



House of Commons
Political and Constitutional
Reform Committee

Constitutional implications of the Cabinet Manual

Sixth Report of Session 2010–11

Volume I

Volume I: Report, together with formal minutes, oral and written evidence

Additional written evidence is contained in Volume II, available on the Committee website at www.parliament.uk/pcrc

*Ordered by the House of Commons
to be printed 22 March 2011*

HC 734
Published on 29 March 2011
by authority of the House of Commons
London: The Stationery Office Limited
£15.50

The Political and Constitutional Reform Committee

The Political and Constitutional Reform Committee is appointed by the House of Commons to consider political and constitutional reform.

Current membership

Mr Graham Allen MP (*Labour, Nottingham North*) (*Chair*)
Mr Christopher Chope MP (*Conservative, Christchurch*)
Sheila Gilmore MP (*Labour, Edinburgh East*)
Andrew Griffiths MP (*Conservative, Burton*)
Simon Hart MP (*Conservative, Carmarthen West and South Pembrokeshire*)
Fabian Hamilton MP, (*Labour, Leeds North East*)
Tristram Hunt MP (*Labour, Stoke on Trent Central*)
Mrs Eleanor Laing MP (*Conservative, Epping Forest*)
Sir Peter Soulsby MP (*Labour, Leicester South*)
Mr Andrew Turner MP (*Conservative, Isle of Wight*)
Stephen Williams MP (*Liberal Democrat, Bristol West*)

Powers

The Committee's powers are set out in House of Commons Standing Orders, principally in Temporary Standing Order (Political and Constitutional Reform Committee). These are available on the Internet via <http://www.publications.parliament.uk/pa/cm/cmstords.htm>.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/pcrc. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Steven Mark (Clerk), Lydia Menzies (Second Clerk), Hannah Stewart (Legal Specialist), Lorna Horton (Inquiry Manager), Emma Sawyer (Senior Committee Assistant), Annabel Goddard (Committee Assistant), Keith Pryke (Committee Support Assistant) and Rebecca Jones (Media Officer).

Contacts

All correspondence should be addressed to the Clerk of the Political and Constitutional Reform Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6287; the Committee's email address is pcrc@parliament.uk.

Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
2 Purpose, status and consequences	7
Who is it for?	7
Dealing with disagreement, ambiguity and complexity	8
Improving usability	10
Sources and references	10
Precedent book	11
Legal status	12
Consequences of publication: a life of its own?	12
The role of Parliament	13
3 Relationship to a written constitution	16
Context	16
Content	17
Consequences	17
4 Content: Analysis of two chapters	19
Chapter 5: Ministers and Parliament	19
Parliamentary involvement in decisions to commit troops to armed conflict	19
Ministerial responsibility to Parliament	20
Chapter 2: Elections and Government formation	21
5 Process and consultation	25
Consultation before publication	25
Consultation after publication	25
Updating the Cabinet Manual	26
6 Conclusion	28
Conclusions and recommendations	29
Formal Minutes	32
Witnesses	33
List of printed written evidence	33
List of additional written evidence	34
List of Reports from the Committee during the current Parliament	35

Summary

We regard the creation and publication of the Cabinet Manual as both highly significant and welcome. Its creation came about in the context of constitutional questions being asked by the then Government, including consolidation of existing conventions into a single written document. The Manual raises issues of constitutional and political importance for Parliament and the relationship of the Legislature to the Executive. All the work of the Executive, including the Cabinet Manual, is subject to scrutiny by Parliament. The fact that the document is primarily directed at the Executive does not exempt it from this scrutiny.

The Cabinet Manual was published in draft for consultation in December 2010. The consultation has given rise to some debate, including criticism of aspects of the Manual, not least from the House of Lords Constitution Committee. While we share some of the concerns that have been expressed, in general terms we welcome the publication of the Manual.

In this Report, we do not attempt to undertake line-by-line scrutiny of the Manual in its entirety. We do, however, make some practical suggestions for specific improvements to the text, with a particular focus on the chapters covering government formation and Ministers and Parliament. There is no reference in the Manual to Parliament's role in decisions on committing British forces to armed combat. This needs to be put right.

The Manual was written both as a guide for Ministers and civil servants and to inform the wider public. These two goals do not sit entirely happily alongside one another.

The Manual is meant to guide, rather than to direct or to set issues in stone. In practice, however, it may be treated as having greater authority than originally intended. This is particularly true where it describes relations between the Executive and other parts of the constitutional framework. We recommend that the House should hold a regular debate on the Manual.

The Manual appears to have originated from a wider project to consider whether the United Kingdom should adopt a codified constitution. It covers constitutional issues that range beyond the functions of Ministers and civil servants. Although it is not in itself a written constitution, it may lead to further debate about the United Kingdom's constitutional settlement, including the desirability of a written constitution.

The uncodified British constitution contains areas of uncertainty. It is not always possible to write down existing conventions in definite terms without taking sides. Where uncertainty or disagreement exists, the Cabinet Manual needs to signal this clearly. The existing draft does not always do so.

Dissatisfaction with parts of the original draft should not significantly delay production of an approved version of the Cabinet Manual. The next version need not be perfect—it will be subject to further review—but it should be considerably improved as a result of the consultation that has been undertaken, and as a result of parliamentary scrutiny.

We welcome the motivation we detect behind the Cabinet Manual project, which is a desire to be more transparent about how Government works, and we look forward to future involvement in its development.

1 Introduction

1. The genesis of the Cabinet Manual was when Rt Hon Gordon Brown MP, then Prime Minister, announced the project to create a Manual in February 2010, and in the same month, a draft chapter of the Manual on Elections and Government Formation was published. The Justice Committee were able to scrutinise this chapter and make recommendations on its content.¹ This chapter, now Chapter 2, was amended to take account of the Justice Committee's recommendations and the events surrounding the May 2010 general election and the formation of the coalition Government.²

2. We regard the Cabinet Manual as a highly significant document. As one of the first attempts to codify some of the practices in British Governance and politics it can be no other. As such its creation and publication are most welcome signs of openness and transparency. Any deficiencies that have been identified in the document are far outweighed by the benefit of publication itself. The Cabinet Manual was published in draft by the Cabinet Office on 14 December 2010. Sir Gus O'Donnell, the Cabinet Secretary, in his foreword to the draft, states that:

The Cabinet Manual is intended to be a source of information on the UK's law, conventions and rules, including those of a constitutional nature, that affect the operation and procedures of government.³

3. The publication of the draft Cabinet Manual (hereafter 'the draft') opened a twelve-week public consultation period. Our intention in this inquiry is not to replace this period of public consultation, and we do not in this Report make detailed comments on the content of every part of the draft. Instead we consider the status of the Manual and the implications it might have for the United Kingdom's uncodified constitution.

4. The draft is modelled upon New Zealand's Cabinet Manual,⁴ which has been in use since 1979, and was published in its current form in 1998.⁵ The New Zealand Cabinet Manual is updated periodically to reflect changes in practice, most recently in 2008. The British version is strikingly similar in structure to its New Zealand counterpart.

5. We have heard evidence from two panels of academic experts, some of whom had been consulted in the drafting process, as well as from the Cabinet Secretary.⁶ We also had the opportunity to speak to Professor Margaret Wilson, former Speaker of the House of

1 Justice Committee, Fifth Report of Session 2009-10, *Constitutional Processes following a General Election*, HC 396

2 Political and Constitutional Reform Committee, Fourth Report of Session 2010-11, *Constitutional Processes following a General Election*, HC 528, Ev 76

3 Cabinet Office, *The Cabinet Manual – Draft*, December 2010 (henceforth "Draft Cabinet Manual"), Foreword

4 Political and Constitutional Reform Committee, Fourth Report of Session 2010-11, *Constitutional Processes following a General Election*, HC 528, Q175

5 Evidence taken before the Political and Constitutional Reform Committee, *Constitutional Lessons from New Zealand*, HC (2010-11) 747-i, Q1[Professor Margaret Wilson]

6 Q9

Representatives and former Government Minister in New Zealand, about the New Zealand Cabinet Manual.⁷

6. On 7 March 2011, the House of Lords Constitution Committee published a Report on the Cabinet Manual.⁸ They concluded in summary that

the Cabinet Manual is not the first step towards a written constitution; it should be renamed the Cabinet Office Manual and its greater relevance to officials than to politicians emphasised; it should only seek to describe existing rules and practices; it should not be endorsed by the Cabinet nor formally approved by Parliament; and it must be entirely accurate and properly sourced and referenced.

7. As will become apparent, we agree in some respects with this Report from the Lords. Where our recommendations differ, this is largely because our view on the status of the Manual is more equivocal. However, we restate our strong belief that Parliament is or should be Sovereign and that the Executive and all its works including the Cabinet Manual should be accountable to Parliament and especially to the directly elected House of Commons.

7 *Constitutional Lessons from New Zealand*, HC747-i

8 House of Lords, *The Cabinet Manual*, Twelfth Report of the Select Committee on the Constitution, Session 2010-11, HL Paper 107 (henceforth HL Paper 107)

2 Purpose, status and consequences

8. The Cabinet Secretary’s foreword to the draft states that the Cabinet Manual will be a “guide” to “the way in which government operates”.⁹ It is “primarily written to provide a guide for members of the Cabinet, other ministers and Civil Servants, but ... also ... to inform the public whom the Government serves ... It is not intended to have any legal effect or set issues in stone”.¹⁰ The Foreword acknowledges that “Some areas of the Manual continue to be subject to public debate”, but states that it “does not seek to resolve or move forward those debates, but is instead a factual description of the situation today. In other words, it will be a record of incremental changes rather than a driver of change”.¹¹

9. The Cabinet Secretary’s stated intention is clear; but it does not necessarily follow that this is how the Cabinet Manual will be used in practice by those within and outside the Executive. It is a new development in the United Kingdom context, and its exact character and status are open to question and unexpected development.

10. In the following paragraphs we identify areas in which the Cabinet Manual risks straying beyond the limits described for it by the Cabinet Secretary, and examine the potential consequences of it doing so.

Who is it for?

11. The Cabinet Secretary told us that the Manual would be “a guide for Ministers and civil servants” but he added that “we also, by making it public, want to help in general education”.¹²

12. The tone and content of the Cabinet Manual are not always obviously suited to its stated primary audience of “members of Cabinet, other Ministers and Civil Servants”.¹³ Rodney Brazier, Professor of Constitutional Law at the University of Manchester, warns that “matters which might well be well known to the main audience must be spelled out so as to make sense to the interested citizen”, and as a consequence “the scope and breadth of the paper is possibly wider than it would be if it were aimed only at those who work in Cabinet Government”.¹⁴ He also highlights that at times more basic detail is given than would be necessary if the document were purely aimed at the Executive:

If this draft Cabinet Manual were conceived so as better to inform Ministers and civil servants only – that is, if interested citizens were not among its planned readership – then there would be areas where too much detailed information is given. I take chapter 1 (The Sovereign) by way of example. Why would all overworked Ministers and officials throughout Whitehall need or want to know the details concerning

9 Draft Cabinet Manual, Foreword

10 As above

11 As above

12 Q79

13 Draft Cabinet Manual, Foreword

14 Ev w1, para 4

royal succession, coronations, arrangements in a Sovereign's absence or incapacity, or the Established Church?¹⁵

13. Dr Michael Pinto-Duschinsky told us that “this document is neither fish nor fowl and it is the worst of all worlds”.¹⁶ Dr Stuart Wilks-Heeg, Director of Democratic Audit, agreed:

I do have concerns that a document, which on one level is meant to be written by the Executive for the Executive is supposed to also be a document that explains how government operates to the general public ... To my mind, that does not quite make sense.¹⁷

14. Certainly, there are some statements in the draft which are declaratory principles, more in keeping with a written constitution than a technical manual:

- “The UK is a parliamentary democracy...”¹⁸
- “General elections allow voters on the electoral roll to cast their ballot for a Member of Parliament to represent them in the House of Commons.”¹⁹
- “Members of the House of Commons are directly elected by universal suffrage of the adult population of the United Kingdom.”²⁰

15. Conversely, the paragraphs in the draft on NATO seem to contain information of relevance to very few Ministers or civil servants.²¹

16. The publication of the draft Cabinet Manual is a welcome signal of open government. The Manual will no doubt be a useful point of reference for Parliament, the electorate and those involved in public education on constitutional issues. It is notable that the New Zealand counterpart on which it is based is a more technical and well-referenced document.

Dealing with disagreement, ambiguity and complexity

17. The foreword to the draft states that:

Some areas of the Manual continue to be subject to public debate. The Manual, however, does not seek to resolve or move forward those debates, but is instead a factual description of the situation today. In other words, it will be a record of incremental changes rather than a driver of change.²²

15 Ev w1para 17. See also Ev w14, para 19 [Institute for Government]

16 Q59

17 Q60

18 Draft Cabinet Manual, para 1

19 Draft Cabinet Manual, para 38

20 Draft Cabinet Manual, para 186

21 Draft Cabinet Manual, paras 323–327

22 Draft Cabinet Manual, Foreword

18. The Cabinet Secretary told us, however, that “some judgment calls” had been taken in deciding how to record areas of uncertainty in the draft, and that the Manual will be “the Executive’s interpretation”.²³ This gives weight to an argument put to us by Dr Pinto Duschinsky that “it is inherently difficult if not impossible for a written document to list existing, often unwritten, rules, conventions and precedents without interpreting them in the process”,²⁴ and on similar lines, by the Institute for Government: “where previous conventions had been tacit and implied, the mere fact of publication can be seen as seeking to lay down one viewpoint (primarily a Whitehall one)”.²⁵ The Institute for Government suggest as a consequence that “publication of the Manual may have the constitutional consequence of hardening up and entrenching certain practices in the short-term, even when the intention is to permit discretion”.²⁶

19. The Centre for Political and Constitutional Studies, King’s College London, provide a concrete example: “In stating that (para 30) ‘Cabinet is the executive committee of the Privy Council’ the Manual is once more making an unsupported assertion over which there is not a consensus”.²⁷ A further three examples are cited by Richard Gordon QC.²⁸ The recommendation from the House of Lords Select Committee on the Constitution that the Manual should be “fully referenced throughout” would ensure at least that assertions were not unsupported.²⁹

20. The Lords Constitution Committee has recommended that

where no convention exists, or there is doubt as to its extent, this should be stated. As a description of the current constitutional position, it is better for the Manual to be open about areas of debate than to resort to potentially ambiguous wording in order to cloud the issue.³⁰

We agree.

21. We think that the Manual should include “judgment calls” only where straightforward “factual description” is impracticable, and that it should do so sparingly. The Manual must, however, avoid presenting as unchallengeable fact a statement that the Government knows to be disputed.

22. Where there is the potential for disagreement or uncertainty, as there so often is on the meaning of unwritten constitutional conventions, it is important that the Cabinet Manual should signal the existence of this uncertainty. This would be of enormous assistance to those involved in seeking to interpret the text of the Manual and help to ensure consistency in interpretation, and thus transparency.

23 Q103

24 Ev 58 para 6

25 Ev w14, para 13

26 Ev w13, para 8

27 Ev w10, para 58

28 Ev w19, paras 37–47

29 HL Paper 107 (see also para 30 of this Report)

30 HL Paper 107, para 52

23. Dr Wilks-Heeg has drawn attention to the sometimes imprecise language used in the draft: “the Cabinet Manual is ... vague in so many places using lots of phrases like ‘ordinarily’ or ‘normally’ or ‘as far as possible’”.³¹ The draft contains 47 instances of ‘usually’, 32 of ‘normally’, and three of ‘as far as possible’.³²

24. Iain McLean, Professor of Politics at the University of Oxford, also illustrates this point:

At para. 56, “the Prime Minister is expected to tender the Government’s resignation, unless circumstances allow him or her to opt instead to request dissolution”. What circumstances are these? This is a key point, which should be clarified. I do not think that the [Manual] clarifies this point.³³

25. Vague language—‘usually this’ and ‘normally that’—probably indicates a shorthand way of avoiding long and detailed explanations of complex situations, but it risks limiting the Manual’s usefulness as a practical tool, unless the Manual also makes clear where the more detailed explanations are available.

Improving usability

26. Two rather prosaic practical additions would improve the usability of the draft Cabinet Manual. One, as suggested by Professor Rodney Brazier, would be to include an index.³⁴ This seems to us consistent with a realistic idea of how the Cabinet Manual will be used: as a point of reference, rather than a book to be read from cover to cover.

27. The second suggestion is that the Cabinet Manual should mirror its New Zealand counterpart by opening each chapter with a list of sources of related information. This would be useful to the reader, and would also make clear from the outset that the Cabinet Manual is a starting point and reference guide, rather than the only source of information on the areas it covers. The lists should include not only published sources, but also relevant unpublished internal government guidance, except in those rare cases where the existence of this guidance would not be subject to disclosure under Freedom of Information principles.

28. An index should be added to the Cabinet Manual so that it can be more easily used as a point of reference. Sources of related information, both published and unpublished, should be listed at the beginning of each chapter to make clear to readers the range of other guidance that exists.

Sources and references

29. As set out in paragraph 5 of the draft Manual, constitutional matters have a number of sources, including statutes, legal precedents and conventions, which are defined in the draft as “rules of constitutional practice that are regarded as binding in operation but not in

31 Q60

32 ‘Ordinarily’ does not in fact appear.

33 Ev 40, para 20

34 Ev w4, para 18

law”.³⁵ The Institute for Government suggest that “there are subtle but important distinctions between laws, conventions and rules and it would be helpful if a clearer distinction were drawn between what is required by these three categories”.³⁶ David Walker makes a similar point, writing that “the Manual does not distinguish hard from soft convention, as opposed to statute or fungible ‘understandings’”.³⁷

30. It would not therefore be clear to Ministers and civil servants using the current draft which of its provisions they are bound by law to follow and which might be departed from should circumstances render this appropriate. This kind of distinction would also be of value to readers outside the Executive, and might help them to fine-tune their judgments on whether a Minister or civil servant has acted inappropriately when departing from guidance contained in the Manual. **We agree with the House of Lords Constitution Committee that the Manual should “be fully referenced throughout”.**³⁸ This would also help to prevent the Manual from unintentionally taking a position on constitutional issues, as well as setting out for those using the Manual the basis for the advice it contains.

Precedent book

31. In holding a consultation on the draft Cabinet Manual, the government is inviting outsiders to comment on a text a large proportion of which is made up of constitutional conventions. These conventions in turn rely on precedents—events in the constitutional past of the UK—for their authority. Some of these precedents are widely known and publicly sourced, while others are not.

32. It came to our attention during the course of this inquiry that the Government keeps a ‘precedent book’ containing the events upon which its operational understandings, its conventions, are based; but that the current ‘precedent book’ and a number of earlier editions remain classified.³⁹ Without the ‘precedent book’ being available in the public domain, it can be difficult for those outside the Executive to comment with authority upon those parts of the draft that involve conventions, yet it is this that the Government has asked us to do. **We appreciate that the ‘precedent book’ may contain within it information that is personally sensitive, but believe there is a strong case for the publication, at the earliest practical time, of a redacted version of the ‘precedent book’, providing those outside the Executive with a more informed opportunity to judge whether constitutional conventions are accurately reflected in the draft. It would also make a more general contribution to public understanding of the British constitution as a whole.**

35 Draft Cabinet Manual, para 5

36 Ev w14, para 11

37 Ev 51, para 1.1

38 HL Paper 107

39 Q4 [Lord Hennessy]

Legal status

33. The foreword of the draft states that the Cabinet Manual “is not intended to have any legal effect”.⁴⁰ This is clearly true in the sense that it has no statutory force and would not be directly enforceable in court. However, both Professor Lord Hennessy of Nympsfield and the Cabinet Secretary suggested that there were circumstances in which the Manual might be used in judicial review to establish “the normal expectations of proper process”.⁴¹ Richard Gordon QC argues that in one sense at least, the Manual could come to have legal status:

if the Cabinet Manual comes to be used as a source of guidance but contains incorrect statements of law it could be the subject of declaratory relief by the Court ... A possible trend here is that if judges become used to issuing declaratory relief about constitutional matters it may lead to greater judicial involvement in areas that have previously been regarded as ‘off-limits’.

If judges were to pronounce in this way on matters contained in the Cabinet Manual it would be hard to deny that, although not intended to have legal effect, the Manual was operating as a constitutional catalyst and, at least in that sense, possessed arguable legal status.⁴²

34. **It seems unlikely to us that the Cabinet Manual will feature extensively in court proceedings. However, in a constitution based on the rule of law judicial interpretation is always possible. This is simply a further reason for the Executive and Legislature to do all they can to ensure that the Manual is accurate, does not mislead and is subject to due process.**

Consequences of publication: a life of its own?

35. The Centre for Political and Constitutional Studies write that “The Manual may prove to have greater significance than its authors appear to be claiming for it; and it may contribute to unintended change”.⁴³ The Institute for Government suggest that “The mere act of publication may mean that the Manual will become a reference point against which future actions of ministers and the civil service will be judged”.⁴⁴ On similar lines, the Centre for Political and Constitutional Studies state that “The Manual may be come to be used by those who attempt to justify or criticise the actions of actors within the executive, with claims being made about whether or not the Manual is being adhered to”.⁴⁵ Professor Margaret Wilson told us that in New Zealand there could be consequences “in political terms or in media terms” of not following guidance in their Cabinet Manual.⁴⁶

40 Draft Cabinet Manual, Foreword

41 Q31, Q123.

42 Ev w16, para 5

43 Ev w6, para 3

44 Ev w13, para 7

45 Ev w7, para 21

46 *Constitutional Lessons from New Zealand*, HC747-i, Q34

36. Even if it is not intended to be binding, the Cabinet Manual, when published, may set the expectations of the media, the public, and of politicians. Even if it has no legal force, the political pressure created by publishing the Cabinet Manual to comply with its provisions may make it hard to depart from in practice. As Lord Hennessy told us “if it becomes part of the warp and the woof of everyday business it gives it a great salience; in practical terms it becomes very important”.⁴⁷ This is problematic if those outside Government are judged on rules and conventions as set out in the Cabinet Manual, despite the fact that they have not agreed to them. This effect would also be particularly problematic if incorrect constitutional positions were included. For example the inclusion of the footnote to paragraph 49 which quotes the Leader of the Liberal Democrat Party expressing the view that following a general election “whichever party has won the most votes and the most seats, if not an overall majority, has the first right to seek to govern, either on its own or by reaching out to other parties” gives the impression that this is an accepted constitutional norm, which it very clearly is not (see section 5, below).⁴⁸ **The foreword to the draft suggests that the Cabinet Manual is a document of limited ambition, which is not intended to “set issues in stone” or to “resolve or move forward” matters of public debate. Despite these intentions, there is scope for the constitutional impact of the Cabinet Manual to be greater than this. This becomes particularly true where the Cabinet Manual’s content extends beyond matters that are purely for the Executive.**

The role of Parliament

37. Part of the role of the sovereign United Kingdom Parliament is to hold the Executive to account. It is for Parliament, and not the Executive, to decide to what extent it is appropriate for it to become involved in matters of the Executive. The Cabinet Secretary states in his foreword to the draft that he expects “to invite Cabinet to endorse a revised version of the Cabinet Manual”.⁴⁹ While the Cabinet Secretary also says that he “would welcome further comments in particular from ... the relevant committees of Parliament”, the Manual itself refers to no further involvement from Parliament.⁵⁰ We expect nonetheless to engage in an ongoing dialogue with the Government about the Cabinet Manual and its contents. The Cabinet Secretary raised no objection to this in his oral evidence.⁵¹

38. We have heard different views on the extent to which parliamentary endorsement of the Manual is appropriate. Democratic Audit proposes that, given the importance of the Cabinet Manual, it should be “the subject of debate in Parliament and that ownership if the document should ultimately rest with Parliament”.⁵²

39. In contrast, Professor Wilson said of the New Zealand Cabinet Manual that for it to be endorsed by Parliament “would give it a status beyond which it has”.⁵³ Professor Robert

47 Q18

48 Draft Cabinet Manual, para 49

49 Draft Cabinet Manual, Foreword

50 As above

51 As above

52 Ev 55 para 10

53 *Constitutional Lessons from New Zealand*, HC747-i, Q29

Hazell, Director of the Constitution Unit at University College London, told us on similar lines:

I don't think it does need to be formally approved by Parliament. This is ultimately a document of the Executive. It has submitted it for public consultation and for scrutiny by a parliamentary Committee, but at the end of the day it is the Executive's document.⁵⁴

The House of Lords Constitution Committee has also concluded that the Manual should not be formally approved by Parliament, stating that they “are strongly opposed to any suggestion that the Cabinet Manual be formally approved by Parliament or by any of its committees”.⁵⁵ We disagree, because we believe the Manual is or could become the kind of document which requires a strong form of accountability to Parliament, or at least to the elected House.

40. Whether or not the Cabinet Manual should be open to amendment and decision by Parliament depends in our view on what the Cabinet Manual is or might become. If it is simply a document by the Executive, about the Executive and for the Executive, then for Parliament to decide on its content would give it a status it should not have. As the Constitution Committee has put it:

The Manual is an official guide primarily for ministers and civil servants and has some value as a reference work and in illuminating the operation of government. It is, and should be, no more than that.⁵⁶

41. The Manual, however, seems in part to be intended as—or might become, whatever the intention—the basis for a shared understanding beyond the Executive of important parts of the United Kingdom's previously uncodified constitution. Parliamentary intervention would be entirely appropriate in such circumstances. An official document, approved by the Cabinet, will have a status unlike that of existing academic texts on the same subject. We intend to monitor closely how the Cabinet Manual develops, and how it is used both within and beyond Government during the life of this Parliament.

42. Whatever the status of the Cabinet Manual as a document, it covers ground which is significant enough to merit regular debate in the House. We therefore propose that, soon after the Cabinet Manual is finalised, the House should have the opportunity to debate it as a whole and should seek the Government's assurance that such a debate should become an annual fixture in the parliamentary calendar. Alternatively, the debate could occur twice during the course of a five-year Parliament – the first debate within 30 months of the start of a fixed term five-year Parliament, and the second debate within 30 months of the election concluding the Parliament. Before each one, the Government should publish a list of changes made to the Manual since the previous debate. The Government should publish a list of changes made to the Manual during

54 Q7

55 HL Paper 107, para 40

56 HL Paper 107, para 41

the preceding year to inform this debate. As the Manual is largely about the conduct of the Executive, we would expect this debate to take place in Government time.

43. It would go against the spirit of discussion between Government and Parliament so far if the Government were to resist this proposal, but, were it to do so, we would consider approaching the Backbench Business Committee.

3 Relationship to a written constitution

45. One thing that is clear is that the Manual is not itself a written constitution: no one has claimed it is, none of our witnesses has suggested that it is, and many have been explicit that it is not.⁵⁷ There are questions to be asked, however, about whether it is an increment which brings the United Kingdom any closer to having such a constitution.

Context

46. The view of the Prime Minister of the day could not be clearer. Mr Brown announced the project to create the Cabinet Manual in a speech containing the following section:

There is a wider issue—the question of a written constitution—an issue on which I hope all parties can work together in a spirit of partnership and patriotism. I can announce today that I have asked the Cabinet Secretary to lead work to consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document.⁵⁸

47. Immediately after this Mr Brown announced the creation of a working group to identify the principles that would be included in a written constitution.⁵⁹ While in this speech Mr Brown did not explicitly say that the “single written document” was the Cabinet Manual, it seems clear that it was, and when the Cabinet Secretary told the Justice Committee later that month that he had been asked to draft the Cabinet Manual, he used identical language to that used by Mr Brown.⁶⁰

48. It is apparent that the Cabinet Manual project came about in the context of wider constitutional questions being asked by the Brown Government, including whether the United Kingdom should move towards a written constitution. The Centre for Political and Constitutional Studies note that “when Gordon Brown first announced that the Manual was in production, he portrayed it as part of a process that could lead to a fully codified constitution. This idea has seemingly been dropped and is not mentioned in the draft”.⁶¹

49. The current Government has stated explicitly that it has no plans for a written constitution.⁶² The Manual itself has survived the government transition nonetheless.

57 For example Ev w7 [Centre for Political and Constitutional Studies], Ev w13 [Institute for Government], Ev w1 [Professor Brazier]

58 “Towards a new politics”, speech to the Institute for Public Policy research, 2 February 2010, available at http://www.ippr.org/uploadedFiles/events/gordon_brown_ippr_feb_10.pdf

59 As above

60 Justice Committee, Fifth Report of Session 2009-10, *Constitutional Processes following a General Election*, HC 396

61 Ev w7, para12

62 HC Deb, 17 June 2010, Column 516W

Content

50. Dr Wilks-Heeg suggests that the draft “can be regarded as a sort of substitute for what would typically be found in a written constitution in most democracies”.⁶³ Any document that claims to be “a single source of information on how the Government works” is likely to have overlap with the content of a written constitution.⁶⁴ However, there are also differences between the Cabinet Manual and what would be included in a written constitution. For example, it contains no Bill of rights or statement of basic constitutional principles.⁶⁵ The draft also has administrative content that would certainly not be seen in a constitution, for instance that “Parliament usually meets in the Cabinet Room in 10 Downing Street every Tuesday morning while Parliament is sitting,”⁶⁶ or that “It is the responsibility of the Cabinet Secretariat to write and circulate the minutes [of Cabinet] to members of Cabinet... This should be done within 24 hours of the meeting”.⁶⁷

Consequences

51. While a relationship therefore exists between the Cabinet Manual and a written constitution, the Cabinet Manual is not a codified constitution, nor is it close to being one. Could, however, the publication of the Cabinet Manual influence the prospects for a codified constitution in the United Kingdom?

52. The Cabinet Manual would indeed be likely to be a working document for any project to produce a codified constitution. In evidence to us in November 2010, the Cabinet Secretary said that

it is certainly true that if one were working towards such an event, you would want to start off by bringing together existing laws and conventions. I think in that sense, the Cabinet Manual will be useful very much in its own right, but it will also be useful and I think those who are in favour of a written constitution would start with it. They may well not end with it, but they would certainly start with it.⁶⁸

53. It has also been put to us that the Manual “may draw attention to features of the UK settlement which some find objectionable and ... encourage some to demand that the Manual is succeeded by a fully codified UK settlement”.⁶⁹

54. The Cabinet Manual is not a written constitution. It has, however, considerable overlap in content with what might be expected of a constitution. The Cabinet Secretary has suggested to us that it would be likely to be a starting point for any

63 Ev54, para 7

64 Draft Cabinet Manual, Foreword

65 Ev w2 [Professor Brazier]

66 Draft Cabinet Manual, para 140

67 Draft Cabinet Manual, para 166

68 Political and Constitutional Reform Committee, Fourth Report of Session 2010-11, *Constitutional Processes following a General Election*, HC 528, Q268

69 Ev w7, para 22 [Centre for Political and Constitutional Studies]

attempt to produce such a constitution. By bringing together and publishing the Government's interpretation of existing constitutional rules and conventions, the Government has already begun to spark debate about both the nature of these rules and conventions, and if and how they should be written down. This is a debate in which Parliament needs to play a full part.

4 Content: Analysis of two chapters

55. In this section we examine briefly Chapter 5 of the draft, ‘Ministers and Parliament’, to illustrate some of the potential problems with the draft, and Chapter 2, to address some of the specific concerns raised by witnesses about this section of the draft. We do not attempt in this Report to deal with other points raised with us about specific parts of the Manual. We trust that the evidence we have received will be treated in its entirety as part of the Government’s consultation on the text of the Manual.

Chapter 5: Ministers and Parliament

56. A comparison of Chapter 5 with its equivalent in the New Zealand Cabinet Manual, *The Executive, Legislation, and the House*, reveals a significant difference in scope and tone.⁷⁰ The New Zealand chapter contains practical information on, amongst other things, how to develop and draft legislation, the process by which Ministers should draw attention to conflicts with other important legislation, and when Ministers should make proposals for legislation to be included in the Government’s legislative programme.⁷¹

57. Much of this information is largely absent from the United Kingdom draft, almost certainly because it is already published elsewhere.⁷² The problem is that, perhaps as a result, what is included often seems not to relate to the Executive’s role and responsibilities, but rather to those of others.

58. The first two paragraphs of Chapter 5 of the United Kingdom draft contain general statements about Parliament, describing the membership of both Houses and the relationship between them. The chapter goes on to make statements about the functions of parts of the parliamentary machine for which the Executive is not responsible, such as the Backbench Business Committee.⁷³

Parliamentary involvement in decisions to commit troops to armed conflict

59. While Chapter 4 states that any decision to take military action will “normally” be considered by Cabinet,⁷⁴ Chapter 5 fails to mention the convention that the Executive should also give the House of Commons the opportunity to debate any such decision.⁷⁵ Both the Deputy Prime Minister and Cabinet Secretary have acknowledged that this convention exists.⁷⁶ The Cabinet Secretary has made clear that the debate would take place before troops are committed to conflict “except in emergency situations”.⁷⁷

70 New Zealand Government, *Cabinet Manual 2008*

71 As above

72 For example, Cabinet Office, *Guide to Making Legislation*.

73 Draft Cabinet Manual, para 190

74 Draft Cabinet Manual, para 150

75 Ev56, para 18 [Democratic Audit]

76 Political and Constitutional Reform Committee, *The Coalition Government’s programme of political and constitutional reform*, HC 358-i, Ev19, Q3 [Deputy Prime Minister]; Q118.

