in developing constitutional practice on government formation. His purpose is to encourage negotiating parties to establish a detailed policy programme for government, whilst maintaining a caretaker government in office whilst the negotiations are conducted. However, the process by which this initiative was, and is, being conducted is questionable.

44 The Committee may therefore wish to consider –

(a) whether it should inquire into the changes and whether they were shown to be necessary or desirable;

(b) whether the pre-election preparations for implementing the Cabinet Secretary's changes were adequate or need improvement in a similar future situation, for example in the quality of support given to the incumbent Prime Minister in the role as "caretaker", and in developing public expectations about transition of government arrangements; and

(c) whether it is intended that the Cabinet Manual is a public document of constitutional authority; and if so, whether the degree of public consultation outside Whitehall has been sufficient, and whether as a process for reform this should now be developed further by a cross-party parliamentary body such as the Committee itself and/or by a minister responsible to Parliament.

9 October 2010

Written evidence submitted by the Hansard Society (LPGF 04)

The Cabinet Manual

1. The drafting of the Cabinet Manual amounts to partial codification of aspects of our constitutional arrangements. With one exception (the extension of the rules governing the purdah/caretaker period beyond the election until a government formed) it did not set out anything that is constitutionally 'new', rather the novelty lay in setting out the existing arrangements (both conventions and legislation) in clear written form. That chapter six on elections and government formation was published in draft form before the rest of the manual was understandable due to the pressing nature of the political and electoral circumstances that pertained in spring 2010 and the understandable desire of both the civil service and Buckingham Palace that the arrangements should be clear to the politicians, media and the general public in the event of a hung Parliament at the general election.

2. The original draft was revised to take account of comments made at the Justice Committee's public session on 24 February and it was this revised draft that was used by the civil service in May 2010. This revised draft was not published due to a lack of time before the election was announced - we therefore do not know exactly how the changes were made. A number of issues arise:

a. The Justice Committee recommended that the wording in relation to the extension of the purdah/caretaker period should be clarified and strengthened but how this was subsequently achieved is not in the public domain. The guidance needs to be clear in setting out how the opposition parties are to be consulted if action beyond that usually permitted in the purdah /caretaker period is deemed necessary by the incumbent government. In April - May 2010 two specific situations arose – the closure of air space following the eruption of the Icelandic volcano, and the deteriorating economic situation and problems specifically in relation to the Greek economy – where the conventions of the purdah/caretaker period might conceivably have come under pressure. In the latter case the Chancellor, Alastair Darling MP, did consult his opposite numbers, George Osborne MP and Vince Cable MP, about the ECOFIN meeting he attended over the course of the weekend immediately following the election. In the absence of any significant criticism of the handling of this event it would suggest that the wording of the revised draft did provide the politicians and the civil service with the necessary guidance to deal with such situations.

b. Additionally, the position about what support the civil service can provide to inter-party negotiations needs to be clear, albeit flexible, in light of the political permutations that might emerge. In May 2010 the civil service appear to have played a very limited role. However, in the event of a minority government being formed and some form of supply arrangement being reached it is conceivable that an opposition party(ies) might seek some civil service support and policy advice if only on an ad hoc basis. In 1977-78 during the Lib-Lab Pact, for example, some, albeit limited, civil service support was provided to the Liberal Party leader, David Steel, through the workings of the inter-party Joint Consultative Committee whose secretariat was staffed by civil servants from the Privy Council Office. Throughout the period of the Pact government ministers steadfastly refused to answer questions about the Joint Consultative Committee, including its resourcing arrangements, in the House of Commons on the grounds that it was an inter-party not a governmental arrangement. This clearly stretched the boundaries of accountability. In February 2010 the Cabinet Secretary indicated to the Justice Committee that he and his fellow Permanent Secretaries would have to come up with some guidance 'about what constitutes the right level of support' to give to the parties because they might be supporting a party which then turned out to be in opposition to the government. If such guidance were developed, it should be incorporated into the revised Cabinet Manual chapter.

c. The drafting of the chapter was handled largely by officials within the Cabinet Office in consultation with a small number of eminent constitutional experts. The House of Commons Justice Committee was then consulted on the draft. For political reasons associated with the proximity of the general election the parties themselves, although consulted, did not want to be closely associated publicly with the document for fear of how it would be interpreted. However, there is now time for a proper period of consultation with a wider range of interested individuals and bodies thus ensuring that a broader range of opinions and ideas are brought to bear on the document than was possible with the small number of constitutional experts hitherto consulted. Thus:

- i. the final draft of the chapter of the Cabinet Manual should be published for further consultation and consideration;
- ii. the full draft of the Cabinet Manual – which Sir Gus O’Donnell had previously indicated would be completed soon after the general election – should be published at the earliest opportunity for consultation;
- iii. it should be made clear which minister at the Cabinet Office now has ministerial responsibility for the process and is therefore accountable to Parliament for it.

