

House of COMMONS  
MINUTES OF EVIDENCE  
TAKEN BEFORE  
JUSTICE Committee

**constitutional processes following a general election**

*Wednesday 24 February 2010*

LORD BUTLER OF BROCKWELL AND LORD TURNBULL OF ENFIELD

PROFESSOR ROBERT HAZELL, MR PETER RIDDELL

and PROFESSOR VERNON BOGDANOR

**SIR GUS O'DONNELL**

Evidence heard in Public Questions 1 - 128

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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

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Witnesses: **Lord Butler of Brockwell**, a Member of the House of Lords, and **Lord Turnbull of Enfield**, 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 of Enfield: 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 of Enfield: 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 of Enfield: 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 of Enfield: One of the features is that we choose our ministers from the executive.

**Q8 Chairman:** From the legislature.

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

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 of Enfield: 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 of Enfield: 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 of Enfield: 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, and you can see where support really lies, who is bluffing and who is not; and 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 of Enfield: 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 of Enfield: 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. That is 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 of Enfield: 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 of Enfield: 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 of Enfield: 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 of Enfield: It may well be the case.

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

Lord Turnbull of Enfield: 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 Tyrie:** 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 of Enfield: 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, and it is now the accepted practice that those directions which are regular but not frequent are reported to Parliament, it would not be Parliament, but 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 of Enfield: 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 of Enfield: This mechanism is yet to be developed.

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

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

**Q44 Chairman:** Triumph of hope over experience!

Lord Turnbull of Enfield: 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.

**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 of Enfield: 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 of Enfield: 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 of Enfield: 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 of Enfield: 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 of Enfield: 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 of Enfield: 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.

## **Memoranda submitted by Constitution Unit, UCL, and Institute of Government**

### **Examination of Witnesses**

Witnesses: **Professor Robert Hazell**, Constitution Unit, UCL, **Mr Peter Riddell**, Senior Fellow, Institute of 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 wholly clarity about the position of the Prime Minister in such circumstances. It seems to me the Prime Minister derives his authority to advise the Queen from the fact that he has the support of Parliament, and that obviously is normally the case. If you have a hung Parliament situation 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, that is in no sense binding. In that sense I think it is not wholly clear; and that must be right, otherwise a Prime Minister, if he could advise in those circumstances, could advise something entirely mischievous, and he is certainly not in a position to seek a second dissolution in those circumstances. This seems to me to relate to the very fundamental principle that is behind the whole issue of hung parliaments, namely that we have a parliamentary system of government, and the test is always the view of Parliament as to who should be the next Prime Minister, and the role of the Queen is obviously to endorse that view. I think a good slogan might be: it is Parliament who chooses, Parliament that 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 1896: in each case the argument was to test whether Parliament would support the Prime Minister, and to show the public that the centre party in 1924, the Liberals, were putting into power a Labour government. That is certainly right: 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 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 1923/4 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 been in no way actively involved in seeking out governments. 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 possibly 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 is it 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 it in Westminster because to get a government out you need, as it were, a positive majority against it under our system, which is sometimes difficult to achieve when you have a number of minority parties. There was a general agreement in Scotland after the last election to sustain a minority government because of special circumstances. But I think it 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 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, I think on paper, and 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 we have had is there any doubt, and were there ever to be doubt the Queen could give that 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 arrangement 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 in normal circumstances 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 and 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 and they perhaps would not want a rapid second election either. 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: This 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 give the example that you gave of 1974 and I think the public took the fairly straightforward view that Edward Heath had lost the election. He had had a majority, he called an election and he lost that majority; but the constitutional position, as we have discussed, is quite different - that Edward Heath 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, 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 issue the Cabinet manual publicly. 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 think there has been a lack of explanation here. I think there is a further area where there is a difference between public perception and what could happen in a hung Parliament, 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." - that 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 difference and the public view is that we, the public, choose the government and, of course, that 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 tension, 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. I take your point, Dr Whitehead, and I think it 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 longer than that, 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 to 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 to an electoral college the current Prime Minister would meet Parliament and seek a vote of confidence but give a promise that he would promise to resign as Party Leader; he would institute the procedure for electing a new Leader, which would take three or four weeks, and when that happens he would resign; and 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 probably not viable, 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 - and that happened in South Africa in 1939 when a Prime Minister who lost the support of his Cabinet 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; but the Queen ought not to be asked to make a decision to refuse a dissolution based 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, from the minority government 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 are not justiciable but on the question of coalition I think there would be a need for some machinery to resolve disputes or disagreements or any conflict between the parties involved, and 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 government but the Lib-Lab pact in 1977 to 1978 because if you have such an arrangement, in addition to the normal conflicts in Cabinet government between one minister and another you may have 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 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 Mayer 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 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 Tyrie:** 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 Tyrie:** 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 you we cannot publish them to Parliament because we do not have a Parliament to publish them to, but we would just publish them on a government website or make them publicly available.

**Q92 Mr Tyrie:** 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 Tyrie:** 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 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 previous Prime Minister, we all know 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 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 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 do 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 a real question to my mind about 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 manage 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.

**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 Tyrrie:** 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 carefully drafted Whitehall statements, 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 Tyrrie:** 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 Tyrrie:** 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.

**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.