77 Q130

60. It was by no means obvious, however, that this convention existed in the run-up to the Iraq War. Parliamentary debate on the decision to go to war came about only after tremendous pressure had been exerted on the Government, both inside and outside Parliament. Following the Iraq war, the House resolved that “that the time has come for Parliament’s role to be made more explicit in approving, or otherwise, decisions of the Government relating to the major, or substantial, deployment of British forces overseas into actual, or potential, armed conflict” and called “upon the Government, after consultation, to come forward with more detailed proposals for Parliament to consider”.⁷⁸ The Government of the day published a draft detailed resolution in 2008,⁷⁹ but this was never formally considered by the House. This indicates that the nature of the convention, if it indeed exists, is by no means clear. We regard it as vital that this matter is clarified, and we intend to investigate it separately.

61. Given the high political and public profile of this issue in the context of the decision to go to war in Iraq, we find surprising the omission from the draft Manual of the convention that the Executive will give the House of Commons the opportunity to debate any decision to take military action. This is a prime example of a convention which involves Parliament, but which relies on the very Executive which Parliament is holding to account to take the initiative to allow Parliament to hold a debate. The Cabinet Secretary stated in evidence that he would look carefully at this omission.⁸⁰ **The chapter of the Cabinet Manual on Ministers and Parliament should focus on the role and responsibilities of central Government. Conventions which rely on the Government to take the initiative need to be included: a salient example—and a surprising omission from the draft—is the convention, acknowledged by the Government, that Parliament should have the opportunity to debate decisions to commit troops to armed conflict, and that the debate should take place before the troops are committed, except in emergency situations. This convention, as the Executive understands it, should be included in the revised Manual. We also intend to inquire separately into whether the Government’s understanding of the existing convention is correct and complete—and whether it goes far enough to ensure appropriate parliamentary involvement in any future decisions to go to war.**

Ministerial responsibility to Parliament

62. Elsewhere in the draft, in Chapter 3, it is stated that “Parliament will normally understand that the many comparatively routine decisions that departments make in carrying out their responsibilities are not ones for which the minister can be held responsible” (except in certain limited circumstances).⁸¹ This apparently banal statement is problematic in no fewer than three different ways:

- i. This is a matter central to the constitutional relationship between Parliament and the Executive, and we are surprised that it is not included in Chapter 5.

78 HC Deb, 15 May 2007, col 492

79 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, March 2008, p53

80 Q130

81 Draft Cabinet Manual, Para 116

- ii. It does not seem right to us that the Executive should seek to read the mind of Parliament in a document of this kind, certainly not without reference to a parliamentary decision supporting this point of view.
- iii. The most recent parliamentary decision in this area does not in fact support the contention set out in the draft Manual. The House resolved on 19 March 1996 that “Ministers have a duty to Parliament to account and to be held to account, for the policies, decisions and actions of their departments and Next Steps Agencies”, without exception. The paradigm of ministerial responsibility is often cited as that of Sir Thomas Dugdale, who resigned from the Ministry of Agriculture in 1954, “as a result of an error by a civil servant of which he had not been aware over an issue in which he had not been involved in any way”.⁸² There is at the very least an “uncertainty at the heart of the modern interpretation of Ministerial responsibility”.⁸³

63. Descriptions of Parliament’s expectations of Government, where it is appropriate to include them, need to be based on evidence, such as resolutions of either House, and the Manual should be amended to reflect this evidence.

Chapter 2: Elections and Government formation

64. Our Report on *Lessons from the Process of Government Formation following the 2010 General Election* included recommendations relating to Chapter 2 of the draft.⁸⁴ Some further observations, however, have been made during this inquiry.

65. A driving factor in the production of the Manual seems to have been the perceived need before the 2010 general election to set out the procedures to be followed in the event of a hung Parliament. Dr Wilks-Heeg told us that

It strikes me that a key driver was this sense of deep concern that if we ended up with a hung Parliament, if it was not clear what would happen next, that there would be a media feeding frenzy, there would be panic, the financial markets would panic and so on. So, the desire was to have a set of procedures in place that would deal with a situation of absolute confusion.⁸⁵

66. David Walker has suggested that the novelty of coalition formation in May 2010 could have ensured the survival of the Cabinet Manual initiative from the previous Government:

You could envisage circumstances after May when it could have been dropped. Maybe the nature of coalition building in those days of May gave Gus O’Donnell the sense that he had to somehow encode what he had accomplished. I don’t know. It was to me slightly puzzling that they bothered to continue something that was enjoined by an outgoing ... Prime Minister.⁸⁶

82 Institute for Government, *Ministerial Accountability in an Era of Devolved Public Services*, November 2010

83 As above

84 Justice Committee, Fifth Report of Session 2009-10, *Constitutional Processes following a General Election*, HC 396

85 Q68

86 Q62

67. We also heard the allegation that some of the contents of Chapter 2 might be politically motivated, that “certain people wanted to help the Liberal Democrats win power in a hung parliament”.⁸⁷ Dr Wilks-Heeg disagreed with what he described as a “kind of Lib Dem, Trojan horse perspective on how this rule book came about”.⁸⁸ The Constitution Unit also disagreed, arguing that the idea that the Cabinet Manual is a power grab by the civil service is

a wild allegation, which is mistaken on two grounds. First, there were no significant changes to constitutional conventions. The civil service did their best to set out the existing rules on government formation. Second, these were not ‘secret’ rules: they were published on 23 February, over two months before the election.⁸⁹

The Cabinet Secretary unsurprisingly also denied the allegation.⁹⁰

68. We do not agree with the view that any part of the Cabinet Manual represents an attempt to bias the political process. The draft may, however, be misleading in some places, probably as a result of an understandable desire for a degree of clarity that does not exist.

69. Two statements in Chapter 2 have raised particularly forceful concerns. Both appear to be attempts to provide clarity where none exists. The first is paragraph 50, which states that

The incumbent Prime Minister is not expected to resign until it is clear that there is someone else who should be asked to form a government because they are better placed to command the confidence of the House of Commons and that information has been communicated to the Sovereign.⁹¹

70. This paragraph did not appear in the draft of Chapter 2 which was published before the general election and appears to have been added in response to confusion around the issue during the May 2010 election.⁹² Professor Vernon Bogdanor, Research Professor at King’s College, London, writes that

paragraph 50 is mistaken, and could lead to a clash between an incumbent Prime Minister, the Cabinet Office and the Palace. The incumbent Prime Minister has a right to remain after an election in a situation where no single party enjoys a majority, but not, in my view, a duty. The decision as to when to resign is in my view a political one with no constitutional implications. In any case, I am not clear what is the provenance of the proposed rule as stated in the draft Manual. There seems no obvious precedent, and no basis for the proposed rule.⁹³

87 Q57 [Dr Pinto Duschinsky]

88 Q68

89 Ev42, para 2.5

90 Q140

91 Draft Cabinet Manual, December 2010

92 See Political and Constitutional Reform Committee, Fourth Report of Session 2010-11, *Constitutional Processes following a General Election*, HC 528, Ev76

93 Ev w25

71. Professor Brazier describes paragraph 50 as one of the areas in the Cabinet Manual that “indicates changes in practice”.⁹⁴ Dr Pinto-Duschinsky states that the paragraph is “ambiguous” and “implies something stronger” than the constitutional position as he understands it.⁹⁵

72. The Cabinet Secretary made clear to us that the guidance on this issue is intended to establish an expectation rather than an obligation:

The question is what should the expectation be about what Prime Ministers should do? Prime Ministers will always be able to do whatever they want in those circumstances. The convention can say what they should do.⁹⁶

The problem is that our evidence suggests that this expectation is not widely shared.

73. The foreword to the draft states that one aim of the consultation has been “to ensure that – as far as possible – the Cabinet Manual reflects an agreed position on important Constitutional conventions”.⁹⁷ This is a laudable aim and the debate that has arisen around paragraph 50 demonstrates the value of publishing the Cabinet Manual in draft. In our Report on the May 2010 election we recommended that

There needs to be clear and well-understood published guidance about when an incumbent Prime Minister should resign and when he has a duty to remain in office, in particular whether this extends to a duty to remain in office until there is clarity as to the form of an alternative Government, as opposed to simply the name of an alternative Prime Minister. Reaction to the events of May 2010 suggests that more detailed guidance was needed then. Reaction to the revised text in the December 2010 Cabinet Manual suggests that it may not go far enough.⁹⁸

74. **The evidence indicates that there is a continuing dispute over the extent to which a Prime Minister has a duty to remain in office when it is unclear who else might be best placed to lead an alternative government. The Cabinet Manual needs to give clarity to the extent of this uncertainty, rather than to attempt to resolve the argument.** We agree with our colleagues in the House of Lords in this respect.⁹⁹ The inclusion of references would allow readers to inform themselves on the different views that have been given on this question.

94 Ev w3, para 14

95 Ev 60, para 10

96 Q137

97 Draft Cabinet Manual, Foreword

98 Political and Constitutional Reform Committee, Fourth Report of Session 2010-11, *Constitutional Processes following a General Election*, HC 528, para 27

99 HL Paper 107, para 59

75. The second part of Chapter 2 that has raised concerns is the footnote to paragraph 49 which states that

In 2010, the Leader of the Liberal Democrat Party expressed a view that “whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties”.¹⁰⁰

76. Dr Wilks-Heeg called the footnote “rather unhelpful”.¹⁰¹ Professor Hazell told us that the footnote should be “struck out”:

It is not a constitutional principle. The constitutional principle in any newly elected Parliament is that that person who can command the confidence of the House of Commons shall be appointed as Prime Minister, and, as we saw in May of last year, it is up to the political parties to negotiate to try to work out who can command confidence in the new House. But there are no set rules ... about how those negotiations should be initiated or by whom.¹⁰²

77. The Lords Constitution Committee has concluded that

the statement contained in the footnote to paragraph 49 of the draft Manual does not reflect the current constitutional position on which party has the first right to seek to govern. The footnote should therefore be removed.¹⁰³

78. The Cabinet Secretary told us that he would be recommending that the footnote should be removed because it is not “a convention in the sense that it should be binding on future party leaders”.¹⁰⁴

79. There appears to be widespread agreement that the footnote to paragraph 49 represents a political negotiating position adopted in 2010 rather than a statement of an existing constitutional convention or practice. It should be deleted from the Manual.

100 Draft Cabinet Manual, para 46

101 Q71

102 Q38

103 HL Paper 107, para 63

104 Q84

5 Process and consultation

80. The Cabinet Manual was drafted by Cabinet Office (originally Ministry of Justice) civil servants.¹⁰⁵ Some of our witnesses were among the “constitutional experts and others”¹⁰⁶ involved to differing degrees in the development of the draft.¹⁰⁷ Alongside publication of the draft in December 2010, the Cabinet Office announced a twelve-week public consultation period. This ended on 8 March 2011.

Consultation before publication

81. Some of those not involved in the development of the draft suggested to us that they and others should have been involved at this early stage.¹⁰⁸ Democratic Audit, for example, describes “private consultations between Cabinet Office officials and a small number of invited ‘constitutional experts’”.¹⁰⁹ Lord Hennessy described his role in the process as follows:

... over a sandwich lunch, we were consulted about this. I don’t want to be funny about it, but it is a funny country where, over a 90-minute lunch and rather indifferent sandwiches, you try and fix, as best you can, these tacit understandings of Sidney Low’s so that they are made more explicit.¹¹⁰

82. Given what we have been told, the wider consultation on the draft that followed was clearly necessary in order to fulfil the professed desire for “greater transparency”.¹¹¹

Consultation after publication

83. The twelve weeks of public consultation on the draft allowed for by the Government in this case is the Government’s own *minimum* standard:

Under normal circumstances, consultations should last for a minimum of 12 weeks ... If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over the summer or Christmas break, or if the policy under consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation.¹¹²

105 Q78

106 Draft Cabinet Manual, Foreword

107 Q9 [Lord Hennessy]

108 Ev 55, Ev 57

109 Draft Cabinet Manual, Foreword

110 Q9

111 Draft Cabinet Manual, Foreword

112 HM Government, *Code of Practice on Consultation*, paras 2.1–2.2

84. It has been suggested to us by a number of people and organisations that this consultation period should have been longer.¹¹³ The Centre for Political and Constitutional Studies argued that the complexity of the document demanded greater scrutiny:

A three month consultation period may accord with best practice, but best practice has not been established with a document of this nature in mind. The Manual is complex and wide ranging; and of potential historical significance.¹¹⁴

The twelve weeks also included a Christmas break, which is cited in the Code of Practice as another reason for considering a longer period.

85. Witnesses have also queried why there is any urgency to finalising the Cabinet Manual, particularly given the long period between the Government announcing the project and the publication of the draft.¹¹⁵ Dr Wilks-Heeg, told us that

Sir Gus O'Donnell himself said we have been waiting decades and decades for this. I think if that is true then we can presumably wait a few more months and perhaps have a better consultation process.¹¹⁶

86. The Cabinet Secretary defended the length of the consultation period.¹¹⁷ It is open to question whether a longer consultation period would have elicited a substantially broader or more informed response, but we feel it was insufficient for a document of such significance. A longer consultation period would have allowed for a more detailed examination by a sovereign Parliament. This would have been wholly appropriate given the constitutional and political importance of the matters described in the Manual.

Updating the Cabinet Manual

87. The foreword to the draft states that

After the final version of the Cabinet Manual has been published, it will be regularly reviewed to reflect the continuing evolution of the way in which Parliament and government operate.¹¹⁸

88. The Cabinet Office has not yet made clear by what process the Cabinet Manual will be updated, nor how often.¹¹⁹ If the Cabinet Manual is used extensively by the public, there is a balance to be struck between updating the Cabinet Manual regularly enough so that it accurately reflects current practice, and allowing time for an appropriate period of consultation and reflection before publishing a new edition.

113 Ev43 [Democratic Audit], Ev w6 [Mark Ryan]

114 Ev w8, para 32

115 Ev55 [Democratic Audit], Ev w6 [Mark Ryan], Ev w7 [Centre for Political and Constitutional Studies]

116 Q70

117 Q94

118 Draft Cabinet Manual, Foreword

119 Ev w13, para 4 [Institute for Government]

89. The Cabinet Secretary told us that he expected “there to be some factual revisions as legislation changes, which are done as and when appropriate, but significant changes [would be] somewhat rare”.¹²⁰ He also told us that “If there are broader issues that are not as clear-cut as that, then it will be an interesting question for future Cabinets to decide precisely how they want to consult on such changes”.¹²¹

90. It seems to us that it will often be a matter of judgment as to how revisions are made and whether new developments should or should not be included in the Manual, even where these relate to matters of fact. We therefore favour an open process of revision of the Manual, rather than one conducted entirely within Government. **There needs to be a clear and published process, agreed with us, for updating the Cabinet Manual once it has been finalised. This process should be as open as possible, to allow for the consideration of comments and concerns about proposed changes before they are included.**

120 Q113

121 Q115

6 Conclusion

91. In publishing the draft Cabinet Manual, the Cabinet Secretary wrote:

Where there is doubt or disagreement, we hope consultation will help clarify the position and achieve a common understanding.¹²²

92. Our inquiry has revealed a fair measure of doubt and disagreement about the purpose and content of the draft Cabinet Manual. The next version of the Manual should be considerably improved as a result of the consultation that has been undertaken, and as a result of parliamentary scrutiny. It need not be perfect, however, provided that there are future opportunities to refine it, as it has been refined in New Zealand over the years.

93. We welcome the Cabinet Manual and the transparency it brings to the workings of government, and we look forward to future involvement in its development.

122 Draft Cabinet Manual, Foreword

Conclusions and recommendations

Purpose, status and consequences

1. Where there is the potential for disagreement or uncertainty, as there so often is on the meaning of unwritten constitutional conventions, it is important that the Cabinet Manual should signal the existence of this uncertainty. (Paragraph 22)
2. Vague language—‘usually this’ and ‘normally that’—probably indicates a shorthand way of avoiding long and detailed explanations of complex situations, but it risks limiting the Manual’s usefulness as a practical tool, unless the Manual also makes clear where the more detailed explanations are available. (Paragraph 25)
3. An index should be added to the Cabinet Manual so that it can be more easily used as a point of reference. Sources of related information, both published and unpublished, should be listed at the beginning of each chapter to make clear to readers the range of other guidance that exists. (Paragraph 28)
4. We agree with the House of Lords Constitution Committee that the Manual should “be fully referenced throughout”. (Paragraph 30)
5. We appreciate that the ‘precedent book’ may contain within it information that is personally sensitive, but believe there is a strong case for the publication, at the earliest practical time, of a redacted version of the ‘precedent book’, providing those outside the Executive with a more informed opportunity to judge whether constitutional conventions are accurately reflected in the draft. It would also make a more general contribution to public understanding of the British constitution as a whole. (Paragraph 32)
6. It seems unlikely to us that the Cabinet Manual will feature extensively in court proceedings. However, in a constitution based on the rule of law judicial interpretation is always possible. This is simply a further reason for the Executive and Legislature to do all they can to ensure that the Manual is accurate, does not mislead and is subject to due process. (Paragraph 34)
7. The foreword to the draft suggests that the Cabinet Manual is a document of limited ambition, which is not intended to “set issues in stone” or to “resolve or move forward” matters of public debate. Despite these intentions, there is scope for the constitutional impact of the Cabinet Manual to be greater than this. This becomes particularly true where the Cabinet Manual’s content extends beyond matters that are purely for the Executive. (Paragraph 36)
8. Whether or not the Cabinet Manual should be open to amendment and decision by Parliament depends in our view on what the Cabinet Manual is or might become. If it is simply a document by the Executive, about the Executive and for the Executive, then for Parliament to decide on its content would give it a status it should not have. (Paragraph 40)

9. The Manual, however, seems in part to be intended as—or might become, whatever the intention—the basis for a shared understanding beyond the Executive of important parts of the United Kingdom’s previously uncodified constitution. Parliamentary intervention would be entirely appropriate in such circumstances. An official document, approved by the Cabinet, will have a status unlike that of existing academic texts on the same subject. We intend to monitor closely how the Cabinet Manual develops, and how it is used both within and beyond Government during the life of this Parliament. (Paragraph 41)
10. Whatever the status of the Cabinet Manual as a document, it covers ground which is significant enough to merit regular debate in the House. We therefore propose that, soon after the Cabinet Manual is finalised, the House should have the opportunity to debate it as a whole and should seek the Government’s assurance that such a debate should become an annual fixture in the parliamentary calendar. Alternatively, the debate could occur twice during the course of a five-year Parliament – the first debate within 30 months of the start of a fixed term five-year Parliament, and the second debate within 30 months of the election concluding the Parliament. Before each one, the Government should publish a list of changes made to the Manual since the previous debate. The Government should publish a list of changes made to the Manual during the preceding year to inform this debate. As the Manual is largely about the conduct of the Executive, we would expect this debate to take place in Government time. (Paragraph 42)

Relationship to a written constitution

11. The Cabinet Manual is not a written constitution. It has, however, considerable overlap in content with what might be expected of a constitution. The Cabinet Secretary has suggested to us that it would be likely to be a starting point for any attempt to produce such a constitution. By bringing together and publishing the Government’s interpretation of existing constitutional rules and conventions, the Government has already begun to spark debate about both the nature of these rules and conventions, and if and how they should be written down. This is a debate in which Parliament needs to play a full part. (Paragraph 54)

Content: Analysis of two chapters

12. The chapter of the Cabinet Manual on Ministers and Parliament should focus on the role and responsibilities of central Government. Conventions which rely on the Government to take the initiative need to be included: a salient example—and a surprising omission from the draft—is the convention, acknowledged by the Government, that Parliament should have the opportunity to debate decisions to commit troops to armed conflict, and that the debate should take place before the troops are committed, except in emergency situations. This convention, as the Executive understands it, should be included in the revised Manual. We also intend to inquire separately into whether the Government’s understanding of the existing convention is correct and complete—and whether it goes far enough to ensure appropriate parliamentary involvement in any future decisions to go to war. (Paragraph 61)

13. Descriptions of Parliament's expectations of Government, where it is appropriate to include them, need to be based on evidence, such as resolutions of either House, and the Manual should be amended to reflect this evidence. (Paragraph 63)
14. We do not agree with the view that any part of the Cabinet Manual represents an attempt to bias the political process. The draft may, however, be misleading in some places, probably as a result of an understandable desire for a degree of clarity that does not exist. (Paragraph 68)
15. The evidence indicates that there is a continuing dispute over the extent to which a Prime Minister has a duty to remain in office when it is unclear who else might be best placed to lead an alternative government. The Cabinet Manual needs to give clarity to the extent of this uncertainty, rather than to attempt to resolve the argument. (Paragraph 74)
16. There appears to be widespread agreement that the footnote to paragraph 49 represents a political negotiating position adopted in 2010 rather than a statement of an existing constitutional convention or practice. It should be deleted from the Manual. (Paragraph 79)

Process and Consultation

17. There needs to be a clear and published process, agreed with us, for updating the Cabinet Manual once it has been finalised. This process should be as open as possible, to allow for the consideration of comments and concerns about proposed changes before they are included. (Paragraph 90)

Conclusion

18. Our inquiry has revealed a fair measure of doubt and disagreement about the purpose and content of the draft Cabinet Manual. The next version of the Manual should be considerably improved as a result of the consultation that has been undertaken, and as a result of parliamentary scrutiny. It need not be perfect, however, provided that there are future opportunities to refine it, as it has been refined in New Zealand over the years. (Paragraph 92)
19. We welcome the Cabinet Manual and the transparency it brings to the workings of government, and we look forward to future involvement in its development. (Paragraph 93)

Formal Minutes

Tuesday 22 March 2011

Members present:

Mr Graham Allen, in the Chair

Sheila Gilmore
Andrew Griffiths
Fabian Hamilton

Simon Hart
Mr Andrew Turner

Draft Report (*Constitutional implications of the Cabinet Manual*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 93 read and agreed to.

Summary agreed to.

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

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

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

Written evidence was ordered to be reported to the House for printing with the Report (previously reported and ordered to be published on 13 and 20 January and 1 February).

[Adjourned till Thursday 31 March at 9.45 a.m.]

Witnesses

Thursday 13 January 2011

Page

Professor Robert Hazell, The Constitution Unit, University College London, **Professor Iain McLean**, Official Fellow in Politics, University of Oxford, and **Lord Hennessy of Nympsfield**, a Member of the House of Lords, Attlee Professor of Contemporary British History, Queen Mary, University of London

Ev 1

Thursday 3 March 2011

Dr Stuart Wilks-Heeg, Democratic Audit, **Dr Michael Pinto-Duschinsky** and **Mr David Walker**

Ev 17

Thursday 10 March 2011

Sir Gus O'Donnell KCB, Cabinet Secretary and Head of the Civil Service

Ev 27

List of printed written evidence

1	Professor Iain McLean, Oxford University	Ev 39
2	Professor Robert Hazell and Dr Ben Yong, The Constitution Unit, University College London	Ev 41
3	Professor Robert Hazell (supplemental)	Ev 50
4	David Walker	Ev 51
5	Democratic Audit	Ev 53
6	Dr Michael Pinto-Duschinsky	Ev 57

List of additional written evidence

(published in Volume II on the Committee's website www.parliament.uk/pcrc)

1	Professor Rodney Brazier, University of Manchester	Ev w1
2	Rodney Brazier (supplemental)	Ev w4
3	Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University	Ev w5
4	Centre for Political and Constitutional Studies, King's College London	Ev w6
5	Centre for Political and Constitutional Studies, King's College London (supplemental)	Ev w10
6	Philip Hosking	Ev w11
7	John Ellery Gillingham	Ev w12
8	Institute for Government	Ev w13
9	Richard Gordon QC	Ev w15
10	Gerard W. Horgan	Ev w21
11	Localis	Ev w24
12	Professor Vernon Bogdanor, King's College, London	Ev w24

List of Reports from the Committee during the current Parliament

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

Session 2010–11

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436 (Cm 7951)
Third Report	Parliamentary Voting System and Constituencies Bill	HC 437 (Cm 7997)
Fourth Report	Lessons from the process of Government formation after the 2010 General Election	HC 528 (HC 866)
Fifth Report	Voting by convicted prisoners: Summary of evidence	HC 776
Sixth Report	Constitutional implications of the Cabinet Manual	HC 734

Oral evidence

Taken before the Political and Constitutional Reform Committee

on Thursday 13 January 2011

Members present:

Mr Graham Allen, in the Chair

Mr Christopher Chope
Sheila Gilmore
Simon Hart
Tristram Hunt

Mrs Eleanor Laing
Mr Andrew Turner
Stephen Williams

Examination of Witnesses

Witnesses: **Professor Robert Hazell**, The Constitution Unit, University College London, **Professor Iain McLean**, Official Fellow in Politics, University of Oxford, and **Lord Hennessy of Nympsfield**, a member of the House of Lords, Attlee Professor of Contemporary British History, Queen Mary, University of London, gave evidence

Q1 Chair: Welcome. This is one of the areas where things seem to have moved on non-glacially in the British constitution. So I don't know whether our three witnesses are breathless because of the hectic pace of movement on the *Cabinet Manual* or because we have shuffled them in rather quickly. But, gentlemen, welcome today. I am very pleased that you can be here. We're extremely interested to get your take on the *Cabinet Manual*. I think all of you—in some shape or form—were involved or consulted as this went through the process. Am I correct in that?

Lord Hennessy: A little bit.

Q2 Chair: Would you like to say something to kick us off? You're at liberty to make some opening remarks, if you would like, Peter.

Lord Hennessy: Just a few sentences.

Chair: Yes, of course, please do.

Lord Hennessy: My first big thought is that it's not a written constitution in embryo, it's the Executive's operating manual; a prime piece of photo reconnaissance of what the old imperial historians, Robinson and Gallagher, used to call the "official mind". It is significant, and it is a very considerable step forward. It is revealing of those moving parts of the constitution and associated procedures that the Executive currently think impinge upon their work, though in my judgement, certain key elements are missing, for example—and we will probably want to come on to that, Chairman—what the Salisbury/Addison Convention of 1945 means when it touches coalition, which it never has until last May. Another one is the precise definition of money bills: again, current.

It's a bit of a kitchen sink of a document, but then we have a bit of a kitchen sink of a constitution, and it's the usual mixture of statute, custom and practice, and making-it-up-as-you-go-along, aligned as closely as you can to previous precedents. It is an Executive document; they own it, but they are not the sole owners of the constitution, on which it touches on so many points. They cannot be, and they should not be. The *Manual* may be in for a bit of a bumpy ride, not least with you—although it is perhaps impertinent for

me to say that—because that always tends to happen with what George Dangerfield called, "Our great ghost of a constitution". When people attempt to reduce it to what he called, "The narrow and corruptible flesh of a code", although this is a manual, not a code.

It is never easy for the Brits to write things down. We have this kind of aversion to it. So it is a very significant step: it's the beginning of a rolling conversation, not least between the Executive and your Committee, but more widely than that. When we are long gone or on our Zimmers, our PhD students will regard this particular political season as of very considerable significance, not least because of this. Although, I have to admit that—outside this room—there are not very many people absolutely riveted by it. It has not been received with the hosannahs of a grateful nation, but it is received with a hosannah of gratitude from me, if nobody else.

Chair: Thank you. Robert, would you like to make some opening remarks?

Professor Hazell: I also strongly welcome the publication of the *Cabinet Manual*, something that we called for just over a year ago. I think it proved its worth significantly, in terms of the early draft chapter published in February about elections and Government formation, and how valuable that was, when in May we did have a hung Parliament and it was very important for there to be wider public and media understanding of what happens in that event. But even without that, there was a very strong case for having a *Cabinet Manual* that drew together all the guidance for Ministers and the Cabinet, because—as our submission shows in the appendix, where we analyse all the previously existing guidance—it is seriously fragmented, patchy and in places very hard to find. So the *Cabinet Manual* is a huge step forward, simply in terms of pulling all that together and making it much more accessible. So, although the Committee may have criticisms, possibly in terms of parts of the content of the *Manual*, I hope you too will strongly welcome its publication in principle.

Chair: Iain?

Professor McLean: Yes, thank you. I can save some time because, on the points that Peter and Robert have

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

already made, I simply concur. I think it's excellent. In fact I submitted two pieces of written evidence, because I'd sent a little pedantic note to the Cabinet Office before I received your kind invitation and then I have submitted written evidence to you.

The points that I would highlight out of that are, first of all, the gain in transparency compared with the situation, which I have written about, in which a person calling himself "Senex" wrote to *The Times* to say what the constitution required, but part of it the public was not allowed to know. That was as recently as 1950. This situation is vastly better; I entirely agree with Robert and Peter.

On some pedantic levels the document could do with some improvement. I noticed a couple of instances of what seemed to me to be circularity, of which the more serious is the use of the word "sovereign" in two contexts, which seem to me to be incompatible. That was in my first memo. The substantive points I want to highlight from my written evidence are two: one is about paragraph 59 of the document, which states, "The sovereign retains reserved powers to dismiss the Prime Minister or make a personal choice of successor". That's the part of that sentence that concerns me. In my second lot of evidence I quoted a letter from Prime Minister Asquith to King George V in 1913, when George V was being pressured by the Opposition, military officers and an eminent law professor to dismiss the Government. Prime Minister Asquith wrote three wonderful letters, one of which I quote in part, pointing out that the power mentioned in paragraph 59 was last used by William IV, whom Asquith very much in-your-face to the King called "one of the least wise of your predecessors". A power that has not been used since 1834, and then by one of the "least wise" of monarchs, I would prefer to see it stated that it is in desuetude. That is the main substantive point in my evidence.

The second one is in paragraph 15 of my submission to you, where I draw attention to paragraph 78, "The Prime Minister's responsibilities include recommending a number of appointments to the sovereign, including high-ranking members of the Church of England". I feel it would be helpful if your Committee could bring out into the open the position of the present Government on that point, since the previous Government in the July 2007 Green Paper said that it was withdrawing from those appointments. I'm not aware of any statement from the present Government either way, and I think that is a constitutionally important issue. Thank you.

Chair: Thank you, Iain.

Lord Hennessy: On that last point, Chairman, could I mention that I had a little sniff on that, and I think the present Prime Minister is carrying on the Gordon Brown position of being the "postman" for the Church of England's wishes to the Monarch. I have not had this in print, but I agree with Iain that it is important; it doesn't look central to everybody but I think that the quite significant change—not disestablishment, but quite significant—has carried on into this Administration.

Chair: I would normally try to dive in at this moment but I know Sheila is very pushed for time, and I think she should come in first.

Q3 Sheila Gilmore: My apologies. I am going to have to leave for a question in the House. It would be helpful if you could let us know, to your knowledge, what kind of consultation took place in arriving at this stage. But subsequent to this, what is the purpose of a consultation process if this is simply a manual expressing what is, and is there a potential here that, in going through a consultation process, we begin to move the constitution on? I agree, it's not necessarily firing up the masses, but people expect a consultation process to produce change, but if this is a snapshot of what is, where is the logic in that?

Professor McLean: If I may, I'll comment on the second part of the question and leave my colleagues to comment on the first. What is the point of a consultation on what is? I think the point is that it's not always clear what is, and Members may know the famous statement of Sidney Low, almost 100 years ago, "We live under a system of unwritten understandings. Unfortunately, the understandings are not always understood". So I welcome this consultation, even if only to establish a consensus among those who study the matter as to what the constitution is.

Lord Hennessy: A lot of this is convention. I haven't totted it up, but the bulk of it is, I think. Conventions only endure if the parties to them still think there is vitality in them. You can't overturn statutes without primary legislation, as you know better than I do, but conventions can decay and if consent is withdrawn they effectively have gone. Parliament is crucial to the vast swathe of all this, so I think the consultation with Parliament alone will be significant.

Also, I think it is in the Cabinet Secretary's introduction—I don't think he quite used the word "validated", Robert will correct me—he wanted this to be the basis of a kind of agreement with the players in the constitutional trade to see if we could all sign up to it. Indeed, it is a pioneering thing, because that is what I meant by "photo reconnaissance". We actually have a sequence of snapshots now, which we have never had before, and if consent isn't forthcoming and genuine disagreement is there, or another way of looking at it, or "You have forgotten this" or "This should be stronger; this is unclear", I'd be very surprised if it wasn't taken on board, which is why I think by British standards it is a remarkable constitutional conversation. Because until now, since the late 1940s—since the year I came into this world, I think—there has been a thing called the *Precedent Book*, which has only been declassified up until the mid-1950s.

Q4 Chair: Are you saying the two things were related, Peter?

Lord Hennessy: I think there is a lot of overlap with the *Precedent Book*; I have not seen the current one.

Chair: No, your coming into the world.

Lord Hennessy: Yes, indeed. I was a precocious boy, but not quite that precocious.

But that has been there and it has been updated. I think it takes the form of thematic chapters: the sensitive bit, the particular instances, the rows, the scandals, the difficult bits, and also things like, I think, although I'm not sure, how you form a War Cabinet,

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

what the menu of choice is there, whether it is a Cabinet Committee or not and all the rest of it.

In fact, Chair, if you will allow me, I think it would be a wonderful thing if you asked for the current *Precedent Book* to be declassified, as much of it as possible, so we can actually set it alongside this, but until now the *Precedent Book* has been a very private operation. This is a step-change from all that. It isn't the *Precedent Book*; it goes much wider than that, but if we had the two together I think that would be a great service.

Q5 Chair: I will ask the Clerk to draft a letter for me to send to the Cabinet Secretary to see whether we can declassify the *Precedent Book*.