Government formation – issues arising

3. The previous benchmark for negotiations in the event of an uncertain election result was the three days of February/March 1974. That has now been pushed to five days by the events of May 2010. It is likely that in future this limit can, if required, be pushed still further given that the events of May demonstrated that political and financial collapse need not follow an inconclusive election result as many had threatened and feared. However, clearly constraints on the ability of parties to conduct negotiations over a longer period remain: the longer that talks go on the stronger will be the media and market pressures, and the parties themselves will come under increased internal strain (in relation to confidentiality, leaks etc).

4. In constitutional terms the only test for government formation is whether or not it is able to command the confidence of the House of Commons in the votes at the end of the Queen’s Speech. This year the Queen’s Speech debates and votes did not conclude until 8 June. There was therefore a month between the election and the actual demonstration, in constitutional terms, of political certainty with regard to the formation of the government. Were the period for inter-party negotiations to require more than five days then this period of constitutional uncertainty might be extended still further in the future. In the event of the negotiation of a minority government, it is also conceivable that a government might be in office for five weeks or more following an election during which period it would not necessarily be clear whether they commanded the support of the House of Commons. This cannot be regarded as ideal. There is therefore a strong case for holding an ‘investiture vote’ (as for example in the Scottish Parliament) to confirm the identity of the Prime Minister and Government shortly after Parliament reconvenes, perhaps after the Speaker’s election, rather than waiting for the later date of the conclusion of the Queen’s Speech debates.

5. It has been suggested in some quarters that Prime Minister Gordon Brown’s decision to resign on the evening of 11 May was precipitous because the coalition agreement between the Conservatives and Liberal Democrats had not been finalised. The incumbent Prime Minister had a constitutional obligation to stay in Downing Street until such time as the political position was clear as to who could form a government. There is clearly a difference between the point of political clarity with regard to the identity of the future government and the point of readiness in terms of that government being ready to assume the reins of office in full. Our constitutional system does not provide for a formal period of transition and therefore political clarity takes precedence over subjective perceptions of readiness. When, for example, would the coalition government in-waiting have been deemed ready to take over from the caretaker government: when the inter-party agreement

was completed by the negotiating teams; when the agreement had been endorsed by the Liberal Democrat Party via its triple lock mechanism (which had there been any real opposition in the party could have added a week or more to the process); or when, for example, all appointments had been agreed (the new Prime Minister took a week to complete the appointment of his ministerial team)? Any one of these scenarios would have left Gordon Brown in Downing Street for anything between an additional day or a week or more. Politically, if not constitutionally, such a delay would not be deemed appropriate. .

6. It was decided this year that Parliament would reconvene on the 18th May, a week later than the usual timetable adopted after the general election. This implemented a recommendation of the Modernisation Committee in 2007 in order to facilitate improved induction and orientation of new members of the House. The Hansard Society is currently conducting a new study – A Year in the Life – exploring the experience of new MPs in their first 12 months in post, part of which explores their views on the induction programme that was offered. Our interim findings suggest that the induction programme was well received by new members. The extended timetable certainly helped and we would recommend that it be repeated after the next general election with consideration given to extending it by a further week in order to improve it still further. This would also beneficially relieve some of the pressure on inter-party negotiations in the event of an uncertain election outcome.

Salisbury Convention

7. The coalition's policy commitments reflect a meshing of the two parties' manifestos with a number of additional measures that did not appear in either of their manifestos. In terms of a popular mandate most members of the public will have had only a broad sense of each party's policy commitments and few will have read the manifestos prior to marking their ballot paper on election day. In political terms however, the emergence of measures that are not contained in either manifesto may have implications once the legislation reaches Parliament as it is conceivable that members of the House of Lords might not feel bound by the terms of the Salisbury Convention and amend or reject the legislation accordingly. There has long been a legal academic debate about whether the Convention really exists anymore, but this could be put to the test if peers feel that they are on safe political ground in challenging the government on an item of its legislative programme. Whether this constitutional convention unravels will ultimately be a matter of peers' political judgement – if they sense strong public support for their stance they may feel empowered to face down the government. On contentious issues, particularly of a constitutional nature, they may therefore not feel bound to acquiesce to the will of the Commons if the proposed measures do not carry the authority of having been manifesto commitments. If this occurs, we could face a political and constitutional crisis. Ultimately however, whether it comes to pass will depend on the circumstances of the moment and the application of acute political judgement as to the attitude and reaction of the general public on the issue.

15 October 2010

Letter from Mr David Laws MP to the Clerk of the Committee (LPGF 05)

Dear Steven

Re: Evidence session on the Process of Government Formation after 2010 General Election

With regard to the question put to me on a draft confidence and supply agreement, I can confirm that what was offered in this on electoral reform was a free vote in the House of Commons on an AV referendum.

