



The UK Constitution and the 2015 Election

An explanatory note from the Institute for Government

The conventions and guidelines governing the work of ministers and civil servants during election campaigns and the process of forming a new government can be complex and are not universally understood. This short paper sets out the general guidance on government and civil service activity in the 2015 election period, highlighting some little-known aspects of the conventions, and outlines the process of establishing a government in the event of a hung parliament.

After the dissolution of Parliament on 30 March and the start of the formal campaign, restrictions on government activity come into force for both ministers and civil servants. These are intended to ensure that the government machine is not used inappropriately for campaigning, while permitting it to continue pursuing essential business.

The restrictions for ministers are a convention set out in a letter from the prime minister to ministers. The restrictions on the Civil Service are set out in guidance published by the Cabinet Office. A third document, the Cabinet Manual, also describes the position, but is not the source of authority on the issue.

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 making other 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.

These restrictions on ministerial action are based on custom not law and the prime minister remains the final arbiter on them. The Cabinet Manual is vague about how any breaches should be managed, though if civil servants have concerns about a ministerial decision during this period they may be able to request a formal and published instruction to proceed in spite of their misgivings (see below under 'letters of direction').

The restrictions on civil service activity are more formal and detailed. The Cabinet Office's 'General Election Guidance 2010' covered all aspects of how to handle the election period – such as responding to requests for information, and officials' behaviour within devolved administrations and non-departmental public bodies – and left regulation and clarification to departmental permanent secretaries, the Cabinet Office's Propriety and Ethics Team and, ultimately, the cabinet secretary. During the election campaign civil servants will go into 'purdah' – essentially meaning that while they may answer factual queries, they will keep public statements to a minimum and take great care to avoid doing or saying anything that could be seen as helpful to the governing or opposition parties.

Policy costings

Since 1987 ministers have been able to ask civil servants to cost opposition policies, on the basis that – as the Treasury website says – ‘since departments provide factual answers to MPs and peers about the costs of identifiable changes in activities or benefits, there is no objection to officials providing ministers with similarly factual information about clearly identified opposition policies’. There were 38 such costings of Conservative policies between January 2008 and January 2010, and in January 2015 the Treasury released 29 papers costing Labour policies.

However, these costings occur in the pre-campaign period. As with the other restrictions on government activity, the election guidance indicates that during the campaign ‘officials should not... be asked to devise new policies or arguments or cost policies for use in election campaign debates, and departments should not undertake costings or analysis of opposition policies during a campaign’.

Letters of direction

In normal times, permanent secretaries – as the ‘accounting officers’ responsible to Parliament for money spent by their departments – may, if asked by a minister to act in ways which might be challenged on legal (regularity), propriety, value for money or feasibility grounds, request a ‘letter of direction’. In essence, this makes it explicit that the minister is overruling civil service concerns, and will take responsibility for the consequences of their instructions. 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. 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 (directions are normally only revealed after the event, via the Public Accounts Committee).

Pre-election contacts between the Civil Service and the Opposition

The convention surrounding pre-election meetings between the Civil Service and the Opposition has become more formalised in recent years but the start of the contacts still remains at the discretion of the prime minister. These began in October 2014 and consist of a series of meetings principally between permanent secretaries and shadow ministers. The purpose is to allow the Civil Service to be forewarned about major new policy directions and machinery of government changes planned by opposition parties, so permanent secretaries can use the campaign period to prepare their departments. They also allow the Opposition to ask ‘factual questions’. We have written [elsewhere](#) about how these contacts work. Their value of them and how they might be improved. The rules clearly set out that they are not a policy resource for the Opposition, and that civil servants must avoid revealing confidential government information.

Conventions for government formation

In the event of a hung parliament, there are several issues that need to be dealt with.

The first is that a government needs to continue in office – though the degree to which ministers govern under the same restrictions as in the pre-election period 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 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.

During this period, 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 – though its incumbent status may mean that, if it is unclear whether it could command confidence, it has the first opportunity to test its majority in the Commons, regardless of other negotiations.

The end of the period of caretaker government is [not clear](#) in the 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'. The Sovereign must appoint a new prime minister on the resignation of the incumbent – though 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. Alternatively, the incumbent prime minister may be able to build a new majority in the House. Usually the new Government's majority is first tested in the Commons at the votes following the Queen's Speech, which may be held three weeks after the election. It is not explicitly stated whether, until those votes are held, an incumbent government remains bound by the restrictions.

Second election

The Fixed-Term Parliament Act has allowed for more certainty around the timing of the election, allowing government and Parliament to plan their business and the Civil Service to plan for the election. However, it has also changed the mechanism by which a second election could be triggered after a new government is in place. First, a dissolution of Parliament can be initiated by a two-thirds majority of the House of Commons voting for an early election.

The second method is if the House passes an explicit motion of no confidence in the government (other votes that were formerly considered akin to a vote of no confidence do not apply). In this event, a 14-day period would commence in which attempts to form a new government would take place. If no government emerges in this period that is able to win a confidence motion in the Commons then a second election is called. During this period, the first government must again operate under caretaker restrictions.

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