Peter, you talk about conventions between parties only existing as long as they don't decay. The consents that are evident from the parties are within the Executive here, though. That is the problem. The consents are not consents given legitimacy by coming from separate institutions. This is an internal manual within the Executive, so it is understandings inside the machine rather than things that are in the public domain, the parliamentary domain or even the judicial domain.

Lord Hennessy: But a lot of it is their view of what the conventions are that affect Parliament: the formation of Government and so on.

Chair: The Executive's view of that, yes.

Lord Hennessy: Absolutely, and that is what I mean by if Parliament says, "We don't recognise this picture", and also, "If this picture is incomplete, this might be the way to finish it off", I think it gives you great salience. To put it bluntly, Chair, the Cabinet Office has to carry you on this, full stop.

Q6 Chair: If Parliament wishes to do this in future, that is true. It has not been true in the past that the conventions you are talking about have involved Parliament and parliamentary consent.

Lord Hennessy: Although Salisbury/Addison, which I began with, does. That is a very important one and it is very live again, and it hasn't been looked at properly since the Joint Select Committee of 2006 and I think it needs to be. That is really central to everybody's business, and that's not up to them. In fact, it was a two-party thing, wasn't it? It was an Executive thing but it was essentially a two-party deal in specific circumstances, and there are other examples of that. I think that is just the most vivid at the moment.

Professor Hazell: Two things, if I may. You asked about the purpose of consultation. I think it is to try to give the new *Cabinet Manual* instant legitimacy and authority. The model—we know this, because Sir Gus O'Donnell has made no secret of it—is the New Zealand *Cabinet Manual*, which has been in existence for about 30 years, and that began in a much more low-key and gradual way. It was originally called the *Cabinet Office Manual* and it was primarily a guide to the officials in the New Zealand Cabinet Office. It's now in its fifth edition, and because it has been going for 30 years and has been adopted by successive Governments of different political persuasions, and in each new Parliament, at the first meeting of the new

Cabinet, they are asked by the Cabinet Secretary whether they want to adopt the *Cabinet Manual* or whether they want to make any changes to it, it has been significantly revised over the years, so it has acquired a huge patina of authority.

We start from a different place, and I quite understand why the Cabinet Office wants to try to acquire that instant authority for the British *Cabinet Manual*, and I think that is in large part why they are going through this extensive consultation. In New Zealand, the *Cabinet Manual* has never been the subject of scrutiny by a Parliamentary Committee. It is simply a product of the Executive. But I applaud the Cabinet Office for submitting their drafts, first for scrutiny by the Justice Committee in February and now this Committee, and while it remains a document of the Executive, and they don't require parliamentary consent for this Manual, I am sure they will take the views of the Committee very seriously.

Briefly, in terms of the extent to which it tries to record the conventions as they are, it does break new ground in one important respect, but one which I strongly applaud and in part we urged upon them. That is in developing a stronger understanding of what I have called the caretaker convention, namely the restrictions that a Government should observe on its own decisions, not simply during an election period but immediately after an election if no party can immediately clearly command the confidence of the new House of Commons; and in a third context if, mid-term, a Government is defeated on a matter of confidence and there is then briefly, clearly, no Government that can command confidence. In those three contexts, we have argued the caretaker convention should kick in and that is accepted in terms of the substance in this draft.

Q7 Mrs Laing: May I ask a very general question, not about the content of the *Cabinet Manual* but about the way in which its standing as an important document, as an element of the constitution—I think we are all agreed that it is in some way an element of the constitution—develops? It is clear that it has to be approved by the Cabinet; should it also have to be approved formally by Parliament?

Professor Hazell: I have just given my answer to that and I repeat it: I don't think it does need to be formally approved by Parliament. This is ultimately a document of the Executive. It has submitted it for public consultation and for scrutiny by a parliamentary committee, but at the end of the day it is the Executive's document.

Lord Hennessy: It is not like a constitutional statute that can't come into existence without it. It's one of those peculiar hybrids we go in for: the twilight zone that is now full of codes and now a manual, which is some ways, cumulatively, is our surrogate for a written constitution. A great deal has happened over the last 20 years, when you tot it up, since John Major declassified *Questions of Procedure for Ministers*—now the *Ministerial Code*—in 1992, and Parliament has become more and more involved in each of these. The British constitution, or a good chunk of it, has moved from fragments of documents—*Precedent Book* equivalent—to the front of a code and then into

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

the face of a Bill, an Act of Parliament. This is yet another one of those hybrids. It's not like the *Ministerial Code* or the *Civil Service Code*. This is *sui generis* in many ways, but it's in the twilight zone. One of the mysteries of the British constitution, which keeps the three of us in business and adds a little poetry and magic to our otherwise routine, academic lives, is trying to work out which bit has which status and how it relates to the rest. So it is a magical mystery tour, Mrs Laing, as much as anything else.

Q8 Mrs Laing: I entirely agree with you about the magical mystery tour. I personally have always argued that our Constitution is the stronger for being unwritten and a magical mystery tour, and therefore flexible and so on. The Chairman and I might disagree on this, but that is what we are looking at over a very long period here, looking at the thing more widely. I am very concerned about Professor Hazell's answer in this respect: that this document—although it's in draft—when it becomes a manual approved by the Cabinet, it is not just a memo between Ministers suggesting how things ought to be done; it is not just the Secretary of State telling his junior ministers that this is what he wants to see. It does become part of the constitution, does it not? It does become part of the constitution.

Lord Hennessy agrees that it becomes part of the constitution. Professor Hazell says that, although it is part of the constitution, it is a clue to how things ought to be operated and therefore doesn't have to be approved by Parliament. So then I will throw it to Professor McLean, who hasn't yet given his answer; he may put the answer differently. How does this affect parliamentary sovereignty?

This sets down rules—not in stone but on paper, which is important—that previously had been in the ether and on the magical mystery tour that Lord Hennessy mentions. If it is to be written down, approved and acted on for ever more, should it not be approved by our sovereign Parliament?

Professor McLean: I am sympathetic with that. I am less keen on mystery than Peter is and, if it is at all helpful, at the end of my written evidence I suggested that it would be desirable to produce a more hierarchical document that began with the statutes, included this code and, because there are so many cross-references to the *Ministerial Code* in the *Civil Service Code*, I think it would be good if there was one master document that included all of them. Unlike Robert, I would be very happy to see Parliament sign off or not sign off on the amalgamated document, but as to its status, if it came to anything difficult, for instance if it came to judicial procedures, then it has to be clear what is statute and what is not.

Lord Hennessy: When *Questions of Procedures for Ministers* was declassified, the then Cabinet Secretary Robin Butler at a seminar—and he gave me permission to mention this later—was asked by one of one of the students, "Could this just be changed by the new Prime Minister?" He said, yes, it could, except for those bits that relate to statute. I can't remember the exact words he used, but it was proper dealings with Parliament and rule of law and all of that.

Again, *Questions of Procedure for Ministers*, in its day, was a great breakthrough and it became the norm or touchstone against which the press, MPs and Peers tested out bits of behaviour. Kenneth Pickthorn, long ago now in 1960 in the House of Commons, famously said, "Procedure is all the constitution the poor Briton has". So I think what is accepted procedure in here really matters, if it is accepted. Indeed, in terms of judicial review, I remember a High Court judge saying to me, albeit privately because they can't really talk in public, when *Questions of Procedure* was declassified—because that was a Cabinet paper with a 30-year delay on it until 1992; it's amazing to look back—that he thought it could be justiciable, in the sense of whether, in a judicial review case, due process as laid out in *Questions of Procedure for Ministers* had been followed. That applies even more to this; so willy-nilly, if they become the norm, if they become, roughly speaking, the accepted way things should be. For example, I suspect, although one shouldn't anticipate, that the Chilcot inquiry may well have something to say about Tony Blair's War Cabinet being a ministerial group, not a proper Cabinet Committee because, as this makes plain, Cabinet Committees have special status; they are different. All these nit-picking things, again—which the country does not thrive on, like us, Mrs Laing—I think are absolutely crucial to our system.

Professor Hazell: May I add two things? One, New Zealand's *Cabinet Manual* requires no parliamentary approval and has never been scrutinised by any parliamentary committee. The second is a point that the Chairman might sympathise with, since he often talks about the need for separation of powers, and under separation of powers it is open to each branch of Government to develop its own procedures, and they don't necessarily require the approval of either of the other branches of government. This is the Executive setting out an important manual about the procedures that it says it will be guided by. Future Governments are not necessarily bound by this first edition of the manual but if, as I hope, it continues to exist and to be used, then each successive Government will be asked whether it wants to follow the manual or whether it wants to make any changes.

Chair: I would say, Robert, that means we have the bad things of the separation of powers but not the good things of separation of powers, but we would probably be best not to go there.

Mrs Laing: I was going to say just the opposite—but then that is why we're a Committee—that actually, Professor Hazell's elucidation there about where the separation of powers comes into this, I think helps our understanding of this potential document. It possibly is a good argument, but if it is an operating manual for one branch, the Executive, then it is in some ways no business of the legislature. That's a very good point to have made, thank you. I think I have taken enough time on that one.

Q9 Simon Hart: There is only one add-on to Eleanor's comments, which is about whether you felt that the consultees in the process hitherto have been the right consultees, leaving aside whether it should be approved by Parliament or not. There is always a

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

list of so-called stakeholders, to use the horrible phrase, in any consultation. Do you think that list is as complete as it should be at this stage? Indeed, is there a list?

Lord Hennessy: I don't think we know who they all are. The bit I helped with a little bit was the formation of Government in hung Parliament circumstances. To answer the previous question, it started off with a Ditchley conference in November 2009 on transitions, and the Ditchley Foundation brought people in from America, Australia and all over the place, and we had a syndicate that Robert chaired. I can say this because it's in the director's report, and you can also see from that who was there, although not what they said. We looked at this for quite a long time, and there were anxieties about what had happened when Harper in Canada had asked the Governor General to prorogue when he was in the manure for—I forget what—money, I think. There is always the fear that the Queen will be drawn into politics, which is the number one no-no, which I accept.

Out of that syndicate discussion there was a sort of recommendation—although Ditchley doesn't do that—that this should be looked at. Then Gordon Brown had given Gus O'Donnell permission to start work on a manual. Then, over a sandwich lunch, we were consulted about this. I don't want to be funny about it, but it is a funny country where, over a 90-minute lunch and rather indifferent sandwiches, you try and fix, as best you can, these tacit understandings of Sidney Low's so that they are made more explicit. Indeed, I think that was all to the good, because Robert and I had to impersonate the British constitution for five days in television studios after the election, and it would have been very difficult for us to have said what the constitutional understandings were if we hadn't had that bit of paper in our hands; the first bit that was made public from this to the Justice Committee, although it has been modified now. I think you would agree with that, Robert. We would have been quite hard-pressed to do that. So it was a very good piece of anticipation. Although the change that has been made is really quite important to the draft that the Justice Committee had on a little scrap of paper that we were waving in front of the cameras, but I'm sure you will want to come back to that. That was the bit that I helped with. Robert may have helped with rather more of it than I did. Robert is the expert on caretaker conventions.

Q10 Simon Hart: Sorry to interrupt, but that was in the construction of the document. What I am talking about is the extent to which the finished product, as much as the draft one is a finished product, is consulted on and commented upon, and whether the list is long enough and wide enough, and whether there are areas of even local government or devolved government, who should be more closely involved in the process. I don't know the answer to that. I'll come back to that.

But you've just raised another important point about the five days, about which there has been countless scrutiny and analysis since. Do you think that this now, in whatever form it finally emerges, will mean that next time this happens you will have a peaceful

five days because nobody will be interested in what your view is because it's all down here? Isn't that a good thing, because it will take the drama and crisis out of the situation, which is presumably exactly what we don't want when we're trying to make some pretty important decisions over the governance of the country? The last thing we want to feel is that there is a media clock ticking and that the whole thing is some great kind of political drama. It should be a perfectly straightforward political process, not a political crisis, which is how it slightly came across in the five days after this election, and my question is very simple: does this solve that problem or not?

Lord Hennessy: It will syringe a lot of the heat out of it, I hope, if "syringe" is the right verb for heat; it probably isn't. But it won't entirely, because—well, you know you have fought constituencies—people are exhausted. They're anxious. Some people are going to see the chance of carrying on serving the Queen as a Minister, snatched away. Some, if it goes the other way are never going to have the chance of serving the Queen as a Minister. There are all sorts of personal problems involved and, with the 24-hour media and electronic news gathering being what it is, the camera is on everybody; people can say all sorts of things about what they think the constitution is because, again, I shouldn't think many MPs will be going around their constituencies with this.

The big difference between last May and the last hung circumstance of February/March 1974 was electronic news gathering. It was done in a remarkable way over that rather dicey weekend, as the Queen's then Private Secretary, Martin Charteris, called it, but this time we had five days, and people won't necessarily sign up to this. I can't remember exactly what Nick Clegg said in the run-up to the election but it was to the effect that, "There is some dusty document produced by the Cabinet Office that suggests this, that and the other, but we'll see what the British people say". I should think it will be different next time, but it will never take out the complete uncertainty.

Indeed, there is probably a debate to be had, is there not, about the new formulation of the hung circumstance, which now makes it explicit in this version that the duty of the Prime Minister of the day is to stay there until a name can be given to the Queen that will command the confidence of the House of Commons. Whereas it was implicit—I think Robert would agree—in the draft that went to the Justice Select Committee, it is explicit in here, paragraph 50, and I think that's a very significant change. Indeed it should help, but I don't think it will be de-dramatised if there is a next time.

Q11 Chair: Peter, you put this in your usual charming way but I think there is a very strong whiff of illegitimacy about the whole process here. The public are not involved because they don't talk about it down at the "Dog and Duck", MPs don't carry the draft *Cabinet Manual* around in their constituencies, but we do need a few sensible people to hold the show together in these moments of crisis, and they can be equipped with sheets of paper and can go out there and be on television, or whatever, and pronounce.

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

Shouldn't this all be the property of the people, in a modern democracy?

Lord Hennessy: The argument has always been—this is me being explanatory rather than advocating, I think—that it only holds, all of this, whatever is put to the Queen, if the Queen's Speech can be presented and got through, and confidence votes, if they subsequently come, are won. So the ultimate validator of all this is Parliament. In 1974—it was always a dialling an 0865 number then—they rang up Jack Wheeler-Bennett in Oxford who said, if I remember, “No Parliament can long survive on a diet of dissolutions”. This was the question of whether there would be another quick election, or if Ted Heath hung on if he could have another dissolution, or whatever. It was made quite plain to Ted Heath that he couldn't; he'd had his election. I think Robert Blake was consulted, and of course that wasn't known about at the time; the telephone calls to Oxford. This time it was an advance anyway—in your terms, Chairman—in that the Justice Select Committee had seen a bit of paper, and also the Cabinet Secretary had told them who had helped out a little bit on this. We were made public in a way that the Oxford lot weren't in 1974. But I know that doesn't meet your concern. Perhaps the best way of meeting your concern is to take the Scottish model and have an affirmative vote in the House of Commons as soon as you are sworn in, of that name. Maybe that is the best that can be done. But of course, Parliament doesn't exist, does it, when the hung circumstance is upon us with the exit poll or by 3.00am on the Friday morning, usually, and you're not there; you're not in existence.

Chair: Only in the ether, as an Electoral College that actually doesn't convene.

Lord Hennessy: Yes.

Q12 Chair: But you're right, yes. So we await a crisis, probably two or three years down the line, when we will get a chance to say yes or no as to whether the Government should survive. Again, it's perhaps unsatisfactory that there is that length of time between those events.

Lord Hennessy: Yes. There was a suggestion the Speaker should be the one who would get involved in all of this, but of course the Speaker, he or she, doesn't exist either at that point. You're not there. We are without you for a while. Not for long; but we are at that crucial moment without you.

Q13 Chair: It is not an issue that the Executive wishes to take up and resolve to ensure that Parliament is in being and can be an active player in this situation. In the circumstances we saw in May, the Executive as a beast was quite happy to see that Members of Parliament weren't really involved at all in that.

Lord Hennessy: To be fair to them, in advance they had told you what the drill would be that they were operating upon—the constitutional drill—insofar as you can actually predict these circumstances. I'm not here as Gus O'Donnell's front-man but they could say, and I would say if I was the Cabinet Secretary, “In advance, we have taken you into our confidence about the assumptions, the tacit understandings”—to use

Sidney Low's phrase—“and the procedures, insofar as they are foreseeable in every contingency”, because “hung” is a variety of degrees.

Chair: But didn't say, “One of the difficulties here is that Parliament will not exist and therefore we would propose the following to ensure that Parliament is consulted.” Since it has just been elected by millions and millions of people, it should have at least as much of a say as the media or honoured gentlemen with pieces of paper.

Professor Hazell: One thing to Simon Hart's question about public consultation: in terms of this draft document, the whole *Cabinet Manual*, first published in December, as I understand it, is now subject to public consultation of the general public; a 12-week consultation exercise of the usual kind, and anyone can write in with comments about the *Cabinet Manual*, such as your constituents. And if this Committee has suggestions of interest groups or organisations who should be specifically asked for comments, I am sure the Cabinet Office would be delighted to have such suggestions.

On the process immediately after an election, if no single party has won an overall majority, I'm afraid I think it's unrealistic to propose that Parliament should immediately meet to try to work out who can command confidence before there have been negotiations between the political parties. I would only remind this Committee that it was a Committee of this House, in the last Parliament, that proposed that 12 days should elapse after the election before Parliament first met, and that suggestion was followed. It was an important proposal because there were so many new Members of the new Parliament who needed induction and training.

Q14 Mr Turner: Who was that, then?

Professor Hazell: It was the Modernisation Committee.

Mr Turner: Thank you.

Q15 Mrs Laing: I will not follow up on the idea that someone has just been elected to represent 50,000 people but they can't actually start their job until they have been trained by someone. Absurd, absurd. If that came from a Committee, it's up to me to challenge that Committee at some point.

May I come back to what Professor Hazell said a few minutes ago about the separation of powers point? I have had a couple of minutes to think over what Professor Hazell said, which was bothering me, and I realise why. Although we have the three pillars of the separation of powers, let me ask you: from where does the Executive derive its authority?

Professor Hazell: Ultimately, in terms of its political authority, the Executive derives that from commanding the confidence of Parliament, and in particular the House of Commons. In terms of the Executive's legal authority, it derives that from being appointed by the sovereign as Head of State: that's our constitution. I can illustrate that, if you like, by reference to the caretaker convention operating after an election, and before it's clear who can command confidence in the new Parliament. We all know there was a lapse of five days after the election before it

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

became clear who the new Government might be. During that period, quite properly, Gordon Brown remained in office as the incumbent Prime Minister. He certainly had the right to do that—indeed he had the right to meet the new Parliament to test whether he could still command confidence—but, I would argue, he had a duty to remain in office as the incumbent Prime Minister because we must always have a Government. In old Tory language, the Queen must never be without responsible advisers, and the Queen's business must be carried on. But in those five days the Government had legal authority to govern, because it was still the Government, but it had only limited political authority because it hadn't yet been able to demonstrate who could command the confidence of the new Parliament.

Q16 Mrs Laing: Indeed, and I accept all that you say on that; that is a helpful setting out of the situation. Thank you. But in your previous answer, Professor Hazell, you said that this document was an operating manual for the Executive, but those who acted upon this in 2010 during the five days that we've been talking about were not only the Executive who continued in office, Gordon Brown and his Ministers—which is quite right—they were, I have to use the names of people because it's relevant, let us say, Oliver Letwin, Danny Alexander, for example, neither of whom were Her Majesty's Ministers, nor ever had been.

Can I put it to you this way? This Manual would not only be the operating rules for an Executive, but was in fact acted upon by people who were not the Executive, who were not Her Majesty's Ministers, and that therefore your argument about the separation of powers, which I accept as such, doesn't hold water and this ought to be a document that is approved by Parliament. Because it can't have the authority as being an operating manual for an Executive if it is used by people who are not the Executive. They are the potential Executive, but they are not the Executive and, therefore, from where do they derive authority to use this?

Professor Hazell: You have reminded me of another respect in which the *Cabinet Manual* breaks new ground, and again it's something we strongly supported and encouraged, and that is in relation to the support that the Civil Service may now provide to political parties immediately after an election if no single party has won an overall majority, and one or more parties are negotiating with each other to see whether they can command confidence. The person I expected you to name was not Oliver Letwin or Danny Alexander but Sir Gus O'Donnell, as Cabinet Secretary, because it was he who said to the political parties, "If you want, in your negotiations, we can provide support. We can provide accommodation, food and water and, if you want, we are on hand to offer factual advice". Now we know, from the books that have been written, that that second offer was rejected by the political parties, but we also know that they did accept the offer of accommodation, and indeed chose to conduct their negotiations in 70 Whitehall. In fact, there were three possible places where they could have negotiated: Admiralty House

being a second and, I think, this building, or certainly part of the parliamentary estate, being the third. It was the choice of the political parties where they chose to negotiate. They could have rejected that too and gone off to negotiate in a hotel.

Q17 Chair: Were they offered Number 10, Downing Street, Robert?

Professor Hazell: Not so far as I know, but that would have been a strange offer to make because, as I have said, the incumbent Prime Minister remained in office in 10 Downing Street; the Labour Party was offered exactly the same support as the other political parties if it were part of the negotiations but, in this respect, there was a Chinese wall—quite properly—and the Labour Party was treated, for this purpose, simply as one potential or actual negotiating party, just like the other parties.

Chair: Professor McLean, forgive me, I forgot to bring you back in. I do hope you have not lost the thread.

Professor McLean: No, I hope not, because I do share some of the unease that I detect behind the questions of both of the Members who spoke last.

In relation to the public consultation, as raised by Simon Hart, in the preparation of the document I came in at a later stage than my two colleagues. The only country house I was invited to was Wilton Park, by which time the document was beginning to gel. I don't think that meetings in country houses are really an adequate form of consultation. Robert is right of course that anybody may currently play the game, but I would prefer if there had been some more proactive effort on the part of the Cabinet Office on that point. So I share the unease that I think lay behind Mr Hart's question.

As to Mrs Laing's question, again, I share some of the unease I think that I hear behind that question, because it's not purely an Executive document, or at any rate it involves at a minimum the relationship of the Executive with many other bodies; there may only be a few people who care about some of them, but I think it touches quite centrally on the position of the two established churches in the United Kingdom, which affect two of the four countries of the UK, and the personal position of the Monarch and her advisers, which is obviously central to the constitution. So I am quite sympathetic with the calls for parliamentary scrutiny of this document.

Q18 Mrs Laing: That is a comforting answer, thank you. I just continue to be concerned, and perhaps Professor Hazell and Lord Hennessy can also give some reassurance because they've thought this through many times. This is a good idea, this *Cabinet Manual*. It is good that the magical mystery tour should have a guide to it, but is it not the case that once this becomes an approved document by the Cabinet, it will become an entrenched part of our constitution, just as much as any of the rule books that you have all been referring to will? I am prepared to accept that if it was simply an operating document, as Professor Hazell has repeatedly said the one used in New Zealand is, if it was simply a document to guide the Cabinet and the Executive in its everyday

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

dealings, that would be fine, but is it not far more than that, because it goes to the heart of the formation of Government, and that is not done by the Executive; it is done by people who are elected to Parliament and, therefore, Parliament ought to have a role in giving this document authority?

Chair: A quick reply to that please. I think we covered that a little earlier.

Lord Hennessy: I must say, I think only Parliament can give this the validation that it needs and is going to be acceptable all round. "Entrenchment" is a tricky word in the British constitution so we don't entrench things, really. Statutes can be repealed and all the rest of it, and we are very wary of motions of entrenchment. But if it becomes part of the warp and the woof of everyday business it gives it a great salience; in practical terms it becomes very important. So I'm not in any way diminishing it, but I think "entrenching" is probably too strong a verb for me.

Professor Hazell: I strongly support parliamentary scrutiny of the new manual. That's not the same as saying that the new manual requires parliamentary approval, or that Parliament has a veto, and I don't think that you do. In terms of whether it might become entrenched, I am not sure quite what you might mean by that. If you mean inflexible, then I have to say—looking at the New Zealand model—that is very far from being the case. It's now in its fifth edition. It has been significantly revised over the years. In the last two editions whole new chapters have been inserted, and the New Zealand manual really is on all fours with the British proposed manual and the chapter headings are almost identical. We have taken the New Zealand model, so that the New Zealand manual has a very important chapter about elections and Government formation and quite a lot of the draft manual, in terms of that chapter, is borrowed from the New Zealand manual.

Chair: Professor McLean.

Professor McLean: Really, I have nothing to add to my previous answer.

Q19 Chair: We were talking about manuals, and we've had quite a discussion over 40 minutes or so as if it were nitty-gritty and as if it was to do entirely with the Executive. This process was started in this country by the previous Prime Minister on very clear grounds different from the ones being put to us by the witnesses today. He said, "There is a wider issue—the question of a written constitution—an issue on which I hope all parties can work together in a spirit of partnership and patriotism. I can announce today that I have asked the Cabinet Secretary to lead work to consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution, into a single written document". Now, that was the beginning of this process.

Professor Hazell: Could you remind us of the date of that?

Chair: That was 2 February 2010, at the IPPR. Really it seems to me we are putting our own interpretations on this and, perhaps, if not rewriting history, leaving aside the origins of this drive to create a *Cabinet*

Manual and to pull together the existing bits of the unwritten constitution.

Lord Hennessy: This isn't it. If Gordon Brown was still Prime Minister, I don't think this would be fulfilling what he set out, would it? It is an important building block. I mean this isn't "we hold these truths to be self-evident" time for the UK. If anybody opened a document with that they'd be offered counselling at the very least, wouldn't they? It's not that. I agree with you, Chairman, that the political weather system, the ecology in which this is being produced, is very different. As far as we know, the current Prime Minister has no plans for a written constitution. A great deal more is being shifted into statutory form, as we speak. There's an enormous rush of constitutional legislation, as there was after 1997. But in this country the way we tend to look at constitutional settlements is to see what has happened and then try and produce a retrospective argument or a few threads that link it.

After 1997, the Cabinet Office suggested that there should be a White Paper saying how all those changes linked together—human rights, devolution, freedom of information, Lords reform—what a new constitutional settlement would look like and which part related to what, and there is no sign that we're going to get that with this rush, but this isn't it.

Q20 Chair: But, Peter, people are entitled to change their view. Prime Ministers are not bound by previous Prime Ministers under previous Parliaments, but clearly the origin of this, the drive to do this from the then Prime Minister, was very different from what you are implying to the Committee: it's a little bit of a car manual on how the gearbox works and the rest of it.

Lord Hennessy: A bit more than that.

Chair: This is somebody who was the Prime Minister saying, "I'm talking to you ultimately about the destination, not just what's on the speedometer or how the handbrake works". Professor McLean.

Professor McLean: Yes, well I agree with that interpretation. I happened to be at that IPPR meeting and that's my understanding of what the then Prime Minister proposed. Of course he was leaving it very late in his term, but it's clear that he did propose a procedure similar to what the Chairman has just outlined as a matter of record.

Lord Hennessy: But this isn't destination, Chairman.

Chair: No, indeed.

Professor Hazell: None of us can know this for certain, but my own impression is that the original initiative and desire to create a *Cabinet Manual* was that of the Cabinet Secretary, Sir Gus O'Donnell. Quite properly, he needed the authorisation of the then Prime Minister and he sought it. We have long known that the Prime Minister, Gordon Brown, had a very strong interest in a written constitution. He declared that within a week of his becoming Prime Minister in the summer of 2007, and it continued to be his strong interest and desire.

I have to say, I think it's slightly ludicrous to announce in February 2010, when he could only have been three months away from the next general election, that we might make serious steps towards that destination in the last three months of the last

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

Parliament. But I think, in effect, there were two slightly different agendas in play. The previous Prime Minister had a much wider and bigger agenda, which he gave voice to in saying that he had authorised work on the *Cabinet Manual*.

Q21 Mr Turner: My question is about caretakers. Between the election and the handing over of control to David Cameron something was done over in Europe, which seems to me to have broken the convention not to do something so substantial. We know that there was a discussion between the current Chancellor of the Exchequer and the previous Chancellor of the Exchequer, but the current Chancellor of the Exchequer said these things are matters for the previous Chancellor. But it seems to me so clear that it could not be done and yet it has happened, and I am very concerned about who was responsible for making this decision, which was just a decision by the previous Chancellor. Am I making myself clear?

Professor Hazell: Yes, to give this a bit more context, I assume you're referring to the meeting of European Finance Ministers?

Mr Turner: Yes.

Professor Hazell: The emergency meeting that took place on Sunday 9 and Monday 10 May, three days after the election. It was to discuss a very important issue, namely the extension of the bailout package for Eurozone countries. It was clearly important for the UK to be represented at that meeting and we did still have a Government, a Government led by Gordon Brown, and we were represented by the then Chancellor of the Exchequer, Alistair Darling. So far as I understand it, he did—as the caretaker convention would require—consult his opposite numbers, George Osborne and Vince Cable, about the negotiating line that he proposed to take.

Where I'm afraid I can't take it any further is in being able to say to you what was said in those conversations, but I have been told—and forgive me, this is second-hand—that the current Chancellor, George Osborne, has since said that he didn't, himself, necessarily agree with the UK line but he fully recognised the authority and right of Alistair Darling in those negotiations to pursue it.

Q22 Chair: We now have a letter from the Chancellor, which I'm sure Andrew is in possession of, which gives the current Chancellor's view on that.

Lord Hennessy: What could have happened, but didn't, is the model of Potsdam in 1945 when Winston Churchill took Mr Attlee with him to Potsdam, and to Stalin's amazement the British electorate turned Churchill out—Stalin was completely breathtaken by this—and Mr Attlee returned in his own right as Prime Minister. There was a precedent, which I don't suppose would have fitted this because it has nothing like the same gravity, important as it is, as the post-war conference in Berlin, but that's what you could do if you go under the usual British system of, "How has it been done in the past? Let's tweak it a bit". But they didn't.

Q23 Mr Turner: You are saying that it is right for the previous Chancellor to take some action, so long as that action is either approved or at least not opposed by the new Chancellor. What I had understood the position to be was: he doesn't take a position because it is too significant a step, and that is a matter that this document should make clear.

Chair: Is there a role for the *Cabinet Manual* in the issue that Andrew is making?

Mr Turner: It seems to me to be absolutely the opposite.

Lord Hennessy: It is a good point, absolutely.

Chair: Professor McLean, any comment?

Professor McLean: I don't think I have anything to add to what Robert said essentially. I mean, on the day in question Alistair Darling was not the previous Chancellor. He was the current Chancellor, albeit by that time in the caretaker Government. I don't think it would have been practical for the UK Government to sit on its hands and say, "We don't have a line on this matter", so I agree with Robert that what Chancellor Darling did was the right thing to do in the circumstances.

Lord Hennessy: There are certain timetables don't await a British general election outcome. The one I've written about, which is not terribly cheering, is the letters the Prime Minister has to sign, the new one, on retaliation from beyond the grave if we're destroyed by a nuclear attack; the so-called "last resort letters", and the Trident submarine patrol pattern doesn't bear any relationship to the British General Election. In 1997 Tony Blair—if my information is correct—was quite worried because for quite a long time John Major's letters for the end of the world were out there on the boat, not his. But that's just another example; not that that should be in the *Cabinet Manual* because that wouldn't fit there, would it? But there are lots of things: important country though we still are, the world does not hold its breath until we've formed a new Government, does it?

Q24 Mr Turner: No, and that is reasonable. The trouble is it doesn't seem to be recognised in this. This is more mechanistic without pointing out that actually life is different.

Professor Hazell: I think it will be very rare that we have such a hard case, but it is a useful dramatic case illustrating again, I think, the difference between a Government with legal authority to govern and political authority. What the caretaker convention says, in essence, is that a Government that doesn't command the confidence of the House of Commons should be very restrained in any decisions that it makes; it should try not to embark on any new policy; it shouldn't enter into any major contracts or make any new public appointments, and where it is forced to do one of those things ideally it should try to do so on a temporary or some kind of deferred or transitional basis.

Forgive me, I don't know enough about that European Finance Ministers' meeting to know whether any of those were, in any sense, a real possibility. But let us assume that it wasn't and the UK Government had to be there and to make a hard decision, and it certainly had the legal authority to make that hard decision,

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

which I think the current Chancellor recognises even if he doesn't agree with the decision that was made.

Q25 Mr Turner: I think the point was that taking a decision in Europe, that's fine. The problem is whether that position could have been reversed after the new Government took responsibility. It seems to me that there was nothing wrong with the Government doing that, but that decision having been taken, and taken in the terms in which it was, it was impossible to reverse the decision. This is very significant for those of us who are worried about Europe. Perhaps not very interesting to most people, but to me very interesting. Why did those three days not only make a difference about when they took the decision, but also it was no longer possible for us to reverse that decision?

Professor McLean: May I quickly say, this it seems to me is a feature of the fact that the UK Government is a member of many international bodies—not only the European Union but many others—so the situation that Mr Turner describes potentially is happening all the time; that a Government commits the UK to a line of action in an international body, which it may be difficult for a later Government of a different complexion to unscramble. So I don't see anything constitutionally unique about the case that we're mentioning except the very question of the timing that we've discussed.

Q26 Stephen Williams: I just want to go back to more general questions, particularly about the scope of the manual. I think it was Professor Hennessy who said it was a summary of the official mind, as it currently exists; do you think it's a complete summary of the current collection of official minds as you understand them, or are there things that are in there that surprised you, or are there any omissions, which all three of you may wish to comment on, that should be in there? I think Professor Hennessy mentioned, in particular, the Salisbury Convention and Money Bills.