14 October 2010

Written evidence submitted by the Institute for Government –

Introduction

In the year and a half prior to the May 2010 general election the Institute for Government considered a number of issues relating to preparations for, processes and consequences of UK general elections and subsequent government formation. This work included the publication of two reports, *Transitions: Preparing for Changes of Government* and *Making Minority Government Work* (the latter published jointly with the UCL Constitution Unit) and looked in particular at the implications of an unclear electoral result, or hung parliament.

Subsequently, the Institute in general, and the authors of this submission in particular, followed the election and government formation process very closely, and provided comment to numerous media outlets as events were unfolding. In the paragraphs below we set out our responses to six of the specific questions posed by the Political and Constitutional Reform Committee inquiry into the 2010 government formation process.

What constitutional and practical lessons are there to be learned from the process of government formation after the 2010 general election?

In the six months before the election there was wide agreement on the need for better understanding about the constitutional conventions for an unclear election result by politicians, civil servants, and the media and in the City – as well as the general public. Alongside this were questions about how prepared these groups were. The outcome of the election result itself has reinforced the importance of this understanding and the need for more coherent preparation.

The main gain was the public discussion ahead of, and after, the general election about the constitutional conventions surrounding an unclear result. The decision by the Cabinet Office to publish the chapter of a draft Cabinet Manual that dealt with the subject was timely and practically useful.

Another precedent set was in managing, and potentially changing, expectations about the time needed for this process to be allowed to take its course. The media, financial markets and politicians saw that government did not fall apart – and, indeed, operated smoothly – over the five days, instead of the usual one day, that it took to form a new administration. The experience of the 2010 election may have made it easier, in future, for there to be a less hurried process of government formation.

Were there any departures in practice from the principles of government formation set out in draft before the general election? Were these justified?

The events following the 2010 general election were a specific test for the draft Cabinet Manual chapter on government formation. However, it is important to note that the process of government formation did not see departures in practice from the principles set out in the draft. There were, however, evolutions from past practice.

One area in which the draft conventions marked a shift was in the role of the Civil Service in facilitating the negotiation process. This was not entirely unprecedented – members of the Civil Service were involved in facilitating negotiations in February 1974. What was new was the move towards formalising this role, as embodied in the permission given by Prime Minister Gordon Brown to the Cabinet Secretary for the Civil Service to support the coalition negotiations between the Opposition parties. This development was part of a wider effort to ensure that the process was more transparent than in the past. In the event, the Civil Service appear to have played a very limited direct role in the coalition negotiations during the immediate post-election period, but did play a considerable role in the process of developing the more detailed second Programme for Government that was drawn up after the coalition took office.

Another evolution was in the extension of purdah from Election Day until a new government was formed – affecting new appointments, new contracts and ensuring consultation with Opposition leaders on any major policy issues. More specific definition of the ‘caretaker’ role, of a government remaining in office following an unclear result but before it is clear who was likely to be able to command confidence in the House of Commons, could be seen as a departure from previous practice. The wording and detail of these principles were an extension of the pre-election ‘purdah’ conventions. However, there was one area in which further clarity may be required. Namely, how to determine what constitutes a ‘stable’ government, meaning one to which the caretaker convention would not apply. Attempting to clarify this matter in the draft Cabinet Manual was a sensible step. However, introducing a Scottish-style ‘investiture’ vote (discussed below) might be a more effective way of providing clarity.

Was the draft Cabinet Manual chapter on elections and government formation drafted in a satisfactory way, and has the subsequent consultation been adequate?

Given the pressures of time in which the draft Cabinet Manual chapter was produced the process was about as good as could have been expected. The Cabinet Office did talk to outside experts and, crucially, the Justice Committee held a hearing and produced a report. Now, with more time available and the ability to reflect upon the Election result itself, there is clearly a role for Parliament in being consulted on the draft of the full Cabinet Manual, though it should remain the property of the Cabinet Office.

What impact did media pressure have on the position of the incumbent Prime Minister and coalition negotiators?

The impact of media pressure on the position of the incumbent Prime Minister and coalition negotiators was clearly considerable. However, this pressure was markedly less than many had feared in the period before the election – considering the expansion and immediacy of media and 24 hour news compared to 1974, let alone concerns about the potential reactions of financial markets. One reason for this may have been the efforts to educate media and markets, including by the Institute for Government, in the period before the election, as well as the behaviour and messages of politicians in the period after the results began to suggest an unclear result. Education and public discussion of the possibility of the process taking longer does appear to have mitigated its effects. Clearly, however, there are still lessons that can be learnt, particularly in terms of how other countries approach the period following an election result and whether the UK process is rushed in a way that is detrimental to the quality of governance.

