Written evidence submitted by the Institute for Government (GFE 03)

1. We welcome the Inquiry by the Political and Constitutional Reform Select Committee into the question of Government formation after an election without a clear result. There were many lessons from the 2010 General Election result and its aftermath, and there have been a number of useful studies and recommendations since.\(^1\) With the possibility of another Hung Parliament at the 2015 General Election many of these issues have increased salience. An Inquiry at this stage is therefore useful to identify and explore areas for concern, explain some less clear aspects of the past conventions and current procedures, but also to ensure a public airing of these issues.

**Restrictions on government activity following an election with no overall majority**

2. The restrictions on Government activity following an election with no overall majority are based on the long-standing restrictions that occur during the election campaign period but differ in important ways. These restrictions on government activity are similar to those that occur in other countries under what is often referred to as a ‘caretaker convention’.

3. After the dissolution of Parliament and the start of the formal campaign restrictions on government activity come into force for both ministers and for the Civil Service. These are intended to ensure that the government machine is not used inappropriately for campaigning whilst also ensuring that ‘essential business’ is able to continue.

4. As the Cabinet Manual explains, the government retains its responsibility to govern and ministers remain in charge of their departments during this time. However, ‘it is customary for them to observe discretion initiating any action of a continuing or long-term character’ – meaning they should defer making major policy decisions, signing large or contentious procurement contracts or significant long-term commitments such as senior public service appointments. Where postponement would be ‘detrimental to the national interest or wasteful of public money’, the guidance suggests they either make temporary arrangements or consult with the Opposition.

5. During election periods, permanent secretaries appear to be able to request – or threaten to request – letters of direction as a means of ensuring that the conventions around use of the government machine are followed. In essence, this makes it explicit that the minister is

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overruling civil service concerns, and will take responsibility for the consequences of their instructions. The Cabinet Manual states that civil servants can ask for a letter of direction on the same grounds as in normal circumstances (propriety, regularity, value for money or feasibility). However, the Manual also states that the principles of the restriction of government activity ‘will be relevant to the application of those rules’, implying that ministerial action contrary to those restrictions would in itself be considered grounds. In this event, the direction should normally be made public immediately.

6. The degree to which ministers govern under the same restrictions following a hung parliament is not wholly clear. The Cabinet Manual states that ‘immediately following an election, if there is no overall majority, for as long as there is significant doubt over the Government’s ability to command the confidence of the House of Commons, many of the restrictions [from the pre-election period] would continue to apply’. In other countries this is referred to as a caretaker government. However, the UK version has avoided this term. Furthermore, the Cabinet Manual’s wording is ambiguous, particularly in only stating that ‘many of the restrictions’ that apply during the election campaign would also apply during this period.

7. For the 2015 election, the restrictions on government activity should be more of a theoretical than a practical problem. Because of the Fixed Term Parliament Act and the certainty about the date of the election, the government and the civil service have been able to plan ahead to avoid any decisions both during the campaign and in the weeks afterwards. Furthermore, because of the need for legislation for many measures with spending implications, it is hard to take many decisions quickly. All of this means that, in most circumstances, key decisions and appointments will be deferred. In the case of unexpected events or decisions, the convention on temporary arrangements or consultation with the Opposition comes into play. On 9th May 2010 the then-Chancellor, Alistair Darling travelled to an urgent Ecofin meeting to discuss an EU bailout after consulting with his then shadows, George Osborne and Vince Cable.²

8. The end of the period of ‘caretaker’ government is also not clear in the current UK guidance. The current Cabinet Manual guidance only says that the end of these restrictions ‘depends on circumstances, but may often be either when a new Prime Minister is appointed by the Sovereign or where a government’s ability to command the confidence of the Commons has been tested in the House of Commons’. It is therefore not clear at what point, prior to a vote in Parliament in which the government’s ability to command confidence is demonstrated, these restrictions can or should remain in place.

**Forming a new administration**

9. In the UK, the arrangements whereby a Prime Minister forming a new administration can demonstrate they are able to command the support of the House of Commons is traditionally by passing a vote on the Queen’s Speech. However, in the event of a hung parliament, the process of who attempts to form a new administration is dependent upon

² See Riddell and Haddon, ‘Transitions: Lessons Learned’, p. 19. Darling voted for the support package, but under Qualified Majority Voting the decision would have been approved without UK support
who is considered most likely to be able to command the confidence of the House. The procedure and practice of this may not be clear to public and media.

10. It is first important to remember that a government needs to continue in office. This is the reason why Gordon Brown was right to remain in place in 2010. However, with uncertainty about whether or not the incumbent government would still be able to command a Commons majority, or whether another would be better placed, such a government would be expected to adhere to the restrictions to the pre-election period.

11. This importance of having a prime minister in place, and thereby government, is also why the Sovereign must appoint a new prime minister on the resignation of the incumbent. Therefore there needs to be clarity about who that should be. The Sovereign of course plays no part in making that decision.