Lord Hennessy: I don't think it is complete. I think there is probably too much description of international organisations and our relations and so on. It could be trimmed with great effect at that end.

There are other things that should be there, which are very much on their mind. One of the great changes, again since the early 1990s, is in the intelligence world. The 1994 the Intelligence Services Act setting up a statutory basis for two of the intelligence agencies, which didn't have them until then—MI5 already had its, but the other two didn't—and also the oversight system. That is a very big constitutional change and it has to do with operations, and there are lots of inquiries going on that relate to it in different ways. Now it's silent on that and that should certainly be there.

Also I think, and I briefly touched on this, war in Parliament should be in there. It is interesting that war is in the examples in the Cabinet chapter of what Cabinet should discuss, and it is a great relief to see it there, but the convention, which I don't think has taken the form of a resolution here—it still rests on convention—that Parliament will be properly

consulted with a substantive motion if there is time is crucial for an open society—

Chair: We were promised that but it never happened.

Lord Hennessy: It never happened, and that should certainly be in there. It is a very comprehensive document on one level but of course it isn't complete and we all have different versions, different views of what is central to this and what isn't. But I think there would probably be a consensus on those: the intelligence world, its oversight and its statutory control, plus the question of war.

The Cabinet section is fascinating because Whitehall is almost entirely peopled by herbivores who get very uneasy with command premierships. They much prefer proper procedure and collective Cabinet discussion that means something, and indeed we have that again. You might say the coalition has forced it upon the Prime Minister, although the new Prime Minister said he wanted to do it anyway. But the Cabinet section is pure classic old Whitehall. It is a herbivores' charter for a collective system of government and being an old herbivore myself, Mr Williams, I applaud it entirely.

Q27 Stephen Williams: Do you think it makes it harder or it would make it harder for this Prime Minister or subsequent Prime Ministers therefore to go back to sofa government, which one of his predecessors—

Lord Hennessy: No, because on the *Questions of Procedure for Ministers*, the opening paragraphs were that Cabinet is—the same wording—the apex of the collective system of government, and all serious matters where there is disagreements or big public interests have got to be treated there; meaning Cabinet or its committees. Can you imagine with Mrs Thatcher at her height, some brave Cabinet Minister who has just been done over, picking up *Questions of Procedure* to say, "Perhaps you should read this before you bring the discussion to an end", or Tony Blair in his pomp having the *Ministerial Code* waved at him. It's not like that, is it? I'm glad it's there but in many ways—to use that terrible word—it is aspirational, because it's very easy for a command Prime Minister, as long as he or she can get away with it, if a Cabinet is overwhelmed or verging on the supine, to operate a command system.

Q28 Chair: If it's there and it's in the *Cabinet Manual*, and if the *Cabinet Manual* is endorsed and legitimised by Parliament, then brave souls may appear. In fact, we all may know the rule book, and so some of us who are not in the Cabinet may put our hands up in Parliament and say, "Sorry, we don't think the Prime Minister can, for example, go to war in Iraq without a resolution of this House", or go to war anywhere without consent or consulting with the House. None of these things exist at the moment. If we were to know some of the internal rules we might—some of us, who have no positions of authority—be able to raise questions. I think that is the key thing that this could give us.

Lord Hennessy: More and more the tenor of the discussion seems to be there is a lot in it for Parliament and for you, isn't there? It is not for me to

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

draw conclusions from this, but it may be the Executive's document but there are rich pickings for Parliament, aren't there? That is what I would think.

Q29 Chair: Can I just put Stephen's question to the other two witnesses because I thought that was very helpful. That was a useful annex of additions for the Committee, Peter. Perhaps Robert and Iain, are there things missing that you would like to bring to our attention because we will obviously be part of this consultation process?

Stephen Williams: There were two parts to the question—or things in here that surprised them.

Chair: Or ones that surprise you, but, from my point of view, the ones that it might be helpful for this Committee to raise in this consultation period.

Professor Hazell: Thank you for the invitation. I can reply very briefly: I have nothing to add in terms of omissions to what Peter Hennessy has said. There is nothing in it that surprises me. I applaud almost all of its content and the manual in general. Going back to the discussion you've just had about how it tightens up a little bit how Cabinet and Cabinet committees should properly be operated, there is a paragraph—forgive me, I can't immediately find it—which sets out half a dozen or so issues, which classically should require the attention of full Cabinet. Thank you. Peter has kindly found it for me. It is paragraph 150. That is the kind of thing that if a future Prime Minister decided he didn't want to have much discussion in full Cabinet about these things, then arguably he would want to amend that paragraph in subsequent editions and that would be an explicit amendment and that could be a matter of comment or criticism in Parliament. So to that extent, yes, this is—as Iain McLean has been saying—very important as a much more transparent exercise but also, to some extent, it does give Parliament some levers if future Governments choose to conduct themselves differently.

Chair: Iain, omissions or surprises?

Professor McLean: No particular surprises. I agree with Peter's list of additions, a couple of which I suggested in my written evidence. I will just draw attention to one of the paragraphs that I found slightly troubling, which is number 56. In paragraph 20 of my written evidence I pointed out that 56 says, "If a Government is defeated on a motion of confidence in the House of Commons the Prime Minister is expected to tender the Government's resignation, unless circumstances allow him or her to opt instead to request a solution". Now that, it seems to me, stops where it's getting interesting and is also—in relation to an earlier conversation with some of your colleagues—not a purely Executive matter. Perhaps it is not at all an Executive matter. I would like to know what those circumstances are. I don't know what the Cabinet Secretary has in mind at this point.

Chair: Eleanor had a particular point. Now, Stephen, I'm still with you, but just to follow up on that, Eleanor.

Q30 Mrs Laing: This also follows from what Professor McLean has just said about this not being a purely Executive document. I am still concerned—

and these are genuine questions, I am not trying to put any line—about the standing and the authority of this document. I continue to be concerned about whether it is just an operating manual or whether it is something of far greater standing. You referred a moment ago to paragraph 150, which is very interesting and suggests matters that would normally be considered by Cabinet. Professor Hazell said a moment ago that this might be a matter of comment or criticism in Parliament, and I'm sure that that is correct. If that is the case, if this manual—and let's take, for example, paragraph 150—can be a matter of comment or criticism in Parliament, if it ought to be acted upon by Ministers, if Members of Parliament are free to hold to account Ministers, and therefore the Executive, by means of what is written, let us say, in paragraph 150, and it can therefore be acted upon, is it also subject to judicial review?

Professor Hazell: The answer I think is: almost certainly not. It makes it very clear in the introduction, at page 3 of the *Manual*, that it is certainly not intended to be justiciable. I would be very surprised indeed if the courts found that they had jurisdiction in relation to any kind of dispute about whether, for example, a Minister had or had not acted in accordance with the guidance in the *Cabinet Manual*. They would, I would expect, say, "There is a different forum in which Ministers can be held to account. It is a political forum, it is called Parliament, and it is not for us, the courts, to intrude".

Lord Hennessy: There is a prior problem with Cabinet discussions because it is exempt from the Freedom of Information Act and the test case, the first time the Information Commissioner won in the Tribunal and was overruled by a Minister, Jack Straw, at the last minute, was the Iraq Cabinet minutes, just in March 2003. You only know what has been discussed at Cabinet if the newspapers leak it, apart from—and the constitutional status of this is interesting—I think the Prime Minister's official spokesmen still produce on their website the lobby briefings, what the lobby has been told, and occasionally you're told that this went through Cabinet with not a dissenting voice, and so on. But knowing what the Cabinet or Cabinet Committee discussions were is really rather a first order question here, even if it is on big stuff, and this is big stuff, the seven issues listed here; so how on earth does Parliament know? It has always been the problem for Parliament, hasn't it, in terms of the Executive in its confidential mode, and there is a need for Executive confidentiality; a time limited way very often, but how on earth do you know?

I remember in the endless debates we had about whether the Blair Cabinet was utterly supine on the road to war, I would go occasionally on the wireless and a Cabinet Minister who was present—and now retired—would say, "Well, I was there and you weren't", to which there is no answer. It is very difficult, isn't it; and including for MPs, just as difficult as it is for me in a way.

Chair: Iain, did you have a comment?

Professor McLean: The reference I think that Robert was looking for is page 3, third sentence, "It—that is this manual—is not intended to have any legal effect".

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

Q31 Chair: Indeed, although it may be if you are, like I am, a legislative dwarf, being beaten up by an 800 lb executive gorilla in a dark alley and the person who comes to rescue you is wearing tights and a blonde wig, you don't question his sartorial elegance you just say, "Well, I'm glad there is somebody there looking after me if I can't look after myself". But there we go.

Mrs Laing: But, Chairman, we now have three learned opinions that this is not justiciable, that's pretty good.

Lord Hennessy: Although I did say earlier on, that I think judicial review could treat this as what the normal expectations of proper process are. I think that is a limited version of justiciable, I have to say, but it could be significant none the less.

Chair: Stephen, you were very kind to let us dive in. There were some very important things that arose from your question.

Stephen Williams: I was going to ask what you asked anyway.

Chair: About the gorilla?

Q32 Stephen Williams: No, not about the gorilla. But whether, if Parliament endorsed this manual, it would then give it more authority and would enable us, as parliamentarians, to wave it in the Chamber. Coming back to paragraph 150, which is useful, would our panel consider that the word "considered" has the same meaning as "decided" by Cabinet, because the question of no dissenting voices, which was referred to by Professor Hennessy, there is no provision here for the Cabinet to vote or for votes to be recorded. Do you think it would be an improvement if it was made clear that Cabinet decides things rather than considers?

Lord Hennessy: It doesn't vote, or very rarely. Voices are counted and all the rest of it, and it is not like some systems where the Prime Minister spokesman after a Cabinet does all of that. But "considered" is an interesting verb. They are very carefully drafted.

Q33 Stephen Williams: Yes, I assumed the language has been carefully selected, Chairman, I just wondered whether that word had been very carefully selected.

Lord Hennessy: There is always an understanding in a War Cabinet circumstance, for example, that you might have to have the War Cabinet and the Prime Minister in the inner group, in effect, doing something for speed reasons. That is an extreme case and hopefully it won't arise again, but I am sure that word is carefully thought through.

Q34 Stephen Williams: The reason I asked about whether there were any surprises, obviously I haven't spent 30 or 40 years in academic life studying our constitution, but there was one thing in here that did surprise me, because I'd never heard of it before, and that is the Carltona principle from a 1943 case about ministerial accountability. We can all think of examples where either a Minister does resign, or certainly people call on him or her to resign, because effectively an operational mistake has been made, probably by a civil servant, whereas the Carltona principle seems to say that a lot of decisions are made

by officials and the Minister can't be expected to be responsible for every decision. I just wonder whether that, now that it is in here, gives more protection to Ministers, which most people would expect was common sense; that they can't be expected to know everything, yet often in difficult circumstances we and the media expect them to know everything?

Lord Hennessy: Well, Carltona has been so long an established part of the way things are, I think—that's warp and woof, and has been for a long time. Again it is significant that it is in here, but it doesn't change anything.

Stephen Williams: Well, I had never heard of it before and the Chairman, who has been here rather longer than me, has never heard of it.

Professor Hazell: The importance of the Carltona principle, as I understand it, is that that case decided that officials have no authority or standing separate from that of their Minister. So any decision made by an immigration officer at the UK border is, in effect, a decision made in the name and using the authority of the Immigration Minister. I don't think it has any impact on ministerial resignations.

Q35 Stephen Williams: The second question I was going to ask, Chairman, was devised from the introduction where Gus O'Donnell says that, "The Manual will be updated and a new copy will be published at the beginning of each new Parliament". What it doesn't make clear is how it will be updated, how often it will be updated, and if it's updated during the course of a Parliament—which it may well be—whether Parliament should be told about each updating and not have to wait until May 2015 to get a new copy. Do you have any views on that?

Lord Hennessy: Well, several of the big constitutional Bills going through, if and when they get Royal Assent, will immediately change this.

Stephen Williams: There is no undertaking to publish an amended copy, though, until the start of the next Parliament.

Lord Hennessy: Does it not say it is going to be changed on the website or am I mis-remembering?

Professor Hazell: I think the Manual does recognise in some important footnotes—especially the chapter on elections and Government formation—that, for example, the paragraph, which Iain McLean referred to about mid-term dissolution, would be dramatically affected if the Fixed-term Parliaments Bill becomes law because it removes any discretion in the Monarch to deny a dissolution. Under that Bill, dissolution would become entirely a matter for Parliament. So I would certainly expect that chapter to be substantially revised if those Bills become law.

Q36 Stephen Williams: I expect, Chairman, we would know, because we will have passed the legislation, if it requires amendment because of a decision Parliament has made. What Members of Parliament will not necessarily know is whether an operational change has been made to the manual because the Prime Minister or the Deputy Prime Minister has deemed that it shall be so. What I am asking is: should the House of Commons be told about each change to the Manual rather than wait until 2015,

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

which, from what I can see, is the only commitment in this document?

Professor McLean: I would say that—as well as the Fixed-term Parliaments Bill that Robert has just mentioned—a change would certainly be mandated if this Parliament enacts any substantially elected Upper House. Because then, in the section dealing with circumstances in which there are appeals to the Monarch to get involved—I think everybody around this room thinks the Monarch should under no circumstances get involved—that raises the spectre, as I briefly mentioned in my notes, of what happened in Australia in 1975, when I think the authority of the Monarchy was seriously damaged by the actions of the Governor General. That was brought about by a deadlock of the sort that is familiar in all countries that have two elected chambers elected by different methods and, therefore, having different partisan majorities. Therefore, I think, as and when any elected Upper House comes into existence, there must be a serious rewrite of the section. Indeed at the moment there is almost no section dealing with deadlocks between the Houses and what it is right for the Executive and for the Monarch to do in those circumstances.

Q37 Chair: I think there are two levels here. One is when legislative changes that we have approved alter the working of the manual, then there will be automatic changes, but it would be nice to see how those changes are interpreted and impact upon the manual. Secondly, to maintain the legitimacy of this document, Parliament should be involved in a consultation on what should change in the manual and have the ability to initiate or to enter a dialogue with the Executive. That would seem to me to maintain the legitimacy of the document, rather than just hopefully having some researcher who has nothing better to do than check the Cabinet Office website every day for a change in the *Cabinet Manual*.

Lord Hennessy: Could you not, Chairman, do an annual audit; it might not take very long if nothing much has happened on the condition of it?

Chair: That is a very helpful suggestion. That may be something that we can put to Sir Gus O'Donnell when he comes to us on the next occasion.

Q38 Tristram Hunt: On page 26 of the Manual, footnote 8 says, "In 2010 the Leader of the Liberal Democrat Party expressed a view that 'whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties'". What does that footnote mean?

Lord Hennessy: He chaired the Cabinet Committee that endorsed it, so I have a suspicion that he wanted his view to come in in that. I don't know. That was one of the things that slightly bothered me, whether we were going to have to impersonate the constitution even if it wasn't hung. David Cameron said something—not quite this—but they both commented on it, and it seemed to me that it gave the impression, maybe wrongly, that they hadn't signed up to the draft chapter in here on Government formation or the

Justice Select Committee's Report, and that did worry me.

I noticed that too, but he did chair the Home Affairs Cabinet Committee. Another thing that emerged from that Home Affairs Committee, which I don't think is in here, I think the phrase was: "They were allergic to the use of the word 'caretaker'". I mean they didn't leave it entirely unchanged. It would be quite interesting to know how much work they did on it, but that bit of Cleggerly is very interesting as a footnote. It rather stands out, doesn't it?

Tristram Hunt: Its very presence seems to indicate a sort of pushing of an agenda, which is not necessarily in the main body of it.

Lord Hennessy: Maybe he is proud of it, who knows.

Professor Hazell: I don't think it should be there, and in my comments to the Cabinet Office I argued earlier that it should be struck out. It is not a constitutional principle. The constitutional principle in any newly elected Parliament is that that person who can command the confidence of the House of Commons shall be appointed as Prime Minister, and, as we saw in May of last year, it is up to the political parties to negotiate to try to work out who can command confidence in the new House. But there are no set rules and I don't think there can be, or should be, about how those negotiations should be initiated or by whom. There could be Parliaments in which a majority, or a working Government, which can command confidence, might be established, for example, between the second and third largest party. So, I don't think that footnote should be part of the manual.

Professor McLean: I agree with that. I think the operative rule is the rule in paragraph 46. I agree with my colleagues that the footnote in 48 is distracting and it's simply the statement of a particular political leader or political party at a particular time, who we may say had an interest in making a particular statement. Other party leaders at other times may take a different view.

Q39 Tristram Hunt: I quite agree. Two more questions: first of all, maybe to Iain first. Do you see an interesting direction of travel in terms of the position of the Monarch and the *Cabinet Manual*? You have raised the issue of the appointments process with regards to the Prime Minister and Sovereign in terms of bishops. Do you see a limitation on the power of the Sovereign within this? I just want to unpick whether your analysis points to any underlying trends within it?

Professor McLean: The withdrawal from appointing bishops was, of course, a decision of the Prime Minister, not of the Monarch, so I don't infer anything from that. That is in any case subject to inquiries, which you might make of the present Prime Minister. I was rather trying to say that it is in the interests of all sides to prevent—this has been said for centuries—the Monarch from getting involved in partisan politics. Once again, to revert to what Mr Asquith said in 1913, Monarchs have had strong personalities. His letter, as I have suggested, has a very heavy subtext telling George V's secretaries, one of whom had served under Queen Victoria, that Queen Victoria

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

came pretty damn close to repeating the mistakes, as Asquith saw it, made by William IV in 1834.

Those mistakes, I would argue, were then repeated by Sir John Kerr in Australia in 1975, and if there is a direction of travel here I guess it is towards Monarchs and their advisers becoming more and more sensitive to the great potential dangers in those situations.

Q40 Tristram Hunt: The other question was: do we have similar models for this in terms of, I suppose, principally, Scotland and Northern Ireland in terms of devolved Administrations there in terms of manuals?

Professor Hazell: Yes, in the appendix to our written submission to this Committee we set out some comparative tables showing the executive guidance available in Australia, Canada, New Zealand, the UK, and Scotland. Scotland, as I understand it, is now interested in reviewing its own suite of executive guidance, and possibly considering whether it could usefully be brought together in a compendium like the *Cabinet Manual*. I believe there is some interest in Canada as well.

The key point where there is clearly potentially a strong similarity—and you may or may not be referring to this—is the restriction on the power of dissolution. But in half answer to your previous question about the direction of travel in relation to relations between the Monarch and Cabinet, I would say two things: one, clearly there is a very powerful direction of travel in terms of much greater transparency. The constitutional conventions that we have been discussing were—as Iain has been quite rightly reminding us—not always clearly understood and were regarded as semi-secret. Now they are out in the open and up for public discussion.

Secondly, if the Fixed-term Parliaments Bill goes through in its present form that will remove altogether the prerogative power of dissolution from the Monarch, and that is a very important reserve power: the power to grant a dissolution or, in exceptional circumstances, to refuse a dissolution. So that would be a big change too.

Q41 Tristram Hunt: One final thought on fixed-term Parliaments. Some of us take the view that five years is slightly too long for a fixed-term Parliament, and the unwritten tradition, the unwritten convention, is for four-year Parliaments. If this Manual is updated and it says, “We have fixed-term Parliaments of five years”, and this document continues and lasts on—as it probably will—then the five years becomes part of the warp and weft and becomes part of the constitution, part of the settled order. Some of us regard that as a constitutional innovation, which doesn’t have the support of many people. Does this document then become at risk of codifying and, *de facto*, supporting constitutional innovations by the present Government, which might be a rather partisan, sort of fix-this-Parliament agenda, but the nature of this document gives it a legitimacy that some of us think it might not have?

Lord Hennessy: Statute always trumps this in terms of legitimacy. So if it is a statute it trumps everything: it trumps the royal prerogative; it trumps any manual; it trumps any code, and this will always have to reflect

the statute. I agree with you, the natural rhythm is, roughly speaking, four years, just as our rate of growth, whatever Governments do, seems to be, roughly speaking, 2.7% since the war. There are certain rhythms that countries acquire, and that is one of them. I know we are not here to discuss that but I have slight anxieties about five being on the face of an Act of Parliament because there is a danger of the fag-end year. They are never normally happy if Governments hang on to the fifth year, which they usually only do if they are under severe duress. They never bring radiance to the electorate or the country or to policy making, do they?

Chair: Because of the uncertainty, whereas a five-year Parliament or a four-year Parliament gives you certainty at the end of the period. You know when the election is going to be. I’m sorry we’re going back to the previous debate.

Q42 Tristram Hunt: It is the language that is important, isn’t it? That statute declares X.

Lord Hennessy: Statute trumps all.

Tristram Hunt: Yes, statute trumps all, but the language in which this manual is updated and described, if it becomes part of the collection of documents that form our written and unwritten constitution—the actual editing of this document—is rather important, I think.

Lord Hennessy: Yes, because it will be the first port of call when something comes up that we need to talk about; absolutely.

Q43 Chair: Presumably, even if statute has changed this, if there is a means of review within Parliament there could be a body of people within Parliament who say, “We need to have a look at clause A, line B”, or whatever it is, “Let’s have some discussions around that”. This could evolve because Parliament feels that evolution could take place rather than, in a sense, statute law, which we could argue has been imposed by the Executives to date. It could be a longer running parliamentary interest that has a means of expression that can constantly revisit some of these things that many of us perhaps feel are not appropriate in a document like this.

Lord Hennessy: There was an example of that in the 1990s, after the Scott Inquiry into arms to Iraq, there was an accountability resolution passed in the House of Commons, wasn’t there? I don’t think that is in here actually. Is it? It hasn’t impinged on the Velcro of my fading memory. But if it isn’t it should be. That is another one to add to the list because that was very important. It was the one constitutional change that emerged after the Scott inquiry. The only constitutional change after the Westland crisis—I remember the great John Griffith wandering down the Committee Corridor over the road saying, “The British constitution is what happens. All these years I’ve been looking at it”. And the one constitutional change then was that Permanent Secretaries had car phones installed, because the Permanent Secretary of the DTI was on the way to the Civil Service College and couldn’t be consulted by the press officer, Colette Bowe, because he liked a bit of peace in his car. So

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

the one constitutional change that Westland gave us was car phones, just a sort of footnote on history.

Q44 Mr Chope: Can I ask about some of the specifics, particularly in chapter 2. I'm looking at paragraph 60, about the pre-election contact with Opposition parties. It starts off using the expression, "At an appropriate time towards the end of any Parliament". Surely if this Manual is going to be of any use, that should be spelt out specifically, particularly if we are in the context of a Prime Minister who has said that the next general election is going to be on the first Thursday in May 2015. If this Manual is going to be of use to people, surely it should spell out at what stage during this Parliament, consistent with the Prime Minister's pledge, the Opposition parties will be able to establish their pre-election contact, and does not the fact that it doesn't spell that out breed an atmosphere of cynicism?

Can I link that question with what I see as a whole lot of rather vague references. Paragraph 63 says, "As soon as an election is called, certain restrictions on government activity apply", with a further reference to paragraph 68. But in paragraph 67 it says that, "governments are expected to observe discretion in initiating any new action of a continuing or long-term character in the run-up to an election". But again it doesn't specify what they mean by a "run-up". Surely, if this Manual is going to be of any use, that needs to be spelled out in more defined terms.

Again, paragraph 68 refers to "When an election is called". We can almost say now that the Prime Minister has already called the election for May 2015, but that obviously doesn't mean that Government activity has to be restricted in the way set out in paragraph 68, and so on. Throughout the Manual it seems there's an interchange between words like "could" and "should" and "must" and "may". There is no means of enforcing anything that is not contained nor set out accurately in the Manual. We are told now that we can only discuss this during this three-month consultation period. The Manual itself refers to the EU Bill, and if that is passed into law it will alter the situation. We have the EU Bill, which will get Royal Assent this year as will the Fixed-term Parliaments Bill and the Bill limiting the number of MPs. Wouldn't it make more sense for this manual to be updated to reflect all those major pieces of legislation and then be subject to consultation? Rather than what seems to be happening now, which is that they are going to rush through the consultation before any of those Bills are on the Statute Book, and then we'll be able to argue: well, we have a closed book now, and what we were hoping for, which was more guidance, more specifics about the run-up to the next general election, that will not be subject to parliamentary and public access, in the way that it would be if this whole exercise was postponed for, say, six months.

Professor McLean: I don't see a huge problem here. Already at paragraph 58 it says, "This paragraph will be substantially affected if Parliament agrees the proposals in the Fixed-term Parliaments Bill". That comment quite obviously applies to all the paragraphs that Mr Chope has also highlighted. If the Bill is

carried, the Cabinet Office is promising to rewrite the manual and there would then be, presumably, another round of consultation, another opportunity for this Committee to have a look.

Some of the matters that Mr Chope has raised don't trouble me terribly much. With regard to the phrase, "As soon as an election is called", there is a statutory definition of what calling an election constitutes, so I don't think there is any ambiguity in that one. Should the Fixed-term Parliaments Bill fail, I agree it might be a good idea to revisit these to get more precision on some of those points.

Professor Hazell: I would only add on your first point about the date, which might trigger pre-election contacts with the Opposition parties, that that whole issue was the subject of an excellent report published by the Institute for Government on Transitions, whose main author was Peter Riddell, together with Catherine Haddon. That report recommended that pre-election contacts should be initiated round about 18 months out from the end of the Parliament. They were writing that in a pre-fixed-term Parliament context, and they thought 18 months was a safe period to choose, so that if an election were called after four years there would still have been six months of pre-election contacts.

Clearly if we do have fixed-term Parliaments we will know the date of the next election. It would then be much easier to specify a time period for the initiation of those contacts.

Q45 Mr Chope: Sorry for interrupting you, but we do already know the date of the next election because the Prime Minister has told us. So we don't need the Fixed-term Parliaments Bill to go through for this Manual to be consistent with what the Prime Minister has already told Parliament.

Professor Hazell: As you may be aware, two of the Bills that you mentioned are now in the House of Lords, where I understand they are encountering serious difficulties. Peter may be able to tell us more about that. The EU Bill has been the subject of very powerful criticism from a Committee of this House. I don't think we can necessarily anticipate that all three Bills will receive Royal Assent this year. We shall see. If and when they do receive Royal Assent then it shouldn't be a difficult task to revise and update the manual in order to reflect the new law. I wouldn't myself expect that then necessarily to require a further round of consultation because the manual will simply be reflecting what Parliament has willed, and Parliament, as Peter has said, and legislation trump the manual.

Lord Hennessy: I am a great supporter of the Riddell/Haddon suggestion of an 18-month starting gun. I think that would be very sensible. But on your big point, Mr Chope, about their trying to get it through and all settled while there are still so many moving parts, that is in your own hands. You can reopen this question any time you want, Chairman, can't you?

Chair: Technically.

Lord Hennessy: Yes. I don't want to preach, but that is what Parliament is there for, isn't it? No question is beyond your remit.

13 January 2011 Professor Robert Hazell, Professor Iain McLean and Lord Hennessy of Nympsfield

Chair: I'm sure a strong independent Parliament would have no problem in meeting your request on that. One with whipped majorities may find a little more difficulty. Chris, do you want to come back?

Q46 Mr Chope: I was just saying, I thought we had quite a lot of reluctance from the powers that be to get this manual published in the way it has been. We have it published now and there does not seem to be any reason why the short period for public consultation should be limited to three months. It wouldn't matter if this manual wasn't put to bed until December.

Lord Hennessy: I don't think there was reluctance. I think Gus O'Donnell was very keen for Ministers to take it; that was the impression we got.

Q47 Mr Chope: I wasn't suggesting that Gus O'Donnell was reluctant. I was suggesting that the Ministers were reluctant.

Professor Hazell: I think it may simply have been the pressure of the business. This Government has a very big agenda and they felt there were more important things they needed to get on with first.

Chair: As I said in my very opening remarks, it felt a little slow, I think, Chris, because we had people here and we were keen to get this moving. But for it to be in the public domain within a year is record-breaking speed probably from a Whitehall perspective, and I think we are very grateful for the fact that it is now in the public domain. It gives us a chance to nudge things forward a little bit.

Q48 Mr Chope: On that, I think it was Professor Hazell was saying he might not expect any more consultation if these Bills get Royal Assent, but to give a specific example, if we have 600 MPs, rather than 650-odd, then should we change the number of Ministers? That was a matter of statute, but something which could be fairly and squarely within the *Cabinet Manual*, would be limiting the number of Parliamentary Private Secretaries, so that the size of the Executive's influence within the House of Commons is restricted or made *pro rata* with the reduced numbers. Surely that would be an issue, which would be legitimately one that there should be consultation on if that Bill gets into statutory form.

Professor Hazell: On the specific about whether the Government is willing to reduce the size of the Ministry if the House of Commons is reduced to 600 MPs, my understanding is the Government said, I think, during the passage of that Bill through this House, that they were not willing to make the reduction through that Bill, but they said that they did propose to make a reduction—I can't remember the words—in due course, but words to that effect. Clearly again, it is a matter for Parliament and this House to hold the Government to that undertaking.

Q49 Mr Chope: That doesn't deal with the point about Parliamentary Private Secretaries. It is not a matter of statute. That would surely be something that would, in a full manual, be set out in the Manual with

guidance as to how many Parliamentary Private Secretaries there should be?

Professor Hazell: I stand to be corrected by my colleagues, but I don't think Parliamentary Private Secretaries are recognised anywhere in statute. I think it is essentially a bit of patronage for the Prime Minister. These are unpaid positions, and it's a matter of self-restraint or sometimes lack of it, which seems to determine the number of PPSs under any Government. I don't think there is much the manual can say about it.

Q50 Mr Chope: It does say something about it already, doesn't it?

Professor Hazell: It recognises their existence.

Lord Hennessy: The continence argument always comes up with special advisers too—the temptation to appoint more than some would think were necessary or desirable. But that is a continence question. It is not a statutory question, is it, as Robert was saying?

Professor McLean: It seems to me that those two cases are different since special advisers interact with civil servants in more—

Lord Hennessy: They are temporary civil servants too. They are Crown servants, aren't they?

Professor McLean: I was going to say in more central ways than do PPSs.

Lord Hennessy: Yes, exactly.

Professor McLean: My inclination would be that PPSs are not an Executive matter and the regulation of them is not for this document.

Chair: Well, if there is indeed some form of review or, as Lord Hennessy suggested, annual audit by Parliament of the *Cabinet Manual*, then there will be an opportunity—I don't know whether it would be for the whole House or whether it could be for this Committee—but there could be an opportunity, and probably a tightly regulated opportunity, which may find favour with the Executive to regulate the amount of change suggested by Parliament. But there could be a mechanism by which people could raise issues in Parliament, from a parliamentary perspective, related to things that are found in the *Cabinet Manual*. That may be something that will assist it in its legitimacy and may assist Parliament in progressing particular ideas. There is no guarantee of that but that could be one of the ways forward, and that will no doubt be one of the things that we explore with Sir Gus O'Donnell when he comes before us.

A number of very helpful things have emerged from the evidence this morning, not least those areas where further work may be necessary: omissions, accidental I am sure, in the document that the Committee may wish to highlight, and a lot of very thoughtful perceptive ideas from our witnesses. I think we have been very fortunate this morning. I thank Lord Hennessy, Professor Hazell and Professor McLean for their time and attendance this morning. Be assured we will take your views further and you are, of course, at liberty—now you have interacted with the Committee—to drop us further notes if you feel it appropriate. Thank you, gentlemen, so much for coming.

Thursday 3 March 2011

Members present:

Mr Graham Allen, in the Chair

Mr Christopher Chope
Mr Fabian Hamilton
Tristram Hunt

Mrs Eleanor Laing
Mr Andrew Turner

Examination of Witnesses

Witnesses: **Dr Stuart Wilks-Heeg**, Democratic Audit, **Dr Michael Pinto-Duschinsky** and **David Walker**, gave evidence.

Q51 Chair: Michael, how are you?

Dr Michael Pinto-Duschinsky: Very well. Thank you very much, nice to see you.

Chair: Good to see you. Thank you for coming. Stuart, welcome. Thank you for coming. We have an hour and 15 minutes or so, and we would like to get your views on the Cabinet Manual. I think you have slightly different views from the last set of witnesses that we had, so we are interested in some of the differences and where your views on the Cabinet Manual come from. Would you like to have a minute to tell us generally where you come from, and then colleagues can ask you questions, or are you happy with what you put in?

Dr Stuart Wilks-Heeg: I am quite happy to make a very short opening statement.

Chair: Yes, Stuart, kick it off.

Dr Stuart Wilks-Heeg: By way of observation partly, and to explain where I and Democratic Audit are coming from on this issue, I think it is quite remarkable how a document of interest to such a small community has divided opinion so much, as I am sure the Committee will be aware. Obviously, that difference of opinion relates very much to whether this should be seen, or could be seen, in any way as a step towards a written constitution. For the record, I don't think it could or should be seen as a step towards a written constitution.

Q52 Chair: You do not agree with the former Prime Minister.

Dr Stuart Wilks-Heeg: I think we would have to look—I am sure that will come up in the discussion about the origins of the idea of having this document. I do agree the original intention was clearly to look at the possibility of codification, but somewhere along the line the intentions have changed, and the apparent purpose of the document was changed, so I think that is something we need to clearly discuss.

Q53 Chair: But you are agreeing with the change. You are disagreeing with the originator of the proposal.