A particular question of interest is whether the Prime Minister should have gone to the Palace at the time he did. He left at the point when it had become evident that he could not remain in power, and that David Cameron was the only political leader able to form a government that could command confidence in the House of Commons, although it remained uncertain whether that might be through minority government with ‘supply and confidence’ support from other parties or formal coalition. Under existing conventions this course was constitutionally correct; he was able to recommend to the Monarch who his successor should be, and further consideration of the exact form that the government would take was subsequent. However, there is a case to be made that there should be a longer handover period after the election whatever the result. This would ensure that an outgoing PM would wait until not only his/her successor, but also the composition of the new government was known. Thus it is not merely a question of media pressure, but of political and personal pressure which is inherent in a system accustomed to seeing a handover of power within a day of a general election result – something not seen in any other comparable democratic system.

Are there more satisfactory models for coalition and government formation in use elsewhere in the world, or in other parts of the United Kingdom?

One major difference between government formation in the UK and elsewhere in the western democratic world is the time set aside for this process. The five-day government formation period in May 2010 was long in British terms, but remarkably short compared to many other western democracies. Allowing for a slightly slower pace in future might be sensible, since an overly compressed timetable can lead the parties to put to one side difficult decisions or to agree upon policies without sufficient consideration. Certainly, we

would not desire months of negotiations as in the Netherlands or Belgium, but two weeks or so, as is common in Scotland, Canada and New Zealand, might strike a sensible balance between the two extreme positions.

In some systems, including Scotland and Wales, there is also a statutory time limit for the government formation process, or at least for the election of a First Minister (28 days in both cases). Given that the Government proposes (in its Fixed Term Parliaments Bill) to place in statute a 28-day limit for government formation in the event that a no confidence motion is passed during the lifetime of a Parliament, it would be worth considering whether a similar provision at the beginning of a Parliament would also be desirable.

In the devolved systems, and also in some European legislatures including Germany, heads of government (and sometimes other Cabinet ministers too) formally take office only after having been nominated by means of an ‘investiture’ motion in the legislature. In the final section of our submission we set out reasons why introducing a similar mechanism at Westminster might be beneficial.

Finally, in other countries such as New Zealand and Canada, an outgoing Prime Minister is expected to remain in office (in a caretaker capacity) until the new government is fully ready to assume power, even after it is apparent that there will be a change of power. Thus in 2008, the outgoing New Zealand PM Helen Clark remained in office for 11 days after the election while the victorious National Party negotiated ‘confidence and supply’ agreements with smaller parties. Establishing such a convention in the UK (perhaps through the Cabinet Manual) could provide for a clearer transfer of power from one fully-formed government to another, and avoid excessive haste in concluding negotiations.¹

Should the head of government or Cabinet require the endorsement of the House of Commons, by way of an investiture vote?

In *Making Minority Government Work*, the Institute for Government (in partnership with the UCL Constitution Unit) concluded that there were arguments in favour of holding an investiture vote following a general election. This change could be made without undermining the personal prerogative powers of the Crown, as it could be on a motion that simply made a recommendation to the monarch as to whom to appoint as PM (as is the case in the Scottish Parliament).

First, a formal vote among MPs on who should be invited to form the new government would be more comprehensible to the general public than the current mechanism for testing the confidence of a new government – the vote traditionally held during or at the end of the Queen’s Speech debate.

Second, an investiture vote would make explicit the fact that governments in the UK are made and broken on the basis of their ability to secure the confidence of the House of Commons. This public education function could become particularly important in the

¹ Had such a convention been in place in May 2010, Gordon Brown would have been expected to delay his resignation until the coalition agreement between Conservatives and Liberal Democrats had been finalised, rather than resigning as soon as it became apparent that David Cameron would lead the new government one way or the other.

event that the leader of the *second* largest party emerged as the person best able to form a government, when questions of legitimacy may come to the fore in public debate.

Third, if it were unclear whether or not a prospective PM enjoyed the confidence of parliament an investiture vote would clear up the uncertainty relatively quickly. If the answer was in the negative, then an alternative government could be formed at that stage, rather than waiting for the Queen's Speech vote which may be some weeks later. The case of 1923-24 springs to mind, when six weeks elapsed between the election and the defeat of Prime Minister Stanley Baldwin in a confidence vote.

Fourth, if an election result were very close, such that more than one party leader had plausible aspirations to form a government, debate on the investiture motion would offer an opportunity for the competing leaders to state their cases, and for parties or Members

holding the balance of power to explain their reasons for backing a particular candidate. This would help to assuage fears that government formation following an inconclusive

election takes place largely behind closed doors and away from public scrutiny.

Fifth, putting government formation so transparently in the hands of the House of Commons would reduce the chances of the monarch being drawn into the political process of determining who is best placed to form a government.

Peter Riddell, Akash Paun and Catherine Haddon

14 October 2010