12. In the aftermath of the election result, parties may negotiate in whatever fashion they choose. There is no convention that the incumbent government has the first opportunity to negotiate with other parties. However, its incumbent status may mean that, if it is unclear whether it could command confidence, the incumbent government has the first opportunity to test its majority in the Commons, regardless of other negotiations.

13. In the UK, historically, an outgoing Prime Minister has often offered advice as to who should be called for – in recent decades almost inevitably the Leader of the Opposition. However, as 2010 showed, it is not clear that this will only occur when another candidate has a fully-forged coalition or workable arrangement with smaller parties. Gordon Brown resigned when it became clear to him that he would not be able to put together a coalition and thereby command a majority. In those circumstances, David Cameron appeared more likely to form a minority or coalition government, but the negotiations with the Liberal Democrats were not complete.

14. Usually the new Government’s majority is first tested in the Commons at the votes following the Queen’s Speech, which may be delivered three weeks after the election. It is not clear from the Cabinet Manual to what extent and for how long the Government is bound, by convention, to the restrictions on activity. Again in practice it could not begin legislating until after this point. However, a new government may not wish to portray itself as ‘caretaker’ at a time when it is attempting to convey its authority to other parties.

15. In other countries there is a clearer process to establish who is able to form a government. In Scotland and Wales, a legally required vote is held within 28 days of the election in which the Parliament/Assembly formally nominates the next First Minister (in the form of a recommendation to the Queen as to who should be appointed). This ensures more transparency about how a government has shown itself to be viable, and provides a distinct moment at which it replaces the previous government.

16. Whether or not Westminster would benefit from a similar process, until it has been properly debated and with the necessary time to amend Standing Orders, it would not be practical to make this change before May, whatever may happen in the long-run. A different question is whether or not the vote on the Queen’s Speech, usually after a few days of debate on the speech, is brought forward in order to establish certainty. This is possible as there is no
requirement for the speech to provide great detail or set out legislation. The date for the speech is announced upon the Dissolution of Parliament.

**Negotiations between political parties on government formation**

17. As the above discussion sets out, the UK has an ‘unordered’ process of Government formation. This also means there is no agreed practice for how parties negotiate with each other. As discussed, it is up to the parties with whom and on what they negotiate. There is also no formal reason why the largest party should have the first opportunity – though of course that may be a factor in the decision of the parties.

18. One question for 2015 is whether the process of negotiations may take longer, or need to take longer than the 5 days between the election and the appointment of David Cameron as Prime Minister.

19. It is important to note that in 2010, the negotiations between the parties actually took longer than 5 days. When the Liberal Democrats formally agreed to enter into Government with the Conservatives, the two parties produced a Coalition Agreement outlining the agreement they had reached. However, this document was later superseded by the more detailed Programme for Government, which was published 13 days after the election. In many other countries, there is no such two-stage approach to forming a coalition: instead, a government is usually not formed until a fairly detailed agreement is reached, which is one reason why the process takes significantly longer than 5 days in countries such as Germany and the Netherlands.

20. This time, a longer period of negotiation might be more likely as parties seek to pin down more clarity on any agreement, but also to consult with their wider parties. Some flexibility is possible, by moving back the date of the Queen’s speech. The date for Parliament’s return is set and the first order of business is the election of a Speaker and can only be moved by a new proclamation. After this a few days are normally allowed for the induction of MPs.

21. As well as taking longer, getting to a fuller agreement (whether for coalition or any other kind of formal agreement between parties) may also require revisiting the question of the role of the Civil Service.

22. The current edition of the Cabinet Manual states that leaders of the political parties involved in any negotiations may ‘seek the support of the Civil Service... organised by the Cabinet Secretary with the authorisation of the Prime Minister’. Such support would then be ‘focused and provided on an equal basis to all the parties involved, including the party that was currently in government’. In 2010 such support was offered, but not given. In Scotland, Civil Service support was provided during both the 2003 and 2007 negotiations.

23. In evidence to the Public Administration Select Committee in January 2015, the current Cabinet Secretary, Sir Jeremy Heywood has stated that he envisages any role to be ‘largely logistical. It is up to political parties to decide what their programmes are, and if it gets to a position where no party has got an overall majority... that will be matter for the parties themselves to discuss amongst themselves. The Civil Service does not have a role in coalition negotiations as such.’

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3 Sir Jeremy Heywood, Oral evidence: Whitehall: capacity to address future challenges, HC 669, 27 January
24. The use of the Civil Service in any such negotiations is ultimately up to the Prime Minister and then to the parties concerned. However, as parties get into more detail on policy and look for a fuller agreement, it may require more clarity on costing, legislation and implementation issues. The Cabinet Secretary has set out that a role for the Civil Service may also include ‘factual questions about costing and so on’\(^4\), but it is not entirely clear whether this covers the role the Civil Service might play in a more extensive agreement.

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