Dr Stuart Wilks-Heeg: No, I am not agreeing with the change. As we have got into this, I will elaborate. The origins of the document I think are clear. There were Gordon Brown's statements in the midst of the expenses crisis—the debates about constitutional reform, and so on—about whether we should move to some form of codification, which has clearly been a long running debate, and during the 2000s there were

more and more senior Labour figures who I think moved towards favouring some form of codification. So the statements made by Gordon Brown clearly indicated that this document in preparation was seen partly in that light. Parallel to that, we clearly had the suggestion being made, as it looked likely we were going to have a hung parliament, that something should be attempted along the lines of the New Zealand model of a Cabinet Manual to explain what should happen in those circumstances, as the Committee will be aware.

That seems to me to have been a rather curious situation, in which the perceived need to have very clear rules about what would happen in the situation of a hung parliament drove the process in many ways. In many ways, that is one of the most problematic parts I think of the document. So that is something I think we need to address. It does seem to me the original intention has been forgotten about somewhat. The things that we were told by Gordon Brown about what would happen with the document once published, we seem to have moved away from those intentions as well, because—as my understanding of it is—there was going to be a wider public debate about this document, about whether this could be moving towards a written constitution for the anniversary of Magna Carta, and so on. So, just to clarify that, that is how I understand it.

If I could just add: the other thing I want to say in opening, I think it is also very curious, despite these differences of opinion you will find on this document, there is also—as I am sure you have noted—an incredible amount of agreement about some of the questions about what is potentially missing from the document; perhaps what has been over interpreted; perhaps precedents that have been asserted; which perhaps have been over asserted; and so on. So I think the way the Committee has framed its request for written evidence—separating out the constitutional implications from those other matters—is very helpful indeed.

Q54 Chair: To pick up one question, you say they sort of got off track in terms of seeing this as the very first step on a written constitution. How would you suggest that they get back on track, or would you suggest that they do not get back on track?

Dr Stuart Wilks-Heeg: If we wanted to get back on track towards codification—I mean this document now exists, so you can't take it away, so it would clearly be there in the mix—I would like to see a

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

much broader debate of the type that I think Gordon Brown was signalling. Ideally, some form of constitutional convention at some stage, I think, would be necessary to look at these issues. I do not think you can simply go to the existing statutes and conventions, attempt to write them down and then consult on the document and assume that takes you towards an appropriate written constitution for the United Kingdom. So it would be an entirely different process, if that were the objective.

Q55 Chair: Have you thought this through? Is there something we could read on this or do you know of people in your field who have thought about this?

Dr Stuart Wilks-Heeg: There are lots of people in the field who have made suggestions. In fact, as I am sure you will be aware, Chair, there are various different attempts that have been made to produce written constitutions. Some of them to try to accurately describe UK constitutional arrangements; some of them to try to describe perhaps what it should look like under certain, I suppose, normative assumptions of what a UK constitution should be like—there are various suggestions I would put on the table about how that could be run through. There is no doubt that it would be a huge and difficult task, given the enormous body of written and unwritten material that currently make up the UK constitution. So the idea that it could be done in time for 2015, the anniversary of the Magna Carta—the 800th anniversary, I think—was always very ambitious, but personally I have no doubt that it is feasible, if the process can be defined in a way which is workable.

David Walker: I can't help you a great deal on the genesis of this. You have talked to people who have given you that. I suppose I come here as a journalist—in distinction to my academic expert colleagues—but someone who perhaps knows something about how government functions, and perhaps then about the relationship between the business of government and the formal processes of government that might be called “constitutionalism”.

I offer you a very brief vignette to indicate what I am sure is perfectly obvious to you, which is that this is a moving feast and capturing it is extremely difficult. I went to an event yesterday evening at which the Permanent Secretary in the Cabinet Office was speaking. He has the title ascribed—presumably, by the machine and him—to himself, which is the Government's Chief Operating Officer. This title wasn't in existence in my recollection before approximately October 2010. Is this a constitutional innovation? Does his reach trespass upon the understood ambit of the Cabinet Secretary's responsibilities? Are these constitutional matters or are they matters to do with banal business of government?

One of my problems with this document was that it did not help us with understanding whether there was a realm of more abstract constitutional conversation to be had, from which we could distinguish the ongoing business of government in which daily things get done, definitions change, and one reason one might say it is good to have a committee like yours, is there needs to be a constant daily invigilation of these

changes that could become encoded in constitutional understanding.

I have given one or two examples in my written submission but capturing this thing is extremely difficult. I am not sure we are any nearer that distinction between the more permanent entelechy—to use that Greek word—about the state on the one side and what is happening in terms of the way a Government runs. Obviously a lot has changed in the way Government runs since May last year.

Q56 Chair: I think you raised the question of authority and legitimacy because, of course, changing title to Government Chief Operating Officer at one level could be internal. It could be the Executive talking about the Executive—to use the phrase—but our Executive derives its authority from Parliament. Therefore, shouldn't it be for Parliament to say whether, “This is a banal piece of trivia. We don't want to get involved in this” or, “Here is a fundamental change. Here is potentially the development of an office of Prime Minister”, an executive office, per se, as common in genuinely separated powers, democracies. Do you feel that we do have that interaction and that we are indeed the people who can ultimately say, “We would like to see a bit more about this. We would like to see this document”? I sometimes get the sense that that is the very last thing on the agenda, even of the people who put the Cabinet Manual into the public domain.

David Walker: Two points: one, why wasn't it in a sense you—the House of Commons Parliament—that issued this draft constitution? Aren't you as much owners of it as the Executive that put the document into circulation? Second, to answer your question substantively, it is quite apparent Parliament is not in control of the Executive. That is demonstrated in this document by the sketchiness of the paragraphs devoted to finding the relative responsibilities of Ministers whom you can interrogate occasionally at least, and the civil servant—the machine—which is arguably supposed to be answerable to those Ministers.

It is as unclear to me from this, as it has always been, exactly where the moral, political and constitutional responsibilities of paid executive civil servants end and those responsibilities of Ministers begin. That confusion, if I am right, does say something about the capacity or the will of the House of Commons, MPs in Parliament, over past times to try and get to grips with this thing that, notionally, you are responsible for.

Q57 Chair: That is my problem—even occupying this Chair—that I don't know, and one of the ways to find out is to see something that defines what I can know and to define things that are outside my legitimate ambit. That is why I think the question of having these things in the public domain becomes very important.

I had a letter in evidence—I don't know if it has reached the office and, therefore, to the Members yet—from Robin Butler, who argued against codification saying that there would be endless debates about what is *ultra vires* and *intra vires*, and one person's endless debates about *ultra vires* and

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

intra vires is another person's debates about the life blood of democracy, about who is meant to be doing what. Would you agree, David, that unless we know what is going on we can't begin to divide up those issues and allocate accountabilities and responsibilities unless it is clear and in the public domain?

David Walker: Absolutely. The rejoinder to Robin Butler has to be: there is a large sphere of Government activity that happens to impinge most closely on real people—your constituents—which is codified; which is based on statute; which manages the problem of *vires* and *ultra vires* on a daily basis. I am talking not just about the elected local government, although that does that, but others, the NHS, where most of the activities of that service are based upon statutory responsibilities. So, in a sense, we have solved that problem in the delivery of public service and governance out with the central portion of the state.

Dr Michael Pinto-Duschinsky: I hope that the Committee would recommend not just the amendment of this document but its complete abandonment. You spoke in an earlier meeting about a very strong width of illegitimacy about the document. Reading through evidence to other Select Committees, I see that your view is very widely shared. It is certainly a view that I share and indeed the doubts—the serious doubts—are so widespread that I think it lacks the consensus needed for a document of potentially constitutional importance. It is muddled in its status and audience. It is said by some that it is by the Executive for the Executive. On the other hand, it is said that it is for the media to help people to understand. We are told that it is merely descriptive but on the other hand that it sets out good practice, namely, that it is prescriptive. We are told that it is not legal but that it may have legal significance. We are told that it is based completely on precedent but, when one looks at it, by some conjuring trick precedents are used to produce some systems that are completely new to British politics and are just conjured up like a magician there. So I think it is a very bad document indeed.

If one looks at the background of the document, I think it is quite simply that certain people wanted to help the Liberal Democrats win power in a hung parliament and wanted to advocate a fairly definitely new system that would enable them to maximise their chances in the event of a hung parliament. If one looks at the background and the way in which this document was presented to the public at the time of the election, I think that conclusion becomes compelling. If I am right in that, then it also follows that, in putting forward this document, the neutrality of the Civil Service has been endangered. So this is why I would agree about the width of illegitimacy and the danger of this document.

If I can give one or two examples of this, I have referred in my evidence to what I have called “the auction method”. In other words, the method of trying to keep an existing Prime Minister who has lost the election in office so that the pivot party—the third party—can go from one to the other of the main parties and have them leading an auction for their favours. For that it was necessary to persuade Gordon Brown to remain in office.

If one looks slightly before the election, three or four days before the election one of those most closely associated with the process, Professor Robert Hazell, wrote in *The Mail on Sunday* saying that Brown had to remain in office if he lost the election. “The Queen will not accept his resignation” he wrote. I have asked Professor Hazell what the basis of this is, and he told me the first time that he was going to Canada and was therefore too busy, the second time that he was not my research assistant and the third time that every expert agreed with his view. I do think that some justification for that view is needed.

I am told by the Cabinet Office that there is no precedent for the Queen refusing a Prime Minister's wish to resign. I think that Professor Hazell was wrong but that putting his view forward in that way had the effect of trying to put pressure on Gordon Brown at that time.

Now, at the same time Professor Hazell wrote—

Chair: I think, Michael, it is a little unfair if we take too much of your views in respect of Professor Hazell if he is not able to defend his position.

Dr Michael Pinto-Duschinsky: I think he certainly should be able to defend his position.

Chair: If you could stick to the principle we would be very pleased.

Dr Michael Pinto-Duschinsky: I think that is right, but what we were told in the press was that the new Cabinet Manual stated that the Prime Minister should not resign until it is clear who can command confidence in his place. Well, nowhere in the draft Cabinet Manual before the election was that stated. In other words, the Manual itself was misquoted in order to create this auction situation, and I see the real danger of what happened was that it was a highly political process masquerading as a set of historical precedents.

If I go on to something else not involving Professor Hazell, the best precedent was the 1929 election, when Baldwin resigned and his advisors said that he could resign when he wanted, which I think is the situation. Now, I gather that the Institute for Government study did not look at the advice given in 1929. It just looked at the result but not at the advice. In other words, I think that things were rather geared—they were tendentious—towards a certain conclusion, the conclusion being that we should move towards a continental system of coalition bargaining. The excuse that you always had a Government, a continuing Government, by having a caretaker Government under a coalition bargaining system, is fairly absurd when one looks at countries like, say, Belgium where you have a caretaker Government but that can last for a number of months. In fact, I read that the wives of Belgium politicians are so fed up with these negotiations lasting so long and being without a Government, that they are looking back to ancient Greek time and threatening a sex strike to make their husbands go ahead and form a Government. So the notion that we should change the system to one of coalition bargaining because the Queen's Government must continue does not follow. The way in which the Queen's Government continues—according to the British tradition—is the Prime Minister is free to resign, does not have to

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

resign after an election until defeat in the House of Commons, and then the Queen asks for somebody else who—if they are not confident that they will be able to form a Government—accepts an exploratory commission, which is perfectly normal in British political tradition.

So I think I have made clear that I very much suspect the political motives in this and the effects, which I think are undesirable.

Q58 Chair: I think, Michael, to an extent, the fact that these things happened and the Cabinet Manual was not in the public domain made those things possible.

Dr Michael Pinto-Duschinsky: It was in the public domain because the relevant chapter, number six, was published shortly before the election. However, I gather that it never went through the Cabinet. It was a production of the Secretary of the Cabinet. He had been given authorisation by the Prime Minister to go ahead with the exercise but the draft did not go to the Cabinet. I don't know if it went to the Prime Minister. It was not subject to proper review by any parliamentary committees. The Justice Committee received evidence in a hurry so that opponents—such as those who might be here today—were not given a chance to express their opposition. It was rushed through.

Q59 Chair: So in a future situation where the whole of the Cabinet Manual is in the public domain and had been viewed and examined by Parliament as a whole, and in detail—possibly by this Select Committee—to raise detailed issues, which are very difficult to do on the floor, but where this Committee perhaps had examined detailed issues and made proposals and sought to enter a process of negotiation on behalf of the legislature with the Executive, the likelihood of that sort of bias, let us say, would be diminished?

Dr Michael Pinto-Duschinsky: I think that I tend to agree with Stuart Wilks-Heeg on this, that if you are to go towards a written constitution you need a fully fledged discussion about it. It can't be done casually. I think this document is neither fish nor fowl and it is the worst of all worlds. If there are those who argue for a written constitution, we have to go through a constitutional convention, and that is the best way of doing it. If we keep to our traditions then we keep to ours, but the halfway house, where there is unclear wording and ambiguity that comes time and again in this document, is undesirable constitutionally.

Chair: Michael, thank you.

Q60 Mrs Laing: I am concerned about—and everybody has addressed this this morning, and our previous witnesses did as well—what kind of creature is this Cabinet Manual. We can't recommend whether it is a good thing or a bad thing unless we know just what it is, and a document is not necessarily what it purports to be merely because somebody says that is what it is. I would suggest that what matters is the manner in which it has been acted upon, the way in which it has been used or could be used in future. So I have a couple of questions relating to that. I have to

go back to Professor Hazell. Professor Hazell suggested to us, and so did our witness from New Zealand, that their Cabinet Manual—and Professor Hazell said this is the same for this Cabinet Manual—is merely an operating manual for the Executive, but I would ask then: is it merely for the Executive?

I notice I asked Professor Hazell this question and he answered a different question, now that I go back and look at the minutes, but what politician can possibly criticise anyone for answering a different question to that which is put to them? So I don't criticise him for that, but he did not answer the question.

This Cabinet Manual was acted upon not only by the Executive but by those who were not members of the Executive, notably leaders of other political parties and others, but especially leaders of other political parties. So, who acts upon it? Secondly, is it innovation? Is it something new in our system? Thirdly, is it justiciable? Because the question of whether it is justiciable takes us to the centre of what kind of creature it is. We have been given some evidence—some opinions—that it is not justiciable and some that it is, and I wonder if our witnesses this morning would like to consider those three points: who acts upon it? Is it innovation? Is it justiciable?

Dr Stuart Wilks-Heeg: There is a series of questions there and very important ones. I think the issue where you started: what is this document exactly, and some of Michael's points, are extremely relevant here. I think there is a muddle. It has been described in many different ways. Yes, operational manual for the Executive. That is one way it has been described but there have been many other terms. It has also been described as being directed at various different audiences. I do have concerns that a document, which on one level is meant to be written by the Executive for the Executive is supposed to also be a document that explains how government operates to the general public, because we have heard both things from the Cabinet Secretary. To my mind, that does not quite make sense.

Who will act upon it? Well, yes, once you have this document, once it exists, once it is in the public domain—which it is—it is not only going to be acted upon by the Executive branch, clearly others will have an interest in what this document says; clearly they will refer to it and brandish it at certain points if they think something is happening that is not as laid out in the Cabinet Manual, and the fact that the Cabinet Manual is so vague in so many places using lots of phrases like “ordinarily” or “normally” or “as far as possible”, all these kinds of things, you can see how much contention there could possibly be.

Is it something new? Is it an innovation? Clearly, it is something new and constitutionally it will have significance. We can see from the New Zealand experience that that has happened. If you look at how the New Zealand manual is now described, it is described as a key source document in relation to the New Zealand constitution. So we can expect with time it will acquire that kind of status. That is absolutely clear.

Is it justiciable or not? This is really tricky and I am probably not best to judge. Clearly, it does not have legal status and it can't have. Whether it could be

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

referred to in a court of law; well clearly, yes. What weight that would carry? It is very, very difficult to say.

David Walker: These observations are negative and probably don't help. This isn't the Executive. The National Audit Office—when I last checked—is an organisation answerable through and to this House. There is a lot in here about the National Audit Office. There is a lot in here about the relationship with the National Audit Office and Accounting Officers in the Civil Service. Immediately you are into the terrain of: what is your collective competence as representatives of the people in this House and, indeed, Parliament? So it can't just be defined as something by and for the Executive. It involves you and obviously these hearings are in part an attempt by Parliament to assert itself in the face of what is, by definition, a product of the Executive.

My great puzzle with this was how to make sense of a mixture of high flown and—I used the word earlier—banal to do with business. For example, there are several paragraphs in here about the appointment of non-executive directors to Whitehall Departments. Again, this is new. It was discussed under the previous Government as being put into effect partially under—now is that a constitutional question or is it again a mere matter of how Secretaries of State choose to run themselves? I confess sheer puzzlement as to what essentially is now meant to be cast in stone, so that all departments in future will organise their relevance in the following way. I don't think so. It is a very brief observation of what necessarily will change because I can already go around the departments and say, "These have done it. These haven't done it".

One interesting question about this: as you know, there is a meeting every Wednesday of the Permanent Secretaries of all departments convened and chaired by the Cabinet Secretary. I wonder if you were to eavesdrop on that or had eavesdropped on that since the draft came out, how many Permanent Secretaries—out with maybe the Treasury and maybe those around No. 10—have even cast their eyes over this? I don't think this is a collective product of the Whitehall machine. I think it is a partial document from a section of the Cabinet Office, produced for reasons you have been discussing, but its generality is not, I think, evident.

Dr Michael Pinto-Duschinsky: I looked through the evidence given to the Select Committees on this. It is remarkable how many different versions come out and ones that can't all be true at the same time. We are asked to believe that it is not new, on the other hand that it is completely new and a marvellous new production; that it is not prescriptive and yet it is; it is not legal and yet Lord Pannick, who I think is an authority on this—and he was on the Lords Constitutional Committee—warned that it was likely and inevitably would be legal, whatever people were saying.

I think that the way I interpret it is that, if you want to introduce something new and important without making people too nervous, you tell them, "Don't worry, it isn't this; it isn't that; it isn't the other".

Mrs Laing: Precisely.

Dr Michael Pinto-Duschinsky: Then once it is in, they will say, "Look at it. There it is".

Mrs Laing: Yes.

Dr Michael Pinto-Duschinsky: So I don't believe it is as innocent as it is made out to be. When leading public servants say there are all sorts of myths about this, well if there are myths it should not be written in such a way that gives rise so easily to myths. I think it is absolutely inevitable that it will lead to controversy about its status, which is one reason I don't think it should go ahead.

Q61 Chair: I think you are all saying, to some degree, that the way this was introduced—going back to Gordon Brown's original speech, and then the publication of one chapter—that this was not introduced openly and transparently as a very early step on some sort of wider codification. This was a typically British sort of smuggling something out and see what happens and, "We'll do a bit of it and get a reaction and—"

Dr Michael Pinto-Duschinsky: I don't know if it was typically British in that way, because there is no precedent for the way in which this was done. I have asked the Cabinet Office, "Is there any previous example in history of a Secretary of the Cabinet issuing a statement before an election about the rules of those elections?" and the answer is, "No". This is an unprecedented thing to come from the Civil Service in an area that is potentially political. So I don't see where the precedents are. The fact that there is a precedent in New Zealand, there is no British precedent for doing this.

Chair: No, I was referring to the precedent of we are not very good at doing the big bang constitutional stuff. We do little bits of reform around the edges and a bit of tinkering with this, that and the other, and see what the reaction is and then withdraw if the horses get frightened. I am sorry, I am diverting—

Dr Michael Pinto-Duschinsky: If there were a bit of tinkering, but done in the correct way, that is fine, you can have piecemeal reforms. But this was something that was not introduced through any accepted constitutional or institutional precedent. It was done in a way that we have not seen before.

Chair: Although the Prime Minister did launch it in effect and then shortly—

Dr Michael Pinto-Duschinsky: No, he did not. I am sorry, because the evidence you had on 13 January was that his permission was obtained but that the Prime Minister felt that it was being obtained for something else; that his IPPR speech was about his general constitutional plans. Yet that permission was used to produce a manual, which was not what the Prime Minister had intended. That was the evidence given by the gentleman who appeared before you in January.

Q62 Chair: We have the quote on the record from the Prime Minister, "There is a wider issue. The question of a written constitution, an issue on which I hope all parties can work together in a spirit of partnership and patriotism. I can announce today that I have asked the Cabinet Secretary to lead work to consolidate the existing unwritten piecemeal

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

conventions that govern much of the way central Government operates under our existing constitution, into a single written document". I think that was the Prime Minister saying, "This is the first step".

Dr Michael Pinto-Duschinsky: Yes, but that was not necessarily a Cabinet Manual.

Chair: No.

Dr Michael Pinto-Duschinsky: His understanding was that it was the beginning of a much longer process of constitutional reform, and that there was some misunderstanding as to what he was proposing. On his part, he felt he was proposing what you have said, which is the wider process, whereas what the Cabinet Office was doing was producing a more limited document to apply to try and change public perceptions of what you would do in the event of a hung parliament.

David Walker: Usually an outgoing Prime Minister asks something to happen and it then cools off. Isn't the puzzle about this that it has continued as a piece of work by the Cabinet Office under a Government whose interests are, it seems, quite different, whose dynamic is quite different? You could interpret the way it has come out as the Civil Service saying, "Basically, we had to do it because Gordon asked us but it is not terribly important any more and we have other fish to fry". You could envisage circumstances after May when it could have been dropped. Maybe the nature of coalition building in those days of May gave Gus O'Donnell the sense that he had to somehow encode what he had accomplished. I don't know. It was to me slightly puzzling that they bothered to continue something that was enjoined by an outgoing—and some might say discredited—Prime Minister.

Q63 Tristram Hunt: That is the interesting point. I think the criticisms we have heard today are, in a sense, Stuart suggesting the process was in many ways illegitimate in the way that this was done; David suggesting it was slightly unsophisticated in its approach to the complexities and modernity of the nature of government today; and Michael worrying about—quite rightly I think—the political consequence of the codification process.

I suppose my question is partly about what happens next because, as Stuart said, this is out there; it can't simply be withdrawn. We as a Committee, having engaged on this question, it behoves us to come up with something useful to say rather than on the one hand or on the other. What should Parliament do about this? Should we try and take hold of it and re-write it? Should we send it back where it came? What would be a useful step that we as a Committee can recommend to our colleagues in Parliament to do with this manual?

Dr Stuart Wilks-Heeg: That is a very important question. I think, a general principle, Parliament needs to be assertive in relation to this. Therefore, this inquiry is incredibly important. I may have this wrong, but I think there may be one other Select Committee looking at this issue as well.

Tristram Hunt: There is always another one.

Dr Stuart Wilks-Heeg: I think it is crucial that Parliament is assertive in response. Could the Select

Committee attempt to re-write it? I don't know. One thing, and this might seem a slightly trite suggestion, but it does seem to me if the Executive branch can write a manual by itself for itself perhaps so can Parliament write a manual as it sees the way things work. Perhaps so too could local government. Then we could look at how all these things match up or don't match up from the different perspective of the different constituent parts of government in the UK. As I say, it might be a slightly trite suggestion but it might reveal some interesting problems that we haven't thought of yet.

It is not really for me to say precisely what Parliament should do, but I think Parliament should do something. I think it is very important that Parliament grasps some kind of role in relation to this document and isn't fobbed off with the argument that this is a document by the Executive for the Executive, which is the line it seems to me consistently still taken in New Zealand. Given that they have had their Cabinet Manual since 1979, I think it would horrify me if, after that much time had elapsed in the UK, we were still in that position, that Parliament didn't seem to have any purchase on the document.

Q64 Chair: To interject there, an informal process could be agreement on the floor to the principle and examination in detail by a Select Committee, which I think would be ourselves; a formal process could be that this is a code and it needs statutory authority, and that would mean then it would go upstairs into Committee and a Public Bill Committee. The downside of that is, of course, that is government versus the rest and there is a whipping, and the rest of it, and you may end up with absolutely zero flexibility and then it is whipped through on the floor similarly. So I think Tristram's question is an incredibly valuable one and I don't know the answer to it. But we need a process because I think the Government and the Executive here are seeking some form of engagement to their great credit, and publication is to their great credit. So I think it does behove us, as Tristram said, to find a way.

David Walker: Repeating what I said earlier, you are corners of whatever the constitution is; you are its pivot; you are its major element. If you don't have considerable input into whatever might be a description of the constitution, it will inevitably be a broken bat. Tristram might imagine one of his Victorian heroes—Gladstone—fobbing off the work of the constitutional definition to clerks. I don't think so. I think this is a task for politicians and parliamentarians. I have to say, if I may, notwithstanding issues about expenses, some of the revenues of this body—which arguably should be larger—could be spent upon the enterprise of development. You could commission distinguished academics to help you in the task of putting together a draft constitution. I don't think it is an Executive responsibility.

Again, you do have an arm—I repeat it—in the National Audit Office. There are other ways in which you could mobilise some small resource to help you in something that I think is yours to do. Clearly, in

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

dialogue but it is as much yours to initiate and to accomplish as it is the Executive's.

Dr Michael Pinto-Duschinsky: I think there is a background to this, that in the coalition the Minister responsible for the constitution is the Deputy Prime Minister and the machine works to him in constitutional matters. Some people may see a sort of underlying compromise where the Liberal Democrats in the coalition will give way on university fees, on various other things to do with substance of policy, but will get their way on constitutional reforms that are the centre of their attention and what they are really after. So I think that is why the process of the Cabinet Manual has gone on through the coalition process.

What we don't want is deep reform that is either partisan or rushed through. Reform is something that needs to have all party consensus and needs to be looked at very seriously. So I do think that if there is a will to look at codifying our constitution it needs to be done on an all party basis, in a very serious way and, as you say, with Parliament involved. So I think that would be what you are suggesting, which is a wider and more serious process would be a better way of going if one was going down that direction.

Q65 Tristram Hunt: But doesn't that point to, in many ways, the dangers and intellectual problems of constructing a written constitution after a nation has existed for however many hundreds of years, rather than the beginning of the nation? Because, in whatever context you do it, it is going to be a reflection of those specific contexts. It is a reflection of the debate surrounding the 2010 election rather than the 1929 election. So in the Cabinet Manual we have the ridiculous footnote eight on page 26, inserted by our fanciful Deputy Prime Minister, about a precedent about the Leader of the Liberal Democrats expressing a view that whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern. To insert that from nowhere, but because he is a Deputy Prime Minister and was in the room he can put that in, that is the illegitimacy of it, isn't it?

Dr Michael Pinto-Duschinsky: I tend to agree. I think that there are questions as to whether a country like the UK should now go towards a written constitution. It may well be that we find ourselves involved in an exercise that is not worth the trouble. On the other hand, there are people who believe that we should go for a written constitution. I think it is a legitimate argument and, therefore, I would respect what the Chair wants, which is to move towards a written constitution as I understand it. What I have no sympathy with is this sort of halfway house, so either do it all or do none of it but don't mess around in the middle.

Q66 Mr Turner: Can you remind me: I was on the Justice Committee on 24 February when it went before that Committee. Were any other committees invited to put the same piece of information beforehand, before the Justice Committee?

Dr Stuart Wilks-Heeg: Not that I am aware of.

Dr Michael Pinto-Duschinsky: I would need to look in detail at this, but my impression is that the Justice Committee was recruited to look at this after PASC—the Public Administration Select Committee—said that it couldn't and that the request came from members of the group, the academics—I mean the Institute for Government, the Constitution Unit—who were pursuing this. The idea was to get some public mileage out of it. There was no real attempt to keep to the timetables normal for a committee, or to have in evidence those who might doubt what was being suggested. It was a quick fix with the view that was being put forward being presented but without any opposite view.

Q67 Mr Turner: The success of the Justice Committee, of course, was that it helped to have a Liberal Democrat in charge?

Dr Michael Pinto-Duschinsky: Alan Beith, who was a university contemporary of mine, is, of course, a Liberal Democrat.

Q68 Mr Turner: Can you tell me something else, which I am not clear on. We know this phrase, "The Queen in Parliament", what happens to the Queen when Parliament isn't there?

Dr Michael Pinto-Duschinsky: Sorry, what happens to the—

Mr Turner: To the Queen when Parliament isn't there, because Parliament is dissolved. What is the role of the Queen because this is the most significant point about whether there are rules that affect the Queen, and the really significant point is: what do these people do where they would otherwise have resigned? Gordon Brown would have resigned but he didn't, was that because of information that was coming to his office after the closure of the polls, but before the Tuesday that followed or what? I am just trying to work out—your finding is quite clear that people were trying to get Gordon Brown to remain in office longer than he otherwise would have done, and eventually he said, "I'm going", but that was four days later, and you are saying the position is, when you have lost the best thing to do is go.

Dr Michael Pinto-Duschinsky: I want to be clear on this. The Queen in Parliament I think refers to legislation, if I am not mistaken. Obviously when Parliament is dissolved the Government continues and so executive actions can happen. The Queen has, as the prerogative, the ability to appoint and, indeed, to dismiss a Prime Minister but my understanding of democratic convention is that a Prime Minister remains Prime Minister until he or she is defeated in the House of Commons on a motion of confidence. So, it is possible for a Prime Minister to remain on after being defeated in an election, there is no doubt about that.

The expectation, democratically, would be that if a Prime Minister has been defeated that they are perfectly free to resign. Indeed, in my view, I think it is better that they go fairly quickly, that would be the democratic expectation, but they legally can continue. Now, in 2010 it is arguable that Gordon Brown remained in office not because he had to, but because he genuinely felt that he could form a coalition and

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

that therefore it was the political logic and not the institutional logic that led him to stay on. On the other hand, it certainly is clear that there was a lot of pressure on him from those who supported the Cabinet Manual to indicate that it was not right for him to resign and, indeed, that he could not resign. So, that may not have been decisive but that was the attempt and that was the spin that was put on to try and persuade him not to resign and, as David Laws said, I think to this Committee, that was in the interests of the Liberal Democrats because they could bargain from one side to the other on the alternative vote.

Dr Stuart Wilks-Heeg: If I could interject, I think what lies behind this question is really this sense of absolute muddle, particularly in that chapter and particularly in this dreaded paragraph 50, and Michael suggested we should press the delete button on the whole document. I don't think we can do that but I think we can probably argue for pressing delete on paragraph 50, which is the one causing so much trouble.

The role of the sovereign in the situation of a hung parliament I think is at the core of this muddle and it is partly because—we talked about the case of 1929. There were other cases in the 1920s with hung parliaments where the sovereign got more involved than we would expect now. A lot of time has elapsed between the 1920s and now in terms of how we would expect the sovereign to get involved in that kind of process. But when we look at those different scenarios of those different hung parliaments, whether the Prime Minister has resigned or not and how the sovereign got involved or not, we clearly had quite different scenarios in each case.

In 1929 the Conservatives had clearly lost on vote share, they had clearly lost on the number of seats; Labour was clearly the largest party and so on. If we look at what happened in 1923, something different happened. Again the Conservatives had lost but Baldwin chose to face Parliament in that instance. In 1974, the situation in which Heath stayed in office for a number of days to the utter bewilderment—if we go back to the press coverage at the time—of everybody concerned who expected he would just resign, that somehow has become the precedent ignoring everything before it. What we have to remember about what was going on at that time is that election was unbelievably close. I think the Conservatives actually won just on vote share, not that that counts, and Labour had a few more seats—I think three or four more seats—incredibly close.

It had been called the election on the issue of who governs, et cetera, it really was not clear what was going to happen next and you could see how that situation developed. To argue that that set some kind of precedent I think is deeply problematic. I agree with much of what Michael says on this but not the kind of Lib Dem, Trojan horse perspective on how this rule book came about. It strikes me that a key driver was this sense of deep concern that if we ended up with a hung parliament, if it was not clear what would happen next, that there would be a media feeding frenzy, there would be panic, the financial markets would panic and so on. So, the desire was to

have a set of procedures in place that would deal with a situation of absolute confusion. That was not a constitutional driver, it was a concern about what the financial markets might do, in my view, which I think is what accelerated this process of getting that draft out. It was a cause of much of the confusion and muddle that we now have on this.

David Walker: We do need some clarity on this. Again speaking about the Civil Service, the doctrine was quite clearly stated by the now Lord Armstrong of Ilminster, Sir Robert Armstrong. In 1986 he said, “The Civil Service has no constitutional personality or responsibility separate from the duly elected Government of the day”. When there is no Government of the day what are civil servants supposed to do? Now, ad hoc, empirically, Gus O'Donnell managed this process, for ill or better that is to be judged, but he took it upon himself to be a constitutional personality, a lynchpin of continuity. Is that appropriate behaviour? Is that expected? Somebody, you or somebody else, has to say, because clearly we will confront parallel circumstances in future and we need to have a doctrine. The Armstrong doctrine is quite clearly, even at the time, anachronistic.

Dr Michael Pinto-Duschinsky: I think the situation is clear, or should be. Namely that we have a Government until the Prime Minister resigns, so Gordon Brown remained Prime Minister and there was a Government. Where I think the difference of opinion rests is about the parameters, or the pressures on Gordon Brown as to whether to resign or not to resign and the traditional view, and I think the correct view, is that that is purely a political decision. That if Gordon Brown wishes to resign before meeting Parliament then as Prime Minister he is entitled to do whatever he wishes. That was the advice to Baldwin in 1929. He does not have to continue while party negotiations carry on. He can if he wants, but there is no constitutional obligation, either express or implied. It is in trying to change perceptions to say that there is an implied expectation or duty on the Prime Minister to continue that the system has been changed, and I think illegitimately. Because it should just be left to the politicians and that is the best way of keeping the monarch out of things.

Q69 Mr Hamilton: My recollection of 1974, and I was there—

Chair: Fabian, do forgive me, Chris has to go and he did tell me. Do you mind?

Mr Hamilton: I am so sorry. No, no, of course not.

Chair: Excuse me, Fabian, my mistake.

Q70 Mr Chope: It is just that I have a first order question. Can I follow up on what Tristram was saying, what are we going to do about this? Are you all agreed that there is no rush for this? Because it seems as though there is a pressure to try and push it through now and get some sort of endorsement for it when we know that the Fixed-term Parliaments Bill is still unresolved, we have the AV referendum still waiting, we have the reform of the House of Lords, we don't know what that is going to be, and the critical parts of this Manual only apply to the period

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

when there is a change of Government really. The rest of it is a mixture of, as you have said, the banal and the normal.

Would it be a good idea to strongly recommend that we should not be rushing about this? Am I right in interpreting your criticisms being really you think that an idea expressed by the previous Prime Minister has been seized upon by the Civil Service in order to manipulate a situation where they are making an unwritten constitution into a written one to suit their own purposes? Do you think that what this manual does is it elevates ad hoc measures of political expediency into the status of constitutional norms? If we really laid into this, with your help, would we be able to try to prevent this becoming, or being seen as part of our constitution rather than as a bit of wishful thinking perhaps on the part of a mixture of some senior civil servants and perhaps some senior elected politicians?

Dr Stuart Wilks-Heeg: There are several parts to the question, and a very good question. I will take them more or less in turn I think. Would we argue, or would I argue, that there is no particular rush? Yes. As I said in my written evidence, Sir Gus O'Donnell himself said we have been waiting decades and decades for this. I think if that is true then we can presumably wait a few more months and perhaps have a better consultation process. I think the idea that this should be subject simply to a three-month public consultation because that is best practice or the norm really is not appropriate because we are talking about something here—despite all the claims that this document is modest I really don't think it is that modest and it clearly is not the norm. So I would agree, why the rush? Let us have a more considered approach to this. Does it elevate ad hoc political expediency to the status of some kind of constitutional norms or conventions even? Possibly, yes, and I think the answer I was giving in relation to what happened in the event of a hung parliament in 2010, there is that risk there and there probably are genuine issues there. So, I think, yes, there is no reason why this should not be slowed down. I think particularly—and I think this is the view that has emerged across the three of us—that the original purpose of this manual, the original intention, that we do seem to have moved on from that, very, very clearly.

The association with the process of moving towards codification, as we said, that seems to have been dropped and the document has come out anyway. Whether in the process, as I think you are implying, it has become something of a Civil Service power grab, I am not so sure about that and I think it has just been put out with a different rationale from the one originally given to it. I think that is a reason why we should now take the time to reconsider.

David Walker: Absolutely, there is no rush, but don't leave it too long. Things happen out there—for example, out there in the constitutional landscape the Welsh are voting on a major extension of the legislative capacity of the Welsh Assembly. It is conceivable that issues involving the relationship between the devolved Administrations of this House and the centre will erupt—who knows? One of the

weaknesses I think, in this document, is the fact that it does not discuss devolution in any major way.

If I can betray a private grief, in your earlier life you will have had encounters with the Audit Commission, which the Government has announced the abolition of. That may or may not trespass upon the constitutional but it does touch on quite teasing issues of the place of local government and so on. Again, very much a changing picture. Some of that does need at least not codification but certainly re-description, and your re-description would be as useful as anyone's. So, all I would say is by all means don't rush but do feel the need for this work to be done.

Dr Michael Pinto-Duschinsky: I appreciate that as a Committee you are trying to look at practical responses rather than a merely negative response and I agree first that this should not be rushed, that there isn't any need to go ahead within this time. I suspect that it may become a matter of honour and pride to get it through since it has been put on the table but I cannot believe that this is the most important thing to be going through, especially as there are other constitutional issues of great importance. We are coming up to the AV referendum and fixed-term Parliaments. There is major legislation on the House of Lords in the offing that is likely to be controversial. I think there is only so much that can be chewed on at one time and I think that it would be reasonable to say that in view of the other constitutional changes that are in the offing at the moment that it is sensible to put off this until we know more about what happens with these other measures. Then revisit this issue as to whether one wants to move towards a general review of the constitution, whether one wants to move on the other hand to a few particular areas where clarification is needed of Civil Service practice and that this discussion should be parked for now and then revisited later, but maybe not too much later.

Q71 Mr Hamilton: The point I was just going to make to Stuart is in 1974, you are quite right, the votes and the seats were almost exactly the same with nobody having a majority. But wasn't the reason that Ted Heath stayed in office, was to try and negotiate a coalition with Jeremy Thorpe, or at least the support of the Liberal Party, to keep him in office, rather than anything else? Wasn't he right to do that because nobody had a mandate? That is just a point I throw on the table.

Dr Stuart Wilks-Heeg: You are right, yes.

Mr Hamilton: But that is very different to what happened in 2010 is my point. Labour clearly lost in 2010.

Dr Stuart Wilks-Heeg: Absolutely, but I think my point is that when we look at the different types of hung parliament that we have had throughout the 20th century, and you can go back to the 19th century, you have many different types of scenarios and I think Tristram's point about that rather unhelpful footnote that has been inserted is quite significant in relation to that history when we look at it.

Q72 Mr Hamilton: Absolutely. I just wanted to come back to a point that David Walker made right at the beginning about the appointment of a chief

3 March 2011 Dr Stuart Wilks-Heeg, Dr Michael Pinto-Duschinsky and David Walker

operating officer of the Government and these internal changes that are made. Is it a banal detail about how the Government—the Executive—functions, or is it something that we, as Parliament, should be concerned about? I just want to go back to something that happened when I was on the Foreign Affairs Committee. The Foreign and Commonwealth Office decided to have a board—I can't remember what they called it, a board of directors if you like—with outside appointments. People who are not diplomats or career civil servants being involved. How much is that a constitutional issue or how much is it a banal detail of how the Government chooses to run itself? Is it something that Parliament should be concerned about?

David Walker: Exactly, it is a constitutional issue because it touches on the sphere and capacity of the representative part of our political system, that is to say the House of Commons. If you interrogate Ministers in the knowledge that those Ministers are now answerable to an autonomous or semi-autonomous board that surely trespasses upon their responsibility to you and a previous doctrine of ministerial accountability. The present Government has said the Secretary of State will chair departmental boards but what then is the position of junior Ministers? All sorts of questions could be opened. I don't think they will be, but they could be opened by that kind of, as you say, apparently innocuous sort of administrative-type change. So, it is partly a matter of defining what constitutionalism is, but it is also I think, the Chairman may reference this, your capacity to oversee what is being done with public money in the name of the people by an Executive which, despite freedom of information, still operates pretty much in shadow.

Q73 Mr Hamilton: From what you say you would probably agree that we are rather out of balance in that Parliament, and the House of Commons especially, should be the sovereign body of the nation from which the Executive derives its power, this is what we have been talking about with reference to the Cabinet Manual, however, with these boards and with these rather shady administrative solutions, Parliament is rather out of control. We could argue, of course, that Parliament really has not had much control following a general election and a Government being formed with a majority, because the greatest strength of Parliament, its sovereignty, is also its greatest weakness if the party of Government has complete, whip control and a majority and can therefore do what it likes, as we saw during many of the Labour years. How do we reassert the authority of Parliament? Is it through a written constitution—which I know is controversial, something I certainly do agree with—and wouldn't a written constitution ensure that that constitution would be the sovereign document, as it were? We would look to that to see how things should be done rather than a Cabinet Manual or any ad hoc other administrative methods.

But following on from what Michael said in the reply to Christopher Chope earlier, with all these other things going on and the impending reform of the

House of Lords as well, shouldn't we then look at every corner of our constitution and try and bring them together? Because surely it is very dangerous to start making major reforms like Fixed-term Parliaments or alternative vote systems and a completely new House of Lords without looking at the effect all these reforms have on every other part of our unwritten constitution.

David Walker: Absolutely, one delves into deep territory when one considers the capacity of the House of Commons and the House of Lords to oversee executive government. Clearly, partisanship has always been a major impediment to the corporate capacity of the House of Commons. Can I just make one point, though? This document refers to—you all know what an Accounting Officer is, the most senior civil servant in the Department or Agency who is financially responsible. Why not broaden that concept? At the moment Accounting Officers answer to, through the National Audit Office, notionally the Public Accounts Committee (PAC). The Public Accounts Committee is broader in its interests and co-operation maybe than it has been, and that is a good thing, but you do have in the Commons an existing capacity to reach into executive government and get knowledge and secure some accountability. I think, if I may say, if you were perhaps more muscular in Select Committees, perhaps more in collaboration with the PAC, a lot could be done short of that wider set of redefinitions that you are right to characterise.

Dr Stuart Wilks-Heeg: I completely agree with the point about if we are going to make all these incremental constitutional changes we need to think about how they need to be connected up, and the obvious way to do that is through some form of written constitution. The Chair made the point earlier that there are these apparently modest changes being made over time and many of them are not particularly modest. I think a lot of them are quite profound within the context of our constitutional arrangements. I think we are getting into a situation where the pace of change now, as it was in the late 1990s under Labour, really is quite profound, and some major reforms are being made without any reference to other reforms that are known to be coming down the line. So, to reduce the number of MPs to 600 on—I think we would all agree—an arbitrary basis, while there is a plan to reform the House of Lords to make it either wholly, partly or mostly elected—nobody is sure and nobody is sure what electoral system—this really is deeply problematic territory, and I think it does, in my mind, make the case very strongly to look at this in the round and in the context of a clear, written constitutional settlement.

Q74 Chair: Gentlemen, thank you very much for your assistance. I think we can release David because we are going to go on for a very brief 20-minute session with Michael and Stuart on the European Court of Human Rights. David, you are most welcome to stay with us, but we will direct our questions to Michael and Stuart.

Thursday 10 March 2011

Members present:

Mr Graham Allen, in the Chair

Sheila Gilmore
Andrew Griffiths
Mr Fabian Hamilton
Simon Hart

Tristram Hunt
Mr Andrew Turner
Stephen Williams

Examination of Witness

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

Q75 Chair: Sir Gus, how are you? Welcome, welcome.

Sir Gus O'Donnell: Very well, thank you.

Chair: Do forgive us for a slight delay in inviting you in.

Sir Gus O'Donnell: No problem.

Chair: You are very well aware that we have been looking at the *Cabinet Manual*, a source of great interest for Members of the Committee. We have taken extensive evidence, as you will know. Our Report will deal with the constitutional and political aspects of the *Cabinet Manual* and also will be sent to you anyway as a late entry for the consultation—which I believe you very kindly allowed us to do—on the questions of specific detail within the *Cabinet Manual*. So this is a little bit of where we are now, now that the consultation has officially closed. We would like to know a little bit about that, if it is possible to comment on that, and a prelude to Members of the Committee going away and writing a report and hopefully continuing what I think has been a very constructive interaction with yourself and the Cabinet Office on these issues. Sir Gus, would you like to open up with a couple of remarks?

Sir Gus O'Donnell: Just on your point about the consultation period, it might be worth saying first of all we are looking forward to your response, so we obviously won't be responding to the consultation period for some time, until we have your Report and the Report of the Public Administration Select Committee, who are looking at it. We obviously have the Lords one now. We had around 40 replies to the consultation. About a third of those were from members of the public, academics, the church gave us some comments—the Church of England—so a number of institutions. Basically, if I was characterising, I would say mostly detailed and constructive, factual; although there have been some differences of view. If I were to say one of the big areas that I know you are interested in this Committee is how much we say about parliament. On the one hand, we have a lot of people asking us to put a lot more in and other groups saying we should have a lot less, so that is one we'll have to resolve. Some wanting lots of footnotes and some questions about ownership as well; should this be owned by the Cabinet, some saying it should in some sense be owned by the Cabinet Office, others that it should be owned by parliament.

Q76 Chair: If I can start with the last issue, I think the Committee will think long and hard about how the *Cabinet Manual* interfaces with parliament. If parliament is sovereign, if parliament indeed controls the Executive—and we will not have a debate on that, we will just take that as a given—then what is the role of parliament in respect of something that details a lot of the activity and action around the Executive? Have you had a chance to formulate a view on that? Do you think parliament could have a constructive role? It follows on from some of the debates we had last week, where I think a number of colleagues felt a role would be quite important, but equally, I do not think there was a great appetite for line by line consideration in a Public Bill Committee or on the Floor of the House. I had that sense from colleagues. So a sense of legitimacy may well be quite important, rather than detailed scrutiny. What is your view on that, Sir Gus?

Sir Gus O'Donnell: I think we were very clear about the *Cabinet Manual*, that it is a document written by the Executive, if you like, for the Executive, but obviously it will relate to parliament, and I think it will be very much a matter for parliament—obviously advised by its Select Committees—as to how it wants to get involved in this process. One thing I was very clear on, although it is by the Executive for the Executive, we put it out for consultation. We are delighted that Select Committees are taking an interest in it, so we're very keen to get your views. Then it will be, I think, for you to decide how parliament wants to look at the document. As you say, you are obviously much closer to knowing the kind of scrutiny that parliament will be interested in, but certainly from the Government's point of view, they're saying that they believe this is their document.

Chair: I think we will come back to that, but we will get some other colleagues to come in.

Q77 Mr Turner: I have to go, so I have the privilege of asking the first questions. Who drafted it?

Sir Gus O'Donnell: It was drafted by civil servants.

Q78 Mr Turner: At what level?

Sir Gus O'Donnell: That's an interesting question. At a range of levels. The people doing it originally were in the Ministry of Justice. Post-election, obviously with moving to a coalition, with the Deputy Prime Minister taking responsibility for a lot of constitutional issues, a lot of the staff that were in the Ministry of Justice transferred across to the Cabinet

10 March 2011 Sir Gus O'Donnell KCB

Office. So the first version was drafted by Ministry of Justice officials and the same officials are responsible for redrafting it now, but they're in the Cabinet Office, because of the machinery of Government change. But it was basically a work where the experts within the Cabinet Office at various levels did drafts and also took expert advice. They have some constitutional experts they talked to. I think Lord Hennessy and Professor Hazell have both told you in evidence that they were consulted by us along the way, and we also consulted the Palace and the church in particular on specific issues.

Q79 Mr Turner: I think what quite a lot of us have thought is that it is not clear what its responsibilities are, and in some ways, it is very unclear. I wonder if you felt that was true, and how you would improve it?

Sir Gus O'Donnell: Unclear? Could you give me—

Mr Turner: It is not clear whether this is a technical document that is very accurate or a sort of general story.

Sir Gus O'Donnell: Okay. That's, if you like, "What is it for?" I would say this is a reference work, a guide for Ministers and civil servants, but we also, by making it public, want to help in general education. I gave a lecture on the *Cabinet Manual* recently to the Institute for Government. I was very pleased to have a very large, very wide audience. I think it has taken the interest of a lot of people who are interested in aspects of the constitution, and I hope will improve the general levels of knowledge. You are absolutely right, we do have a kind of decision to make here. We could make this a very academic treatise, we could footnote and reference every single point, put in all the previous historical episodes that relate to a convention, if people wanted to. I think this would make it a rather harder document to read and might damage its ability to be that kind of—I think it was Robin Butler who said, "This is something that I want, there, available". I can take it down from the shelf and just say, "What's the quick answer to this?" and not have to wade through lots and lots of footnotes.

Q80 Mr Turner: So it will not necessarily be as accurate as a longer document?

Sir Gus O'Donnell: No, I'd hope it will be accurate, but the question is precisely how much detail do you want? We could go down the road of a sort of *Erskine May*, and I don't think that's what we want.

Q81 Mr Turner: The House of Lords has come up with a whole page of things that they say are inaccurate.

Sir Gus O'Donnell: Like I say, there will be questions about matters of fact. We will be very happy—it's the whole point about having consultation—to take their views. I think we'll find that on some of those questions where they come down in one place on a matter of fact, other people will come down in another place, very appropriately.

Q82 Mr Turner: Who decides?

Sir Gus O'Donnell: This is the document owned by the Executive, so it will be for us to decide. Now, that's not to say that there won't be some things in

this document where people will still say, "I disagree with that" but this will be the Executive's interpretation. It's not a legally binding document.

Q83 Mr Turner: So where the Leader of the Liberal Democrat Party expressed a view, Lord Wakeham, Lord Adonis and Lord Armstrong say it is not of great constitutional importance but you are putting it in this—

Sir Gus O'Donnell: We put it in, because I thought it was relevant to the 2010 experience.

Q84 Chair: This is Nick Clegg's comment about the number of votes deciding who should be first in line, as it were?

Sir Gus O'Donnell: That's right, yes. On reflection, I personally would like to remove it on the grounds that I think what it reflects is a particular leader of a particular party in certain specific circumstances of the 2010 general election. I don't think that constitutes a convention, so I think it was relevant to the 2010 experience, but I don't think it's a convention in the sense that it should be binding on future party leaders who are in that sort of position. So one of the changes that I will be recommending is that we delete that footnote.

Q85 Mr Turner: I may agree with you there. In the summary, the House of Lords said it should be renamed the *Cabinet Office Manual*, it should only seek to describe existing rules and practices, it should not be endorsed by either the Cabinet or parliament, and most important of all, it must be entirely accurate and properly sourced and referenced. What is your view of that?

Sir Gus O'Donnell: In terms of the name, I mean, *Cabinet Office Manual*, this implies it's owned somehow by the Cabinet Office. I think that gets you into all sorts of—what's the constitutional force of the Cabinet Office, in a sense. Is this a document prepared by the Civil Service, not enforced by Ministers? So I think it creates more problems than it solves, to be honest. I would stick with the name of *Cabinet Manual*, because this is a manual endorsed by Cabinet, it's the Executive's position on these matters. So I think the existing name is absolutely right.

Q86 Mr Turner: Most important of all, "Entirely accurate and properly sourced and referenced". Doesn't rather that—

Sir Gus O'Donnell: "Properly sourced and referenced", we have had earlier versions where we included these. They are very clever people. They can litter it with footnotes, if you want. All I'm saying is there will be a question about do you diminish its readability to the audience? It's a trade-off, I think, but we can certainly put in—like I say, we have a version with loads of footnotes. As a previous academic, I remember putting lots of footnotes in articles I used to write, and that was definitely good news to get it through peer review and get it published in a learned journal. I'm not sure that it adds to its readability.

10 March 2011 Sir Gus O'Donnell KCB

Q87 Chair: If I may, Sir Gus, some people are trying to paint the *Cabinet Manual* as a sort of mini-Morris Minor, whatever, owner's manual, where the carburettor is or where the spark plugs go. Some people may strongly agree that the footnote from the Leader of the Liberal Democratic Party was not appropriate, some may agree, some may disagree, but you have just said that you do not agree particularly, and you will rewrite it. This is a very fundamental political question as to whether the party with the most votes kicks off this process. Is it something that you should be rewriting, with a very great respect? Isn't this something that parliament at least should have a discussion about? This is something of incredible significance and to be able to rewrite the *Cabinet Manual* in these sorts of regards is a power that should at least have some legislative oversight, rather than be—with great respect—in the ambit of the Permanent Secretary, or the Cabinet Secretary, excuse me.

Sir Gus O'Donnell: That's why I put forward the word "recommend". In the end, the Cabinet will decide. This will go to the Home Affairs Committee first. It will be Ministers that decide. What I was saying, my point about this was that I think I thought it was useful to have it in there with relevance to 2010. I think there's now been a question about whether it is a convention or not, and I think from our point of view, a constitutional point of view, it doesn't represent a convention. So it's in that sense that I would say it's better not there. What the convention should be, or should there be a convention or not, is a matter for others. I agree with that, most certainly.

Q88 Chair: But elections are about the ability to remove Executives and the legislature is in place to hold the Executive to account. I accept this is the Executive, not yourself; I accept Lord Armstrong's view that you have no individual personality, it is an institutional personality on behalf of the Executive. Is this something that the Executive should be deciding alone or on matters of such significance, isn't there a role for the legislature to accept, endorse or legitimise in some way these very significant statements in the *Cabinet Manual*?

Sir Gus O'Donnell: I think, like I say, if my recommendation is accepted, then there wouldn't be a statement, so there wouldn't be an issue to endorse or not.

Q89 Chair: Abolition of something is as big a political consequence as the creation of something.

Sir Gus O'Donnell: It is, in a sense, not. All it was there for was saying, "This is what happened in one election". It's a statement of fact: it's true, it's a quote. But the question is what significance should it be given, and therefore I think that you cannot have a situation where the way one leader chose to operate in a specific circumstance, I don't think that constitutes sufficient of a convention. But when it comes to it, if we have some future occasion, then this will be for the political leaders to decide how to handle these things.

Q90 Chair: I am not clear whether you are not bothering parliament's pretty head over this one because it is too important or it is too trivial.

Sir Gus O'Donnell: No, I think these will be important matters, but I think that they are matters that will be decided by political leaders and it will be for them to decide how they in turn consult their parties. Remember, we are talking about a situation that could well take place when there isn't a parliament. That in fact is what happened in this circumstance. So it's not clear to me how you would consult parliament if there isn't a parliament.

Q91 Chair: I do not wish to labour this too much, but there obviously needs to be provision when there is not a parliament, and there is a very strong argument about parliament not sitting, that the period that we do not have a parliament is far too long and that the newly-elected parliament should have at least been reconvened after that tremendous political exercise of legitimising a brand new parliament, rather than having just party leaders deciding stuff. But maybe I am straying a little too far there, but I think the Executive, frankly, needs to sort out what its relationship is with parliament. Either we believe in parliament sovereignty or we let the servants of the Executive decide what goes in or out of a manual, depending upon their view.

Sir Gus O'Donnell: I can stress it won't be the servants that decide. They advise, but they won't decide.

Q92 Tristram Hunt: Can I just initially take up from where Andrew left? It is always good when writing something to have your ideal reader in mind, and is your ideal reader a grade 7 civil servant pulling this down from the shelf to think about a submission he is making or is it a junior Cabinet Minister, wanting to know the ropes, or is it both or none? Who is your ideal reader?

Sir Gus O'Donnell: It is Ministers and civil servants, so civil servants in their private office, and civil servants drafting legislation. It's a first port of call. It's by no means sufficient, and I think when you had Lord Adonis here, he said, "If you're writing a guide for Ministers, this is a small part of it, a small but essential part, let's say, of understanding the rules and conventions, but about how to be a good Minister, there's a whole set of other things as well". Just a part.

Tristram Hunt: Fiction, non-fiction?

Sir Gus O'Donnell: Indeed.

Q93 Tristram Hunt: More broadly, one of the criticisms we have heard is the idea that it is neither fish nor fowl, so everything we hear from you is in terms of its technical technocratic utility, in a sense. Others—we go back to Gordon Brown's initial speech—think of this as potentially the beginnings of the road to a written constitution, and obviously that is not going to be spelt out, but it begins the brick-laying process. First of all, where do you see its relationship with a move or not a move towards a written constitution?

Sir Gus O'Donnell: I am at the modest end here. Like I say, the *Cabinet Manual* is bringing together existing

10 March 2011 Sir Gus O'Donnell KCB

rules and conventions. It's a guide, it's not legally binding and I don't believe it's the first step towards a written constitution, but there are others who will want to try and use it as such, and that's for them. But personally, I've always been at the, "This is modest, useful guidance" end.

Q94 Tristram Hunt: So in that context, you do not regard it, which is another of the criticisms we have heard, that such a significant document, as some regard it, having such a limited time period for public consultation and debate—and to be frank, the Government has not exactly gone on the front foot about, "Let us have a wide range of debate about this document", it has been a rather subscribed process—you do not think that criticism will arise, because of the nature of the document?

Sir Gus O'Donnell: We have had three months' consultation. One of the chapters, the draft on hung parliaments, went to the Justice Committee. There are now three Select Committees of parliament, one Lords, two Commons, who are taking evidence on it, reviewing it, will write reports on it. We'll wait for that evidence. It seems to me that's pretty good involvement.

Q95 Tristram Hunt: Just sort of extending that point, why might you think—without putting yourself in the position of the House of Lords' Committee—that parliament's relationship with the *Cabinet Manual* would be so different to New Zealand's relationship with their own manual, given the same sort of inspiration behind the document?

Sir Gus O'Donnell: It is quite similar. In New Zealand, it's called the *Cabinet Manual*. It's endorsed by new Cabinets, it seems almost every five to six years, I think, and it's updated as changes take place, but not kind of every few days.

Q96 Tristram Hunt: So I think that the parliament there seems to have much greater ownership over the document.

Sir Gus O'Donnell: I think they would say—when I went to New Zealand to talk to them about it—that this was the document that Cabinet owned. That's their view about it.

Q97 Tristram Hunt: Do you think, finally, Sir Gus, you are a nervous back-bench Member of Parliament, worried about your place in the world, that you would want to have slightly greater engagement and involvement and ownership over such a potentially interesting document?

Sir Gus O'Donnell: This particular document is the Executive's document, talking about how the Executive sees things. There's nothing to stop parliament, you as a back-bencher, deciding that parliament could put forward various ideas. I mean, we are consulting you. There is nothing to stop parliament deciding to lay down a document that explains its rules and conventions. It's entirely in your hands.

Q98 Chair: Why is there a presumption that it is not going to be out there, rather than a presumption that

it should be out there, unless there are bits of it that ought to be kept under wraps?

Sir Gus O'Donnell: How do you mean, "not going to be out there"?

Chair: In terms of being a legal, legitimate, transparent and open process, where the elected parliament of this country has some role to play in its legitimisation.

Sir Gus O'Donnell: I'm here before a Select Committee, being questioned about this document. You're going to give us a report with your views on it, as will another Select Committee of parliament, as will a Select Committee in the House of Lords. But this is a Government document. They believe that they own this document.

Q99 Chair: Doesn't parliament own the Government in our constitutional theory; is that not true?

Sir Gus O'Donnell: Parliament is of course sovereign, yes.

Q100 Chair: You speak for the Executive, Sir Gus, but you said you did not think that this process, this initiation of a *Cabinet Manual* was anything to do with a written constitution. The Prime Minister of the day stated—and I can read it again, because I did read it to you the last time you came here—that this was an initiation. That was not his words, but I think I can do something better than that, "I have asked the Cabinet Secretary to lead work to consolidate the existing unwritten piecemeal conventions that govern much of the way central Government operates under our existing constitution into a single written document. There is a wider issue, the question of a written constitution, an issue on which I hope all parties can work together in a spirit of partnership and patriotism". But you do not think that?

Sir Gus O'Donnell: No.

Q101 Chair: You disagreed with the Prime Minister pretty rapidly thereafter. You just think this is a technical, internal car manual, owner's manual?

Sir Gus O'Donnell: I did what the previous Prime Minister asked me to do, "Lead work to consolidate the existing unwritten piecemeal conventions". So I've done that into a single written document, as the Prime Minister told me to do. That's what I've done. The further work in the end didn't happen because of the election. It's for governments to decide whether they want to go further down that route, but there are no plans for the current Government to do so.

Q102 Chair: The Prime Minister's announcement of, "The creation of a working group to identify the principles that would be included in a written constitution", that just ground to a halt and has not been revived by the current Government so far?

Sir Gus O'Donnell: That's right.

Q103 Mr Hamilton: Sir Gus, in your foreword to the *Cabinet Manual*, you say that it is intended to guide, not to direct, but a number of the witnesses we have had before us have suggested the opposite. In fact, Dr Michael Pinto-Duschinsky said, "It is inherently difficult, if not impossible, for a written

10 March 2011 Sir Gus O'Donnell KCB

document to list existing, often unwritten, rules, conventions and precedents without interpreting and changing them in the process". Do you feel that he is wrong? Have you had to interpret or indeed decide on particular precedents that were unwritten, and therefore were vague and open to interpretation? Have you had to interpret in the *Cabinet Manual*?

Sir Gus O'Donnell: I think we've taken some judgement calls there, that's certainly true, and there may well be in due course some debate about whether those judgements are correct or not, but these judgements are judgements that will be considered by Ministers, and Ministers will decide whether they want these included or not. That's what will end up in the final version.

Q104 Mr Hamilton: You are very clear that it is a guide and it is not there to direct, but I put it to you again: surely in some cases, in some parts of the *Cabinet Manual*, it can be prescriptive, if it is taking a certain interpretation of something that was previously unwritten.

Sir Gus O'Donnell: Let's take a good example, where I know there was some lively debate about the question of the Prime Minister, should the Prime Minister resign, that issue.

Mr Hamilton: Yes, indeed.

Sir Gus O'Donnell: That is a good one, and Lord Adonis gave you a clear view there, that whatever one can put in here, the *Cabinet Manual*, about the expectations and what the conventions are and all the rest of it, a future Prime Minister could just decide to do whatever they wanted and that it wouldn't be binding on them. A future Prime Minister could say, "I know what the conventions are, but I'm resigning straight away". That's it.

Q105 Mr Hamilton: The very fact this *Cabinet Manual* exists and will continue to exist would not influence any future Prime Minister, in your view?

Sir Gus O'Donnell: I think the existence of previous conventions would influence Prime Ministerial behaviour, most certainly, and the *Cabinet Manual* helps in the sense of bringing those together in some way. But it's not legally binding, and a Prime Minister could decide to ignore them.

Q106 Mr Hamilton: Can I come back to the issue—I know you are probably fed up with this—about it being a precursor to a written constitution? Dr Wilks-Hegg gave evidence to us last week, from Democratic Audit and he states that the document can be regarded as a sort of substitute for what would typically be found in a written constitution in most democracies. Now, notwithstanding what the previous Prime Minister's intentions were, do you see this as a basis for parliament then perhaps discussing a potential written constitution in the future? Would the *Cabinet Manual* be used as the foundation for that, or is it simply not comprehensive enough? In your own words, it does not have the footnotes and the references.

Sir Gus O'Donnell: Indeed, indeed. I mean, as a guide to existing rules and conventions, I think when I was here the last time I said, "You could think of

this as a first step". But a written constitution would be something much bigger. It's that part of the work that the previous Prime Minister was thinking about doing a lot on, but in the end, like I say, he ran out of time.

Q107 Mr Hamilton: What, in your view, is the constitutional status therefore of this *Cabinet Manual*?

Sir Gus O'Donnell: It's as I say in the foreword, it's a guide. That's its status.

Mr Hamilton: No more, no less?

Sir Gus O'Donnell: No more, no less.

Q108 Mr Hamilton: Therefore, because it is a guide, you do not feel—and presumably the Civil Service does not feel—it is something that parliament should be discussing in detail? Of course Select Committees are scrutinising it, as you would expect us to, and you pointed out the importance of that, because parliament is sovereign, but you do not believe it is something we should take apart on the Floor of the House and introduce any primary legislation to legitimate it?

Sir Gus O'Donnell: I don't think it's right for me to have a view about that. This is a document that I'm preparing for the Executive about the Executive. It's for parliament to decide what it wants to do with it and that's your decision, not mine.

Mr Hamilton: Thank you very much.

Q109 Stephen Williams: Just broadly a similar theme about how much it directs behaviour or shapes behaviour of the Cabinet themselves. In the foreword to the document, your own foreword, you described it as, "It is intended to guide, not direct" and in answer to Tristram just now, you said it was, "Modest, useful guidance". We are spending a lot of time discussing this, and Committees in other places are spending a lot of time discussing this, and it is just, "Modest, useful guidance". How important do you think this *Cabinet Manual* should be viewed?

Sir Gus O'Donnell: I am very pleased that it is getting the scrutiny that it's getting, because I think, "Modest, useful guidance" is right, but this is guidance about very important issues. If you just read down the chapter headings, you will see this is pretty important stuff, and I think that the fact that we had the chapter on elections and government formation out ahead of the previous election helped considerably in terms of the nature of the debate and public understanding. So I think there are very important issues here. I'm just saying this is a modest contribution to it and it's a view from one particular player in this, which is namely the Executive.

Q110 Stephen Williams: Given it is primarily for the Executive, and therefore for Ministers, how much weight do you think future Ministers or current Ministers will give the document once it is finalised? Do Ministers have an induction process from you?

Sir Gus O'Donnell: There is a ministerial induction process, yes. When the *Cabinet Manual* is finished, I would expect to send a copy of this around to all ministerial offices and to be sure that their private secretaries were very aware of the document, and if

10 March 2011 Sir Gus O'Donnell KCB

there came to be an issue about any ministerial code or whatever, they would first refer to this document.

Q111 Stephen Williams: So if a Minister—or for that matter, one of your officials further down the tree than you—were to depart from the modest guidance in the manual, what is the redress? To follow the Chair's analogy, if it was a Haynes car guide, if you do something wrong the exhaust falls off, but if this is only modest guidance, then presumably it may be mild embarrassment to an official or a Minister or maybe no one would know that we had departed from the modest, useful guidance.

Sir Gus O'Donnell: In that sense, it's guidance, but it's about rules and conventions, and there are certain areas where there are rules where it would be very serious for someone to depart from it. There are things like the ministerial code. Departures from the ministerial code can be very serious, and they are matters that the Prime Minister needs to police, so there are some aspects in here where if, for example, somebody did something that was illegal, that would be very, very serious: misleading parliament, all sorts of things like that.

Q112 Stephen Williams: That is currently understood though, is it not, and there is a ministerial code of the moment, that if a Minister were to mislead parliament, then one of us would make a point of order or the Speaker himself would bring the Minister to deal with it, and that redress is already there. What does the *Cabinet Manual* add that is not already in place?

Sir Gus O'Donnell: Things like the chapter of devolution, which of course will need to be amended post-Welsh referendum. There are aspects there. These are quite complex matters. Mistakes have been made in the past, and the more we can give people a clear user's guide to these areas the better.

Q113 Stephen Williams: How often do you think the document, once it is finalised, will be updated?

Sir Gus O'Donnell: I think I'd like to propose to Ministers that significant revisions are quite rare. But, for example, let's say you have a fixed-term Bill before the Lords at the moment. Once that was changed, that seems to me the sort of thing that you'd want to change the *Cabinet Manual* to reflect. So I'd expect there to be some factual revisions as legislation changes, which are done as and when appropriate, but significant changes somewhat rare.

Q114 Stephen Williams: If there are changes during parliaments, is it up to you to draw, for instance, this Committee's attention to it, or parliament's attention to it, or do you have to spot it on the website, the Cabinet Office's website?

Sir Gus O'Donnell: I'd be very happy to ensure that given this Committee's particular relevance, the constitutional issues, when we change things, we make sure that you're made aware of that. But like I say, mostly these things will be just purely factual. If there has been a change of legislation and that goes through, then we would want to make the *Cabinet Manual* reflect that. But we'd want to not be changing

it, like I say, every few days, because then I think it becomes just too much of a distraction.

Q115 Stephen Williams: I think it is fairly obvious and commonsense that, for instance, the Welsh referendum result would require a change, and we would all accept that, but if it was a change as a result of working practices of the Government or the Civil Service itself, would there be a consultation on that change or would the change be a *fait accompli* of which we would be notified?

Sir Gus O'Donnell: I personally would envisage the changes that we make as we go along to be ones that are very clear and factual, so if the legislation is changed, if there has been a referendum that has changed things, then that is the sort of thing you would institute. If there are broader issues that are not as clear-cut as that, then it will be an interesting question for future Cabinets to decide precisely how they want to consult on such changes.

Q116 Chair: Just to pick up on that last point, Sir Gus, you have the power, clearly, to recommend certain things to Ministers. Could I just ask on behalf of the Committee that you consider how those recommendations are framed so that there is a sensible interaction between the Executive and legislature? It is clearly not going to be in anybody's interest for there to be some sort of stand-off or confrontation. Certainly my personal view, if I may be allowed it, is that parliament is not ideally suited to go through this sort of thing line by line, and then the Executive do get very much involved in terms of the internal workings of parliament. I know you may not believe that, but we experience that at this end of the telescope, and may well use its influence on votes or whatever, which I think would be an extremely destructive step forward.

I should have started by commending you for ensuring that document gets in the public domain and has done so in very short order. I think history will give you many brownie points for that, Sir Gus, and quite rightly too. But I hope you will continue in that spirit, and attempt to work with us, to find if we do indeed report that we would like to go in a particular direction, that you will continue to discuss with the Committee how we can make that work. I do not think there is anyone in this room trying to use this as a way of beating the Government or undermining parliament or anything else. I think we are all trying to find a way to make sure that in what is a more—rhetorically, certainly—open drive in Government, new politics and so on, that there is hopefully room to agree a way forward that does not end up with votes in the House of Commons for or against a Government point of view.

Sir Gus O'Donnell: No, I very strongly agree with that, and this is why I think it's important that certainly when we do this for the first time that we get your views, because there was reference to the House of Lords Committee's view, which is one particular position. I'd be very keen to know what your position is and what the Public Administration Select Committee's position will be before we come to revise the draft and put a new version to Ministers.

10 March 2011 Sir Gus O'Donnell KCB

Q117 Chair: Hopefully you will consider in your recommendations various levels of response, and you used the phrase “significant revisions”. Where there are significant revisions, obviously it would be more appropriate to grade up the parliamentary response so that—I do not know—if something very significant were to happen, perhaps it would be reported to this Committee or reported to the floor or be the subject of a brief annual debate in the House or some such, whereas the amendment of a footnote, for example, probably would not require that.

Sir Gus O'Donnell: Could I just clarify there? In a sense, there could be very significant revisions. I mean, we've had the Welsh referendum, there will be the AV referendum, there is the fixed-term Parliaments Bill. In a sense, what we'll be doing then is just reflecting whatever has happened, the change to legislation or procedures. They are constitutionally very significant changes, all of those, but I would have thought they are ones where the legislation has either passed or it hasn't. I think the point Mr Williams was getting at in terms of if there's a change where one is taking a different interpretation, or in practice that sort of thing, and it's significant, then I think that's the kind of thing you're thinking about. Is that right?

Chair: Certainly, yes.

Q118 Simon Hart: Can I ask one question about the legal status of the *Cabinet Manual*? If it has already been asked before I arrived here, say so, and I will shut up. It strikes me that there might be an unintended legal status—or indeed, an intended one—and the reason I ask that question is there are two elements to that. First of all—and you touched on the devolution point—at the moment, there is an argument brewing as to who ultimately decides on areas of competence between the Welsh Assembly and Westminster, and the particular subject is organ donation at the moment. Does the *Cabinet Manual* go, or could the *Cabinet Manual* go, as far as saying who ultimately decides where the competence lies on something that might have significant legal and therefore cost implications on the one hand, and on the other, there seems to me to be a sort of glaring omission with regard to the convention that the House of Commons would be consulted on matters of sending soldiers to war, which also has significant legal and cost implications, and that appears to be missing. So those two points that come under the overall legal status point.

Sir Gus O'Donnell: In terms of the legal status, as I've said in answer to previous questions, I do not regard this as legally binding, so in that sense, it's guidance, and that's very clear in the foreword. The two issues you raise there, the first on devolution, I think that's a question of, as I say, this is a document by the Executive for the Executive, so it could easily have in it—on devolution, it would have the Executive's view about how these matters are made now. It will obviously need to be amended in the light of the referendum, which has obviously changed that balance for the 20-odd issues. So there will be a change there, and there are some interesting questions about the organ donation issue, which I know are a matter of debate. I suspect if there are matters of live

debate, we would like to get them resolved before we put something in the *Cabinet Manual*. I don't think it's an area where we'd want to be trying to pontificate ahead of time on those sorts of things.

On the question of war powers, I gave some evidence to the Chilcot Inquiry, where I said there is a sort of emerging convention, in my view, that parliament will be consulted before armed forces are sent in, except in exceptional circumstances, and there could be exceptional circumstances. But that's what I said in evidence.

Q119 Simon Hart: Just on the competencies point though—which I accept what you say about the specifics of organ donation—colleagues in both the Welsh Assembly and here are very conscious as a result of last week's referendum that there needs to be some form of adjudication process, because there is confusion. We have already seen it before the ink is even dry on the result of the referendum. There is some confusion about who is responsible for what, and some guidance as to who makes that final decision could, I think, pre-empt quite a lot of embarrassment for whichever government happens to be in office in either end of the M4.

Sir Gus O'Donnell: No, I absolutely take that point. I think in the light of the referendum, it will be important that we get that clarity established. All I'm saying is I don't think that I want the *Cabinet Manual* to be the sort of vehicle for that. I think we need to do that quite urgently now. If there is a lack of clarity, we need to sort that out, and it should not wait for the next version of the *Cabinet Manual*.

Q120 Sheila Gilmore: Why I have some difficulty with this whole document is if it is a manual primarily for the Executive rather than the Government, why is there is a consultation process, because the consultation process to me suggests that at the end of the day, people have some input into altering it. It is a fairly broad consultation process. Are you looking for corrections? In that case, why go out to the public, as it were, because to offer something up to consultation suggests that we or the public have some ability to change it.

Sir Gus O'Donnell: Yes, you do, absolutely do. We do not regard ourselves as all-seeing or all-powerful beings here. There will be questions where there will be disputes about facts, and we can sort those out. The public and various academics and various constitutional experts have given us their views, sometimes conflicting, but your Committee, the Lords, the Public Administration Select Committee will all give us, I hope, your views on all of this, because it's been going a long time in New Zealand but this is the first time we're doing it here. Other countries are thinking of following this example, so I think it's right to try and have a quite open process at the start, while accepting that this document ultimately will be owned and the Executive will be responsible for it. I think, just as with lots of *White Papers* via *Green Papers*, we gain a lot by Government consulting, getting experts to take their views, and then in the light of those views, amending

10 March 2011 Sir Gus O'Donnell KCB

policies and coming up with hopefully better proposals.

Q121 Sheila Gilmore: I see that in regard to policies, and it does not happen often enough, as far as I can see here at all, but if this is simply a restatement of what is, in what sense is it something dynamic that we can all contribute to?

Sir Gus O'Donnell: As you will have seen from the Lords' Report, there are disputes about what is. There are different views about what is, so it's not as straightforward as you'd like to think. What I hope will emerge from this process is a core set of issues that quite clearly establish as what is and accepted by the vast majority of people as the existing rules and conventions.

Q122 Sheila Gilmore: On that basis, if it is a policy consultation, the way it should work is the views are taken, but nevertheless, there is a decision-making body that decides ultimately—and it would be parliament normally in a policy issue—as to which of those to accept, which of those not to accept. As I used to find when I was on the council, people used to come along to deputations and say, "You did not consult us" and what they meant was they did not agree with this, rather than we did not consult. So somebody has to be the decision-maker, so who exactly do you think will be the decision-maker in this process?

Sir Gus O'Donnell: The decision-maker in this process will be Cabinet. When we have all of the responses in to the consultation, we'll put forward some suggested revisions. That will go to Home Affairs Committee, which is chaired by the Deputy Prime Minister, and then Cabinet will either take note of it or discuss it or decide how it wants to handle it, but at the end, this is the *Cabinet Manual* and it will be their document. So they will be the decision-maker.

Q123 Sheila Gilmore: Just slightly different—although maybe not entirely different—having written some of these things down, I suppose in the past, people always talked about the flexibility of the British unwritten constitution, because you could move it along. Is there a risk that in writing some of these things down you end becoming much more static, so that, for example, things can be challenged? We have heard quite a lot about the coalition forming and that process, but there are probably other aspects where by the act of writing it down, and indeed going through all this process, you get to a point where then other people will challenge in some respect what has happened. I mean, they might even try to judicially challenge it; I do not know how possible that would be. Is that a disadvantage rather than an advantage?

Sir Gus O'Donnell: On the point about judicial challenges or whatever, like I say, it's not legally binding, but that doesn't mean the court might not make a reference to it in Judicial Review proceedings, for example. That's possible. But all of these things are written down somewhere already. What we're doing is bringing them all together and making it a little clearer and a little easier for everybody to understand existing rules and conventions, and of

course within the document, there are some things that are binding rules. It refers to legislation, which is absolutely clear, and there are other areas where there are conventions and varying degrees of certainty about those conventions. So it's a mix of things. By writing it down, I think we bring it all together. We, I think, help to clarify any debates about those sorts of issues and make such a discussion better informed. I don't think we change the nature of it in the end, because all of these documents exist. This brings together things that are written down in other places.

Q124 Sheila Gilmore: So you do not think that either maybe politically or the media or whatever, that could lead to a situation where you have people brandishing the *Cabinet Manual* and saying, "You cannot do this", even a situation where Government might consider it needs to respond to a situation?

Sir Gus O'Donnell: As was said before, and the foreword makes clear, it's a guide. It's not a legally binding document. If there were a written constitution that parliament had laid down, that would be very clear and that would provide explicit guidance, but this isn't it.

Chair: Sir Gus, we will obviously correct the record, your slip of the tongue that the Cabinet Secretary was not all-seeing and all-knowing.

Q125 Simon Hart: Just to come back on your response to Sheila, you said that ultimately the decision-maker is the Cabinet. Lots of people will find that quite remarkable, you know, the equivalent of asking Diego Maradona to be the referee on handball decisions, that the person that needs to be policed is doing the policing, that it is the person, the people who are to be guided by this guidance who are deciding what the limits and the arbiters should be. Do you not feel that the way to overcome that would be to have some sort of external or outside body who was much more responsible for the day-to-day management and overseeing of the *Cabinet Manual*?

Sir Gus O'Donnell: I think this process, it could get you into all sorts of custodial arguments, couldn't it, that this is the Executive's document and it's saying how they intend to operate, and people can hold them to account according to whether they operate in this way, just as we published—as we did before—the questions of procedure to Ministers and now the ministerial code. That's out there and people can say, "But surely, X's behaviour is not in line with the ministerial code" and they do.

Q126 Simon Hart: So it is more of a manifesto than a rulebook?

Sir Gus O'Donnell: It's not a manifesto, no. It's a guide, it's a manual.

Q127 Simon Hart: But how can the Government then be held to account, other than to say, "Referee, that is a foul"? There is no referee, there is no arbiter. How could we hold a Government to account that had broken its own guidelines?

Sir Gus O'Donnell: That's exactly the current situation, for example, in the ministerial code. That is a document prepared by the Executive for the

10 March 2011 Sir Gus O'Donnell KCB

behaviour that Ministers should operate, and if there is a violation to the ministerial code, it is a matter for the Prime Minister to decide. He can consult with Sir Philip Mawer, if he wishes, but ultimately it's the Prime Minister who decides on these things.

Q128 Simon Hart: Just for my background knowledge, can you tell me how many times there has been a breach of the ministerial code recently?

Sir Gus O'Donnell: Yes, I would need notice of that question, because there are varying kinds, there are minor or major ones, but it is a very important document.

Q129 Tristram Hunt: It was just in terms of obviously this is a codification of rules, conventions, traditions and so on, but it is also inevitably a product of its moment and of its time. Apart from the notorious footnote 8, the Liberal Democrat attempt to change our constitutional procedures, following consultation and all the rest of it, are there any other examples that you are aware of that you think overly bear the imprint of the moment, for example, the sort of post-coalition moment for the final drafting, redrafting of the text?

Sir Gus O'Donnell: No, I don't think so, but obviously I don't want to come to any final decision on that until we've had in all of the responses, so the consultation period is formally finished, but we're waiting for your report and for the Public Administration Select Committee report.

Q130 Chair: Just a quick one from me, Sir Gus. Will you put the convention on war-making powers and the commitment of troops to armed conflict in the *Cabinet Manual*?

Sir Gus O'Donnell: That's a good question, to be honest, and I think that's something that I'd be interested to hear your views on. I've stated in front of the Chilcot Inquiry the point that I believe—and obviously I had discussed this with Ministers before I said it—that a convention exists that parliament will be given the opportunity to debate the decision to commit troops to armed conflict, and except in emergency situations, that debate would take place before they're committed. Now, it's quite possible that Ministers will decide to insert that in the *Cabinet Manual*, but that will be an issue that no doubt they will want to consider, particularly as we are in the year where we hope the Chilcot Inquiry will report.

Q131 Chair: I think given that this issue is probably arguably the most important single political decision made in the last 20 years, and it gave rise to a debate about the respective authorities in respect of war-making, speaking from personal experience, having been to the table office every day that the House sat for five years in order to put on to the agenda that Government should consider how this could be progressed, perhaps I have more of a nerdy interest in this than anybody else. But on the more grand politics, this of course led to the two largest rebellions within a governing party in British political history at the time we went to war, but nonetheless, to sort of play out a little bit of slack, the decision about going to war

need not itself require parliamentary approval before going. There may be occasions when the Executive have to react very quickly. If bombs are falling on our country, you do not want to get a debate sometime next week. However, the leeway is that decisions should be ratified within a given period or due process of some description should be in place and that the *Cabinet Manual* might be a place where you could find that for future reference, rather than it being—with great respect again—the Cabinet Secretary's view that it is an emerging convention. One does find that in moments of great stress, such as the country going to war, conventions disappear almost as fast as they can emerge, so having it in writing within the *Cabinet Manual* might be very helpful.

Sir Gus O'Donnell: I look forward to seeing, when we get your Report, if there is a very strong push in that direction. I'm sure that will be important.

Chair: Very helpful, thank you.

Q132 Stephen Williams: I have just been skim-reading the House of Lords' Report while we have been here. Are you disappointed with their first conclusion when it says that all your work has limited value and relevance?

Sir Gus O'Donnell: It is kind of curious, because I'm being attacked from two sides here. There's a lovely line that an old colleague of mine, who is on that Committee, Charles Powell—Lord Powell, I should say—said, "This is a bit Janet and John" and there are plenty of people the other way who say, "This is the Cabinet Office far exceeding its limit". So to be attacked from both sides is probably where the Cabinet Secretary has to be in these sorts of things and suggests to me we are probably in about the right place.

Q133 Stephen Williams: Other than the somewhat rude and dismissive comments of their Lordships, are there any of their conclusions that you are minded immediately to accept or do you need to go away and think about all of them? For instance, they even suggest that the name is wrong and it should be the *Cabinet Office Manual* rather than the *Cabinet Manual*.

Sir Gus O'Donnell: Indeed, indeed. I think it's only appropriate for us to—and I have the Report here—take a little bit of time to consider it. I have already, in response to an earlier question, suggested that I think I disagree with them personally on the question of the name, because I think that tends to suggest that the ownership is somehow not with the Executive, it's with the Cabinet Office, and what does that mean: does that mean the Cabinet Secretary; does that mean this is owned by the Civil Service? If that's what they're suggesting, then I think that's wrong. I think this has to be owned by Ministers.

Q134 Stephen Williams: When you were with us before on the formation of Government, I think in that evidence session I asked you whether it was now a good thing that we seem to have Cabinet Government again, partly because of the coalition, rather than social government that one of your predecessors described the practices of Prime Minister Blair. Of

10 March 2011 Sir Gus O'Donnell KCB

course since we last met, the current Prime Minister has beefed up his policy unit with 10 Downing Street. Do you think the *Cabinet Manual* is strong enough on the relationships inbetween appointed advisors of the Prime Minister—or the Deputy Prime Minister, for that matter—and the fact that the Cabinet should make decisions?

Sir Gus O'Donnell: Yes, and I would say that there's all the parts in there about the use of Cabinet Committees and the like, and indeed, it is certainly the case that coalition has had an impact on that, because of the need to make sure that policies are cleared through and, if you like, "coalitionised" is the phrase I have used, where we have Cabinet Committees with a Chair from one party, Deputy from another. That process and the fact of having a coalition has strengthened the use of Cabinet Committees, without a doubt. But could there be more in the *Cabinet Manual*? Well, I think it's important that it covers the issue of use of Cabinet Committees for policy and the like, and covers things like the ministerial code point about the role of the Attorney General and advice particularly on key issues like going to war.

Q135 Stephen Williams: If I can return, Chairman, to this business of the sort of interregnum between a general election and someone else getting in the car and going to the Palace, it seems to me absolutely fundamentally important, because you said earlier a future Prime Minister could of course ignore the *Cabinet Manual*, even though it says that an incumbent Prime Minister has a duty to stay in office. Are you at all worried then, if the next general election has a similar result in terms of being a balanced parliament, 2010 general election, that given what you just said, that the Prime Minister could ignore what is now codified in a manual, that we could be plunged into chaos if Prime Minister Cameron, for instance, decides to walk out in a fit of pique the day after the election, because it may not look as though he is going to be able to head up a new administration?

Sir Gus O'Donnell: I should stress and put on the record that I think the former Prime Minister behaved incredibly well—

Stephen Williams: Indeed.

Sir Gus O'Donnell:—and I think all the political parties did. What we say here is that there is an expectation that Prime Ministers are not expected to resign until clearly there is someone who should be asked to form a government. That is what's in the *Cabinet Manual* at the moment. Now, as you will know from the Lords' Committee, there are some people that take slightly different views, but in the end, I think it's important that the *Cabinet Manual* does say something on this.

Q136 Stephen Williams: Finally, it seems as though it will not be parliament that has the final say on approving this *Cabinet Manual*, but the Cabinet will, because it is their manual essentially, given that the Prime Minister therefore will have acquiesced in the wording of that particular paragraph or that particular

manual, therefore we should expect him to adhere to it if the next election is inconclusive.

Sir Gus O'Donnell: I think it will be owned by the Cabinet, so it'll be for them to put down what they think.

Q137 Mr Hamilton: Does the *Cabinet Manual* not change the convention, in fact? You say that the Prime Minister will not be expected to resign until there is a successor, or a clear successor who could be appointed, but there is a view that the Prime Minister can do what he or she likes and decide to resign immediately the result of the election is known, whether or not there is a successor that is clearly going to take over.

Sir Gus O'Donnell: There is a view. The question is what should the expectation be about what Prime Ministers should do? Prime Ministers will always be able to do whatever they want in those circumstances. The convention can say what they should do. The *Cabinet Manual* has an expectation.

Q138 Mr Hamilton: But the *Cabinet Manual* has absolutely no authority over any Prime Minister to say, "Hang on, you cannot resign, because there is no successor".

Sir Gus O'Donnell: Absolutely, that's right.

Mr Hamilton: I just wanted to clarify that.

Q139 Andrew Griffiths: Did you always expect this document to be a political football?

Sir Gus O'Donnell: When the Prime Minister asked me to do it, it was clear that it wasn't a completely straightforward exercise. I think that's fair. In preparing it, that's why we thought, "Let's do the one chapter" and that one chapter, because it was, we thought, rather important to get that out ahead of the election. That certainly, I think, in my mind, suggested the advantages of having the *Cabinet Manual*, but it did also suggest that this will be a process that a lot of people will be interested in. We have three Select Committees looking at it, the Institute for Government have opined on it in various ways, so I think it is an important document, and I'm very pleased that people are taking it seriously, even though it is a modest guide.

Q140 Andrew Griffiths: You will have no doubt read the evidence that we have had so far. Last week we had the very forthright Dr Pinto-Duschinsky, who came to see us, and he has a particular view about the *Cabinet Manual*, and he very clearly said that he thought the *Cabinet Manual* was a document, I think to paraphrase, "Written to keep the Liberal Democrats in power in a hung parliament". What is your view on that accusation?

Sir Gus O'Donnell: Absolutely not. This is completely impartial, in that sense. It's just noting the conventions. That is it.

Q141 Andrew Griffiths: Do you think that that accusation would have been less valid had work been started on the *Cabinet Manual* or progressed on the *Cabinet Manual* earlier, in an ideal world?

10 March 2011 Sir Gus O'Donnell KCB

Sir Gus O'Donnell: I would love to have written it five years earlier. A very interesting question about what we would have covered is would we have foreseen that it was very important to cover these things? I think it's important, insofar as you can, to kind of lay down the guidelines, as it were, at times of peace, when it's not such a big issue. I remember having a discussion with Mervyn King about the issue of, "What would you do if there was a Monetary Policy Committee vote on the day of an election?" which is quite a tricky one. I mean, the good thing was having a rule beforehand, well away from the election, which, to their credit, MPC decided on, which was they would have a rule about moving it and that would be a rule that everybody understood, and it would be well away from an election, it would be well away from whether the issue was to raise them [interest rates] or lower them so you couldn't be accused of bias. I think trying to establish the rules in a period of calm is good, so yes, I wish we'd done it many years earlier.

Q142 Andrew Griffiths: Your document is following on in the footsteps of the *Cabinet Manual* in New Zealand. How do you think our document compares against theirs, and have we caught up? Is it as developed as theirs, do you think, or is there more work to do or is ours better?

Sir Gus O'Donnell: They don't have to do Europe, so we have a chapter on Europe there.

Andrew Griffiths: There are many in this House that wish we did not have Europe.

Sir Gus O'Donnell: That's true. On devolution, there isn't a similar chapter in New Zealand. They were there well ahead of us, and I've gone out of my way to say one of the reasons I went over there to talk to them was to learn from them. We copied with pride. But it is different and it's written for our circumstances, so there are areas where it will be different. We haven't slavishly followed it.

Q143 Andrew Griffiths: Just a final question: to what extent do you think you will have to revisit this should the referendum on AV go in favour of a change?

Sir Gus O'Donnell: We obviously want to reflect whatever the voting laws are, most certainly.

Q144 Chair: As an aside, we are coming up to 800 years since King John had his meeting at Runnymede, and of course he is famously quoted at the end of that as saying, "It is not our own constitution, it is just an operating manual". But I wonder whether you feel the weight of history, Sir Gus, and whether you feel that if we have a fixed-term parliament that will take us to 2015, how our successors may judge us, whether there is an opportunity to celebrate that 800th anniversary in some significant way in respect of how we write down some of our rights, whether they are parliamentary or individual liberties?

Sir Gus O'Donnell: As you know, the previous Prime Minister, in the speech that you quoted, wanted to do more work on this. I think there is currently an issue in that the Government are thinking about in terms of the Bill of Rights and possibly looking into that,

having a Committee that would do so. So I think 800 years on, it is a very significant moment, and I think it would be good for people to look back and see what the lessons of that are.

Q145 Chair: You are probably aware—you are certainly aware, because you have written to me about it—that the Committee is looking at codifying, and I do not know whether you say legalising, but certainly pulling together the powers of the Prime Minister, which currently are rather defused, let us say, and no doubt you will be back with us to talk about that at some point.

Sir Gus O'Donnell: Indeed, and obviously there's—I think it is—paragraph 75 to 79, off the top of my head, of the *Cabinet Manual* that referred to the power of the Prime Minister. This does get to how things change. One of the powers we talk about there is the power of the Prime Minister to appoint Ministers and the allocation of functions between Ministers. That has been modified somewhat with coalition, so the current Prime Minister has said he will exercise those powers, but after consultation with the Deputy Prime Minister, so there has been a change already.

Q146 Andrew Griffiths: We had a brief reference earlier to the beefing up of the operation in No 10 and spokesmen and SpAds. Obviously we have very clear guidelines about how special advisors can operate, but do you think there needs to be some reference within the *Cabinet Manual* to the operation of Cabinet Members and how they instruct and use their special advisors and spokesmen? Do you think that Cabinet Members should be more responsible for the actions of their SpAds and special advisors and particularly in relation to briefings, off the record briefings, and being accountable to the Cabinet as a collegiate group?

Sir Gus O'Donnell: There's already a code for special advisors, and it is very important that they do abide by that code and live by those values. The only one of the Civil Service values they are not bound by is the impartiality, obviously, but operating with honesty, objectivity and integrity is absolutely crucial to this, and I think the Prime Minister would strongly reinforce the idea of special advisors operating in the best interests of the Government as a whole. That's very important.

Q147 Andrew Griffiths: But you do not think there needs to be anything in relation to Cabinet Members briefing against other Cabinet Members or that sort of sometimes damaging activity of Government over a period of our history?

Sir Gus O'Donnell: It's very clear from the special advisor code that that should not happen, and I know the Prime Minister very strongly—and the Deputy Prime Minister—believes that that shouldn't happen.

Chair: Again, just to reinforce, if I may, Sir Gus, the point I made earlier, that if it is possible to move this forward by more informal interaction with this Committee, myself or the House using us as a conduit,

10 March 2011 Sir Gus O'Donnell KCB

we are open to do that, because we do not want it to be clunky and position-taking if there is the possibility of making progress on some of the issues in a slightly more sensitive way. We would be very open to discuss those further with you. That was helpful.

Sir Gus O'Donnell: Thank you, that's very helpful.

Chair: Sir Gus, thank you. It is very kind of you to come before us again. It is always a great pleasure to see you. I hope to see you again in the near future. Thank you for your time.

Sir Gus O'Donnell: Thank you. I look forward to your Report.

Written evidence

Written evidence submitted by Professor Iain McLean, Oxford University

1. I am a professor of politics at Oxford University and author, most recently, of *What's Wrong with the British Constitution?* (Oxford University Press 2010). I was a member of the Independent Expert Group, Calman Commission on Scottish Devolution, 2008–09. I am a Fellow of the British Academy.

2. I respond below to some of the Committee's questions. This supplements my message to the Committee of 20 December 2010, which enclosed my original response to the Cabinet Office, covering the use of the word *Sovereign*; the position of those who refuse to swear oaths; and the Scottish and English church oaths taken by a new Monarch.

What are the constitutional consequences of the publication of the Cabinet Manual by the Government, and of the process of consultation being adopted?

3. The constitutional consequences are excellent. In my *What's Wrong...?* I criticised earlier ways of stating constitutional conventions. For example, an anonymous letter to *The Times* in 1950 signed "Senex", who was believed to be the Private Secretary to George VI, stated that certain constitutional conventions should not be revealed to the public.

4. I also have comments on the constitutional consequences of some individual paragraphs, of the Draft Cabinet Manual, as under:

5. Paragraph 46 removes a dangerous confusion. Previously, constitutional texts conflated "the leader of the largest party" and "the person ... most likely to be able to command the confidence of the House". As they may, obviously, be different people, the wording of Paragraph 46 is a clear improvement.

6. The constitutional consequence is that it removes the temptation (or the need) for Monarchs to be drawn into active Prime Minister-making, as they were in 1834, 1880, 1886, 1892, 1893, 1910, 1931, and 1963; and as tempted in 1913 (discussed below). I think this is a desirable consequence.

7. Does para. 48 adequately cover the events of May 2010, or any future repetition of them? On the whole, I think so. Some have argued that Nick Clegg's announcement on the morning after the General Election that he was entering talks with the leader of the party that had won the most seats and votes undermined either the convention outlined in para. 48, or the position of Prime Minister Gordon Brown, or both. I think that any fault lies rather with journalists and others who accused PM Brown of "squatting" and other forms of improper behaviour, until his resignation. It is now clear that his behaviour was entirely proper.

Does the Cabinet Manual accurately reflect existing laws, conventions and rules?

8. In the subsection *European Union and other international law* (paras 17 and 18) there should be a specific reference to the Human Rights Act 1998's incorporation of the European Convention on Human Rights, and of the jurisprudence of the European Court of Human Rights. There could then be a cross-reference to the detailed discussion at paras 248–50 and 321–2.

9. There is a minor inconsistency at para 26, (restrictions on the powers of a Regent) with its reference to "as before, to assent to any Bill for ... repealing or altering the Act preserving the system of Presbyterian system of Church government in Scotland". But that Act has not yet been mentioned in the draft Manual. If its mention in para. 37 is moved up, as I have already recommended, to para. 24, the inconsistency disappears.

10. I find paragraph 59 troubling. It is one of those that may have to be changed in the light of the progress made by the Fixed-term Parliaments Bill. In my *What's Wrong with the British Constitution?* I analyse the most recent known occasion on which the Monarch and/or his advisers threatened to use the reserve powers to dismiss the Prime Minister or make a personal choice of successor. This was in 1913, when King George V was being pressed by the Opposition, and certain law professors and military officers, to do this. He passed his concerns on to Prime Minister Asquith, who wrote in reply:

The Sovereign undoubtedly has the power of changing his advisers, but it is relevant to point out that there has been, during the last 130 years, one occasion only on which the King has dismissed the Ministry which still possessed the confidence of the House of Commons. This was in 1834, when William IV (one of the least wise of British monarchs) called upon Lord Melbourne to resign. He took advantage (as we now know) of a hint improvidently given by Lord Melbourne himself, but the proceeding was neither well advised nor fortunate. The dissolution which followed left Sir R. Peel in a minority, and Lord Melbourne and his friends in a few months returned to power, which they held for the next six years. The authority of the Crown was disparaged, and Queen Victoria, during her long reign, was careful never to repeat the mistake of her predecessor. (HHA to KGV, [11] Sept. 1913. Underlined passage was underlined by recipient. Source: Royal Archives, quoted in McLean, *What's Wrong...*, appendix to Chapter 12).

11. Asquith was a master of this sort of correspondence. His reference to Queen Victoria is particularly subtle, since the king's advisers knew that she had come very close to repeating William IV's mistake in 1880, 1885–86, and 1892–93. Only the refusal of Unionist politicians to help her block Liberal governments led by Gladstone and Rosebery had prevented her from meddling with the electorate's choice on those three occasions. Asquith's letter implicitly warns the king's secretaries against encouraging any repetition of his grandmother's attempts to undermine democracy.

12. Asquith's handling of George V and his advisers in 1913–14 may likewise have saved the Monarchy from itself and its advisers. In the end, George V did not use his reserve powers. If he had used them, he would have become openly partisan in the bitter party politics of the day. As the powers have not been used in the UK since 1834, and then by "one of the least wise of British monarchs", I recommend that paragraph 59 of the *Manual* be rewritten, or even deleted.

13. If rewritten, it should say that the reserve powers are in desuetude. It should note that they were last used in 1834, in a way that undermined the respect in which the Monarchy was held. It should also refer to the use of the power made by the Governor-General of Australia, Sir John Kerr, on 11 November 1975, which has had seriously damaging effects on the standing of the Monarchy in Australia.

14. The paragraph may need further rewriting if and when plans for an elected Upper House make progress. In that case, the UK will be in the same situation as Australia in 1975: ie, a mechanism for breaking deadlock between the houses, in the case of divided government, will be needed. Such mechanism must not encourage the Monarch to take sides, as Sir John Kerr did.

15. At para. 78 "The Prime Minister's other responsibilities include recommending a number of appointments to the sovereign. These include high ranking members of the Church of England..." How (if at all) should this be changed in the light of Prime Minister Brown's announcement of his Government's withdrawal from these appointments in the *Governance of Britain* Green Paper of July 2007?

16. At para. 100, note 17, the statutory definition of *Secretary of State* is circular. This is not the fault of the Cabinet Manual, and should be referred to the Law Commission or other competent body.

17. At para. 108, the power to deploy armed forces is defined as a prerogative power. How is this affected by the decision of the previous Government that any proposal to deploy troops will be put before Parliament?

18. At para 287 the last sentence ("Government places no conditions on expenditure of the Devolved administrations") seems too sweeping, as Government may place conditions on their capital expenditure (see, eg, *Statement of Funding Policy* 2010 edition para. 2.20).

Are there areas in which the Cabinet Manual appears to alter existing conventions or rules, or create new ones, rather than acting as a "factual record" based on precedent?

19. I am not aware that the procedure outlined in paras 51–55 was ever used before 2010. However, the events of 2010 now constitute a precedent, one which I support.

Are there matters that are not adequately reflected in the Cabinet Manual?

20. At para. 56, "the Prime Minister is expected to tender the Government's resignation, unless circumstances allow him or her to opt instead to request dissolution". What circumstances are these? This is a key point, which should be clarified. I do not think that the current para. 58 clarifies this point.

21. The Cabinet Manual refers (eg, p2, second paragraph) to the Ministerial Code. That in turn refers to other constitutional or quasi-constitutional documents, eg, at 5.1 and 5.2 of the Ministerial Code to the "*Civil Service Code* and the requirements of the *Constitutional Reform and Governance Act 2010*... [and] the *Principles of Scientific Advice to Government*".

22. There are more detailed cross-references to the Civil Service Code at paras 265 sqq of the Cabinet Manual draft. It is inconvenient to have to refer back to a chain of documents in this way. It would be better if the Cabinet Office could produce an omnibus Manual, opening with the governing statutes, and continuing with an amalgamated list of conventions, including (as relevant) the *Civil Service Code*, the *Ministerial Code*, and the *Cabinet Manual* in a single document.

**Written evidence submitted by Professor Robert Hazell and Dr Ben Yong, The Constitution Unit,
University College London**

1. THE INVOLVEMENT OF THE CONSTITUTION UNIT IN THE CREATION OF THE CABINET MANUAL

1.1 In December 2009, the Constitution Unit in conjunction with the Institute for Government published a report on hung parliaments, entitled *Making Minority Government Work*.¹ The report was written under the growing expectation that a general election held in the near future would result in a hung parliament.² In the event that a general election would result in no overall majority for a single party, there were matters which required urgent clarification: the role of the Queen; the role of the incumbent government, which remains in office until a new government is formed; and the role of the civil service in government formation.

1.2 *Making Minority Government Work* suggested the need to develop a stronger set of guidelines on government formation, perhaps in the form of a “Cabinet Manual”. In the course of work on the report, we had found the New Zealand Cabinet Manual (“NZCM”)³ to be an invaluable executive guidance document. Earlier versions had prepared NZ well for proportional representation and hung parliaments; and it remained of use for multiparty government, and government in general.

1.3 On 23 February 2010, the Constitution Unit and the Institute for Government gave evidence to the Justice Committee making a case for updating, revising and consolidating key guidance documents on executive practice.⁴ An earlier draft of our submission had been sent to the Cabinet Office in late January; and in early February Cabinet Secretary Sir Gus O’Donnell initiated the Cabinet Manual project as part of preparations for the possibility of a hung parliament, with the authorisation of the then PM Gordon Brown.⁵

1.4 Our submission had compared key executive guidance documents available in Westminster jurisdictions, with the NZCM as the main comparator. The UK compared poorly in three aspects.

1.5 Firstly, existing UK documents provided poor guidance in the event of a hung parliament. The British public, media and financial markets were ill-informed and ill-prepared. Moreover, there was a serious (potentially self-fulfilling) danger of financial instability if a hung parliament eventuated. Thus, the principles and rules governing executive conduct needed to be as clear as possible. As of January 2010, there were few guidelines on these matters in the UK. This was alarming.

1.6 Secondly, we argued that updating, revising and consolidating key guidance documents would aid effective and efficient government. The comparative examination had highlighted that documents providing guidance on other key aspects of executive government in the UK were often difficult to find, outdated, or simply non-existent. The UK lagged behind: other Westminster jurisdictions (Canada, Australia, New Zealand and Scotland) had codified many areas of government practice. The UK had by far the most fragmented and piecemeal set of key executive guidance documents, which were also aimed more at civil servants than ministers.

1.7 In short—there was no “rough guide” to being in the Executive: new entrants were expected to learn as they went along. This did not bode well for any new government coming into power following the 2010 general election. We reproduce part of that comparative examination in the appendix to this submission.⁶

1.8 Thirdly, there was the democratic argument: the practices of the Executive had for too long been conducted in secret. Guidelines provided transparency and accountability. They would help explain to the public how and why decisions are made at the executive level. It should be remembered that prior to 2010 there was little indication from the Civil Service that there was interest in updating, revising and consolidating key executive documents.⁷

1.9 The Unit and the Institute then suggested the *New Zealand Cabinet Manual* (“NZCM”)⁸ as a possible solution. The NZCM was a model of what the other Westminster jurisdictions ought to follow: its benefits were clear:

¹ Robert Hazell and Akash Paun (eds) *Making Minority Government Work: Hung Parliaments and the Challenges for Westminster and Whitehall* (Constitution Unit and Institute for Government, London, 2009) http://www.ucl.ac.uk/constitution-unit/files/research/in-the-round/IFG_making%20minority%20government_final%20proof%2020%20nov%2009.pdf.

² Nicholas Watt “Whitehall prepares for hung parliament with Lib Dem talks” (1 January 2009) *The Guardian*, at: <http://www.guardian.co.uk/politics/2009/jan/01/whitehall-hung-parliament-liberal-democrats?INTCMP=SRCH>.

³ *Making Minority Government Work*, 73, para 6.27.

⁴ Professor Robert Hazell and Peter Riddell “Opening the Door to the Secret Garden—A Plea for Revised Public Guidance on How Governments Are Formed and Operate”, reproduced in an appendix to the report of the Justice Committee *Constitutional Processes Following a General Election* (HC 396, 2010) at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/396/396.pdf>.

⁵ “Towards a new politics”, Speech by the Prime Minister to the IPPR (2 February 2010), available at: <http://www.totalpolitics.com/speeches/speech.php?id=422>.

⁶ Professor Robert Hazell and Peter Riddell “Opening the Door to the Secret Garden—A Plea for Revised Public Guidance on How Governments Are Formed and Operate”, reproduced in an appendix to the report of the Justice Committee *Constitutional Processes Following a General Election* (HC 396, 2010) at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/396/396.pdf>.

⁷ Hence our persistent reference to “flexibility”. See, for example, “Opening the Door to the Secret Garden”, paras 1.12–1.13; 5.4.

⁸ <http://cabinetmanual.cabinetoffice.govt.nz/>.

The [NZ] *Cabinet Manual* provides comprehensive, cohesive and clear advice on a number of key aspects of executive action. It is publicly available, and broadly accepted by a wide range of actors in NZ politics: politicians across the spectrum, officials, academics and the public.⁹

1.10 In addition, the Unit and the Institute suggested a process and some considerations by which a Cabinet Manual might be drafted. We quote:

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

Any Cabinet Manual, or “single written document”, bringing together “existing unwritten piecemeal conventions”, should not be the property of any single political party. The process of redrafting should be under the control of the Cabinet Secretary, but there should be consultation outside Whitehall, involving Parliament and others, to ensure wider public and political acceptance. Completion of discussions and drafting will take time, and if this process cannot be completed before the campaign starts, those sections about the formation of governments and caretaker procedures could be published in draft form or as part of an interim public statement before the election campaign starts.¹⁰

1.11 The UK Cabinet Office at the same February Justice Committee hearing published the draft election chapter for discussion by the members of the Committee. On March 29, the Justice Committee published its report *Constitutional Processes Following a General Election*.¹¹ The report set out a number of proposed recommendations, many of which were fairly straightforward, and should have been incorporated into the draft. But the Brown Government did not respond to the Justice Committee’s report; and a new, updated version of the elections chapter, and the Cabinet Manual as a whole was only published on December last year.

2. ARGUMENTS FOR AND AGAINST A CABINET MANUAL

2.1 As noted, we made three strong arguments for updating, revising and consolidating key guidance documents. These were the threat of uncertainty caused by a hung parliament, the need for more efficient and effective government, and greater transparency. These remain persuasive.

2.2 In an earlier submission to the PCRC the Constitution Unit set out our thoughts on the draft election chapter, the process by which it was drafted and published, and its impact on the general election and process of government formation. Early publication of the draft elections chapter provided a measure of clarity about the government formation process where very little previously existed. The key actors all followed the draft Cabinet Manual guidance.

2.3 The Manual does draw together various aspects of executive practice into a more comprehensive and coherent document. This will be of use to this Coalition Government, and future governments. We have some reservations on the draft Manual (see section 3), but we recognise this version is an important first step. We strongly applaud the attempt to simplify guidance for those within the Executive.

2.4 Moreover, the attempt to update, revise and consolidate executive guidance is useful in that it will aid the public in understanding how the Executive works, as well as those who work in the Executive.

2.5 There are two arguments made by those critical of the draft Manual. First, the publication of the Cabinet Manual was seen as a power grab by the civil service, or an attempt to stack the cards so as to encourage the formation of a coalition government.¹² But this is a wild allegation, which is mistaken on two grounds. First, there were no significant changes to constitutional conventions. The civil service did their best to set out the existing rules on government formation. Second, these were not “secret” rules: they were published on 23 February, over two months before the election.

2.6 If Cabinet Office wanted to achieve “radical” change by stealth they chose an unusual means to do so. They consulted the Justice Committee on the draft Elections chapter. Many of the current changes in that chapter incorporate recommendations made by the Justice Committee in March 2010.

2.7 There is also a more specific charge that the so-called “new” government formation guidelines allowed Gordon Brown to stay on—and thus frustrate the Conservatives, or at least encourage the formation of a coalition government. But Gordon Brown was under a duty to stay in office until it was clear who could command confidence in the new Parliament. In old Tory language, the Queen must never be without responsible advisers, and the Queen’s business must be carried on. This principle was seen in action on Saturday 8 May 2010 when there was an emergency meeting of European finance ministers, and the UK was represented by Alistair Darling. There must always be a government, even where there is a hung parliament.

2.8 In the UK this problem was exacerbated by the mystery surrounding the role of the Monarch. There had long been concern that a hung parliament might result in undue attention being focused on the role of the

⁹ “Opening the Door to the Secret Garden”, para 1.12.

¹⁰ “Opening the Door to the Secret Garden”, executive summary and para 1.8.

¹¹ Justice Committee *Constitutional Processes Following a General Election* (HC 396, 2010) at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/396/396.pdf>.

¹² <http://www.telegraph.co.uk/culture/books/bookreviews/8176065/Political-Books-review.html>.

Monarch. The government formation guidelines were intended to ensure that as far as possible that the Monarch remains in the background.

2.9 In short, the early publication of the draft election chapter was intended to aid clarity, reduce uncertainty and avoid drawing the Monarchy into controversy. The alternative would be that the government formation process remained secret. The Cabinet Secretary, the Queen's Private Secretary, the Principal Private Secretary would have continued to act according to contemporary constitutional practice, but conspiracy theories about their involvement would have multiplied. There would have been debates about the role of the Monarch: perhaps she should have intervened at an earlier point; perhaps later. In short, the alternative—no guidance at all—might have resulted in uncertainty about the appropriate roles of the key political actors.

2.10 Second, there is the claim that the Cabinet Manual will lead to a written constitution.¹³ It will not. A written constitution would be a far bigger project, for which there is little public or political demand. It would set out the constitutional architecture of the British state: the key political institutions, their powers and functions, and the relations between them. The Cabinet Manual is more in the nature of a plumbing or wiring diagram, or a user's manual. It is a guide only to the operation of the Executive, in much the same way that Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* is a guide to the operation of the Houses of Parliament. The foreword to the draft Manual insists that it is not law, only "a source of information on the UK's law". It is not intended to have legal effect; it is meant to guide and direct.

2.11 Many aspects of the draft Manual are not new: much was already publicly available prior to the Manual's publication late last year. For instance:

- Sections on the royal prerogative are taken from *the Governance of Britain: Review of the Executive Royal Powers: Final Report* (eg, compare para 110 of the draft Manual with the Final Report, p8, para 30).
- Sections on special advisers (paras 271–2) simply repeat the 2010 revised *Code of Conduct for Special Advisers*.¹⁴
- The Radcliffe rules on the publication of ministerial memoirs (paras 407–9) summarise and for the most part repeat similar passages in the *Directory of Civil Service Guidance* (vol 2, pp41–3).

2.12 As already stated, other countries also provide codifications of executive practice. New Zealand is most well-known, but Australia has a similar comprehensive set of documents. There is considerable interest in Canada in developing a Cabinet Manual.¹⁵ Canada has a codified constitution, but can still see the value in setting down broad guidelines to help guide the executive. There has been no suggestion overseas of such executive guidance documents being a step towards a written constitution, or a power grab by the civil service. They are instruments of good government. Setting down guidelines—we emphasise these are *guidelines* and not *rules*—provide maps for the executive to carry out the business of government.

3. THE CURRENT DRAFT CABINET MANUAL AND ITS FUTURE

3.1 Having dealt with the general arguments about having a Cabinet Manual, what should be made of the current draft UK Cabinet Manual? We do not propose to deal with the substance of the draft Manual here. But we note at least three chapters deserving of further scrutiny by Parliament and the relevant select committees:

- *Chapter 3: The Executive—the Prime Minister, ministers and the structure of government*. This chapter remains silent on key relationships, such as that existing between ministers and arms-length bodies.
- *Chapter 5: Ministers and Parliament*. This chapter is remarkably thin for such an important aspect of executive business.
- *Chapter 9: Relations with the European Union and other international institutions*. The main problem with this chapter is that it is silent on the roles and functions of ministers in relation to these institutions.

3.2 Leaving those matters aside, we ask a more basic question: what is a Cabinet Manual for, and does it achieve these objectives? A Cabinet Manual is intended first and foremost for members of the Executive: the Prime Minister, Ministers and the Civil Service. It is meant to make their work simpler: the Manual should provide relatively straightforward guidance and be easy to read.

3.3 The key problem with the current draft Cabinet Manual is that it is not user-friendly. It is a text for civil servants, not for their masters. The language is dense, legalistic, and unexciting. Take the chapter on Europe and international institutions: what is the relationship of ministers to any of these institutions? We are not told.

¹³ <http://www.epolitix.com/policy/parliament/parliament-article/newsarticle/has-the-cabinet-secretary-unwittingly-created-britains-first-written-constitution/>.

¹⁴ <http://www.cabinetoffice.gov.uk/sites/default/files/resources/special-advisers-code-of-conduct.pdf>.

¹⁵ Peter Russell "Minority Government and Constitutional Convention" (2010) 33(2) *Canadian Parliamentary Review* 13–15, at: <http://www2.parl.gc.ca/sites/lop/infoparl/english/issue.asp?param=198&art=1379>; and Lorne Neudorf "A cabinet manual could protect us against abuses of power" (6 December 2010) *Globe and Mail*, at: <http://www.theglobeandmail.com/news/opinions/opinion/a-cabinet-manual-could-protect-us-against-abuses-of-power/article1824172/>.

Similarly in the chapter on the structure of government: what is the relationship between ministers and ALBs? The text is silent on this basic matter.

3.4 Our main recommendation would be to remind the drafters of its key audience: the Prime Minister and Ministers. There is no point in drafting guidance which they will not use.

3.5 As for the UK Cabinet Manual's future, it might evolve along similar lines to the NZCM. The NZCM is now in its fifth edition, and has changed significantly over the years, from a guide primarily for officials to a guide primarily for Ministers, and the outside world. It retains its status as an authoritative guide. Each new edition is subject to extensive consultation within government (of ministers and officials), but is not put out to external consultation, save to officials such as the Clerk of the Parliament and the Ombudsman. It is then approved by every new Cabinet.

3.6 However, the UK Cabinet Manual faces the challenge of trying to achieve the same degree of legitimacy and authority in its first edition that the NZ Manual has acquired over many years. It also faces the dilemma of whether it merely summarises existing conventions or tries to improve upon them. We believe that in certain respects it should improve upon them. We recognise that this requires a wider process of consultation than has happened in NZ—and indeed the decision to publish this draft is one example of that. This process of external consultation can include constitutional experts, to check that the Manual accurately describes the existing constitutional conventions; and parliamentary committees, to check that the Manual commands cross-party support.

APPENDIX

EXCERPTS FROM THE FEBRUARY 2010 JUSTICE COMMITTEE SUBMISSION

The excerpts from the Justice Committee submission make three basic points on the state of executive guidance as it stood in early January 2010:

1. guidance on the principles and processes of government formation, particularly in the event of a hung parliament, was sorely lacking;
2. more generally, key executive guidance in the UK was neither comprehensive nor coherent; it was fragmented, piecemeal, out of date, or simply not there. This did not bode well for any new government coming into power; and
3. one possible solution was the consolidation and drafting of a comprehensive, coherent, Cabinet Manual, based on the New Zealand model.

A.1 A COMPARISON OF MINISTERIAL GUIDANCE IN FIVE WESTMINSTER COUNTRIES

A.1.1 Table 1 below attempts to represent visually what areas of executive practice covered by each jurisdiction's "central guidance document", as it stood in early January 2010. By "central guidance document" is meant the following:

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

Table 1
AREAS OF EXECUTIVE PRACTICE COVERED BY CENTRAL GUIDANCE DOCUMENT

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

Table 2
THE MINIMUM NECESSARY GUIDANCE FOR CABINET AND MINISTERS

<i>Aspects of Executive Practice</i>	<i>New Zealand</i>	<i>Australia</i>	<i>United Kingdom</i>
The Constitution	Cabinet Manual	[A Guide on Key Elements of Ministerial Responsibility] ("Key Elements Guide")	NONE
Head of State and Cabinet relations	Cabinet Manual	[Key Elements Guide]; Federal Executive Handbook	NONE
<i>Description of HOS role/ powers</i>			
Ministers	Cabinet Manual	[Key Elements Guide]; Standards of Ministerial Ethics	Ministerial Code
<i>Powers and functions of PM</i>			

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

A.1.2 Table 2 attempts to show the minimum number of documents necessary in order for Cabinet and/or Ministers to have a basic understanding of key aspects of executive practice.¹⁶

A.1.3 Table 3 shows that only three “documents” were necessary in New Zealand: the *Cabinet Manual*, the *Cabinet Guide* (in fact a set of webpages) and the *Ministerial Office Handbook*. In Australia, the number of basic documents was higher, standing at around seven to eight documents. The UK had the most number of documents, standing at almost a dozen; but this number was probably higher, as there were two additional areas of executive action requiring guidance: the devolution settlements, and relations with Europe and the European Union.

Table 3

MINIMUM NECESSARY GUIDANCE FOR CABINET AND MINISTERS BY NUMBER OF DOCUMENTS

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

A.2 MINISTERIAL GUIDANCE IN THE UK

A.2.1 The most salient characteristic of the key guidance documents on executive practice in the UK (see Table 4) is their fragmented and piecemeal nature. While the majority of the guidance documents listed can be found on the UK Cabinet Office website,¹⁷ these are not gathered together in one place and the location of some documents is counterintuitive. The second salient characteristic about the available documents is that the majority are aimed at civil servants, not Ministers. Finally, the guidance varies in comprehensiveness and depth: from very detailed to broad and principled.

Table 4

KEY MINISTERIAL GUIDANCE DOCUMENTS IN THE UK

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

¹⁶ More detail on this can be found in the original submission. Note that the Australian *Guide on Key Elements of Ministerial Responsibility* is in square brackets to indicate its defunct status.

¹⁷ <http://www.cabinetoffice.gov.uk/>.

<i>Text</i>	<i>Length</i>	<i>Location</i>
<i>General Election Guidance 2005</i>	40pp	http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/electguide.pdf
<i>Guide to Parliamentary Business</i>	n/a	http://www.cabinetoffice.gov.uk/parliamentary-clerk-guide.aspx
<i>Guide to Making Legislation</i>	n/a	http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html.aspx
<i>Freedom of Information Guidelines</i>	28pp	http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/publication_scheme/pdf/foi_guidelines.pdf
<i>Devolution</i>	n/a	http://www.cabinetoffice.gov.uk/devolution.aspx

A.2.2 The *Ministerial Code* is the central guidance document for executive practice. Previous versions of the *Code* were a mixture of principle and procedure,¹⁸ but in its current 2007 incarnation, the *Code* focuses strongly on the ethical facets of ministerial work. Procedural matters present in previous versions (such as Cabinet and cabinet committee business or the publication of Green and White papers) have been removed. The *Code* currently sets out a general statement about the responsibilities of Ministers; Cabinet responsibility; appointments; ministerial relations with departments; ministerial relations with civil servants and special advisers; constituency and party interests; private interests; the presentation of policy; ministerial relations with Parliament; travel; and the seven principles of public life. The standard format is to set out a general principle governing the area in question, and then provide some elaboration. The *Ministerial Code* is the creature of the Prime Minister: revisions to it may be drafted by the Cabinet Secretary, but it is ultimately the Prime Minister who authorises the *Code*'s publication.

A.2.3 The *Guide to Cabinet and Cabinet Committee Business* provides detailed information on Cabinet procedure. The content is “informative” rather than procedural and the Guide itself contains several flowcharts to explain various processes.

A.2.4 Although there is guidance on the relationship between Ministers and the civil service (in the form of the *Ministerial Code*, the *Civil Service Code*), guidance on broader “state sector” relations is weaker to non-existent. *Executive Agencies: A Guide for Departments* and *Public Bodies: A Guide for Departments* are directed at civil servants and are more concerned with implementation.

A.2.5 A number of guidance documents for civil servants have been gathered together and published in the *Directory of Civil Service Guidance*. The *Directory* consists of two volumes, one volume setting out briefly where guidance on various matters is to be found (eg, copyright or machinery of government changes); the other being a compilation of already-published guidance documents. The guidance in the two volumes offered is useful. However, the *Directory* itself has not been updated in some time, the most recent version being published in 2000 under the direction of Sir Richard Wilson (then Cabinet Secretary). Thus, some of the matters covered in the *Directory* are out of date—for instance, the section on freedom of information notes that the Freedom of Information bill has yet to be enacted.

A.2.6 *Guide to Parliamentary Work* is directed towards officials; the main ministerial guidance on executive-legislative relations is a short section in the *Ministerial Code*. The *Guide to Making Legislation* is also directed at officials, setting out the various stages of the legislative process. It is written simply and is useful and informative.

A.2.7 *The Judge Over Your Shoulder* provides detailed guidance on administrative decision-making and the possibility of judicial review, but at 48-odd pages this is not a lightweight document. (Of course most administrative decisions are made not by Ministers but by civil servants; but Ministers themselves ought to have a modicum of knowledge about these matters).

A.2.8 The guidance documents on general elections (*General Elections Guidance 2005* is the most relevant document: there are others relating to European elections) are directed towards civil servants and those in agencies and NDPBs. There is no mention of the caretaker convention. The guidance documents mostly cover the period up to the election, but not what happens after an election. There is no discussion of the government formation process, or the head of state's role in this process.

A.2.9 Thus, in comparison with the other jurisdictions surveyed, the UK appears to be lacking in important respects. Set out below are the main omissions:

Guidance on the role of the head of state

A.2.10 The most serious omission in available guidance is the lack of any discussion of the role of head of state, either in the period leading up to a general election, or more generally—for instance, in a situation when the government has lost the confidence of parliament. The lack of guidance about the role of the Sovereign in these areas could contribute to media or public misunderstanding of the political neutrality of the monarchy.

¹⁸ On earlier versions of the *Ministerial Code* (previously *Questions of Procedure for Ministers*), see Amy Baker *Prime Ministers and the Rule Book* (Politico's Publishing, London, 2000).

The caretaker convention

A.2.11 There is very thin guidance on the role of an incumbent government in the election period (*General Election Guidance 2005*), and no guidance at all on the role of an incumbent government where a general election has no clear result—ie, a hung parliament. There is also a question of whether or not the caretaker convention should apply more broadly to any situation where it is unclear who has the confidence of Parliament.

Clear guidance on ministerial relationships with departments, agencies and NDPBs

A.2.12 The relationship between Ministers, the civil service and departments is set out both in the *Ministerial Code* and the *Civil Service Code*, although some have argued for greater clarification.¹⁹ But there is only very thin guidance on the relationship that Ministers have with more “arm’s-length” bodies such as executive agencies and non-departmental public bodies (NDPBs). Although there are a variety of relationships between these bodies and Ministers, a broad statement could be made to clarify the general position.

An outline of the constitution

A.2.13 NZ, Australia and Canada all have descriptions of the constitutional framework within which Ministers work. These descriptions may be brief (Australia, Canada) or they may be more detailed (NZ). The UK has no equivalent; and a mere consolidation of its guidance documents could still leave a reader puzzled about the overall framework.

Europe

A.2.14 There is no general guidance on the UK’s relationship with Europe and the European Union. Given the growing interconnections between Europe and the UK, this seems an extraordinary omission.

Induction guide on day-to-day ministerial work

A.2.15 At present it would appear that what is given to a new ministerial incumbent depends very much on the department he or she works in; otherwise Gerald Kaufman’s *How to be a Minister* (1980) remains a DIY guide.

A.2.16 Finally there is no “narrative” which draws all this information together—this *might* be provided by a discussion of the constitution. There is also a question of audience: to whom is this executive guidance addressed? At present it would appear that most of it is directed at civil servants rather than ministers.

A.2.17 To end on a more positive note, the guidance on devolution under Ministers and Government Business is good: it is clear, succinct and covers the main points and principles of the devolution settlements. While it is located too many links away from the central website, this section is a model of how usefully to provide information on a difficult subject.

A.3 THE UK CABINET OFFICE WEBSITE

Organisation and accessibility

A.3.1 The website is not easy to navigate. A reader wanting to understand what are the practical working guidelines the executive follows in exercising government power would be hard-pressed to find the basic documents.

A.3.2 Location/organisation: material is somewhat haphazardly organised. Material related to “Ministerial and Government business” is located in a column on the left hand side of the title webpage (three-quarters of the way down). The *Ministerial Code* and *Civil Service Code* are found under “Codes of Conduct”, and not under “Ministerial and government business”—which would seem to be the key area for ministerial guidance. Guidance on freedom of information is found under “publications”, a link located at the top of the CO’s title webpage. Some information is not even found on the CO website: the rules for judicial review are found on the Treasury Solicitor’s Department website (*The Judge over Your Shoulder*); some information about governance of state bodies is found through a link under “propriety and ethics” on the CO page which links to the civil service webpage on guidance on public bodies (this guidance is directed more at civil servants).

A.3.3 Format: there is inconsistency about format—for instance, the guide to parliamentary business is in HTML (web) format only; the Ministerial code is in PDF format; the topics under Cabinet business are a mixture of HTML, word and PDF formats; some links to documents lead to external websites.

Coverage/content

A.3.4 On the face of it, the structure of the ministerial and government business webpage is quite logical; but coverage is limited. As noted earlier, some guidance is not even available on the CO website itself (eg, guidance on administrative decision-making). Sometimes the coverage is rather haphazard (eg, “consultation”

¹⁹ Better Government Initiative, *Good Government: Reforming Parliament and the Executive*, available at: <http://www.bettergovernmentinitiative.co.uk/sitedata/Misc/Good-government-17-October.pdf>.

only covers the release of statistics; the webpage on the European secretariat only sets out what the secretariat does, but says nothing about the relationship between the UK and Europe).

A.3.5 There are gaps in key areas (at least publicly)—see above.

A.3.6 Some links are dead.

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

A.3.7 Again, there is no “narrative” drawing all these matters together. There is surely an argument that a more coherently organised website and/or guidance would be beneficial to the public too. Just to take a topical example, clear guidance posted on what happens during a hung parliament or during government formation might calm an excitable media and nervous financial sector.

10 January 2011

**Supplementary written evidence submitted by Professor Robert Hazell, The Constitution Unit,
University College London**

When giving evidence on 13 January 2011, I failed to do justice to two points.

PARLIAMENT’S ROLE IN GOVERNMENT FORMATION

There seemed to be a wish that the House of Commons had held its first sitting very soon after the 6 May election in order to influence the negotiations between the political parties. This would simply not be realistic.

I know of no parliament which plays such a role:

- It takes several days for members to be sworn in, and the Speaker to be elected.
- Negotiations cannot be conducted on the floor of the House.
- Even in countries (eg Scotland) which have an investiture vote, where the parliament formally elects or nominates the first minister, that vote takes place after the conclusion of negotiations between the parties.

The impracticality of the proposal can be judged by asking: if the House of Commons had sat on 10 or 11 May, what would it have done? It could only have adjourned to enable the political parties to continue their negotiations, and to await the outcome. But if the concern lying behind the Committee’s questions was that members felt excluded from the negotiations, the remedy lies not in Parliament, but in the internal democracy of their own political parties. As the recent books by Rob Wilson and David Laws both show, Liberal Democrat MPs were extensively consulted during the negotiations; Conservative MPs to some extent; Labour MPs hardly at all.

OWNERSHIP OF THE CABINET MANUAL

I was repeatedly pressed on whether Parliament should claim a right to approve the contents of the Manual. Parliament has every right to scrutinise the Manual, and I have no doubt that Cabinet Office will take any comments very seriously. But that is not the same as a right of approval, or veto. Most of the Manual consists of discrete pieces of executive guidance which are now being brought together, but which have long existed without parliamentary approval. These include:

The Ministerial Code

- A Guide to Cabinet and Cabinet Committee Business.
- Civil Service Code.
- Directory of Civil Service Guidance, vols 1–2.
- Executive Agencies: A Guide for Departments.
- Public Bodies: A Guide for Departments.
- The Judge Over Your Shoulder.
- General Election Guidance 2005.
- Guide to Parliamentary Business.
- Guide to Making Legislation.
- Freedom of Information Guidelines.
- Devolution Guidance.

The Civil Service Code is now statutory and must be laid before Parliament, since the civil service was put on a statutory footing in the Constitutional Reform and Governance Act 2010. But it is not subject to parliamentary approval in the form of positive or negative resolution. It is only subject to minimum

requirements that civil servants must be able to serve administrations of any political complexion, and must do so in accordance with the civil service values of integrity and honesty, objectivity and impartiality.

Another argument advanced for parliamentary approval of the Cabinet Manual was that it refers to relations between the government and Parliament. But the fact that the Manual refers to the Executive's relations with other bodies does not imply that it requires the consent of those other bodies, whether Parliament, the judiciary or anyone else. On this logic, given what is said in chapter 9 on Europe and international institutions, the Manual should require the consent of the EU, NATO, WTO etc etc.

This is a question which it would be worth exploring further in the evidence session with Professor Margaret Wilson, a distinguished parliamentarian who was herself Speaker of the New Zealand House of Representatives.

16 January 2011

Written evidence submitted by David Walker

INTRODUCTION

As a journalist and commentator, I have been a "Whitehall watcher" for some time and was recently a senior manager in an arm's-length body (biographical details at par 6.1 below). These observations are principally about the Cabinet Manual's treatment of the civil and wider public service.

1. *What are the constitutional consequences of the publication of the Cabinet Manual by the Government, and of the process of consultation being adopted?*

1.1 Few, if any. The Manual is a palimpsest, a compendium of references. It annotates some in more detail than others and lacks an overarching framework by which to interpret the weights given rules and understandings in terms of length or exhaustiveness of treatment. References to the monarchy are sententious and lack analysis of how far procedures remain purely formal or proxy. "Secondary" constitutional material is referred to (for example the Civil Service Code) but the Manual does not distinguish hard from soft convention, as opposed to statute or fungible "understandings".

1.2 The Manual could encouraged a sense that the "constitution" were in the custody of mandarins in the Cabinet Office rather than a fungible set of conventions made to work by multiple partners. It refers at length to procedure in the House of Commons: MPs also "own" the constitution. How much would a constitutional manual produced by, say, the Political and Constitutional Reform Committee differ from this?

1.3 The Manual is written in peerless officialese and though the Foreword promises to try to inform the wider public, it rarely unpacks its references or enlightens those lacking background knowledge. Mention is made, say, of an officer of the House of Commons (eg Par 216), as if that were self-explanatory. The sentences around mention of the "sovereign in parliament" (Par 8) are Hegelian in their opacity.

1.4 A reader would take from the Manual little sense of citizen grievance or the public's widely discussed alienation from formal procedure. New technology—the possibilities of "e-government"—gets no mention.

2. *Does the Cabinet Manual accurately reflect existing laws, conventions and rules?*

2.1 Yes, but not exhaustively. Anomalies and mysteries of the British constitutional set up are stated, but few are cleared up. The Royal Prerogative is a leading example, the subject of a notable inquiry by the Commons Public Administration Select Committee (REF 1).

2.2 Areas not usually regarded as "constitutional" but vital to the system are absent. For example the political parties. See Par 8 for dense references to party participation in making the Commons work, but the Manual otherwise says little about parties, their legal standing or regulation. Regulations for special advisers are mentioned but not the reasons they exist. The only mention of the Electoral Commission appears to be in Par 190 and that indirect. Yet this arm's-length body is surely of constitutional import. Last year a venomous and partisan attack on the Chair of the Electoral Commission prompted the intervention of the Cabinet Secretary, presumably on the grounds that its standing matters (REF 2).

2.3 The Manual touches on some of the constitution's penumbral areas (such as the structure of Whitehall and its departments) but leaves others entirely alone. A large gap is recognition of the "understanding" among local authority elected members that their autonomy is somehow "constitutional". More on local government at 4.4 below).

2.4 The Manual is heavy on the procedures of the Privy Council and ministerial titles (see Par 28). It does not say whether these formalities matter in any substantive way. Would government go on if the names and costumes changed? What would happen, for instance, if the Lord President of the Council were no more?

2.5 The Manual is light on the shape of the constitution post devolution. The arrival of a Scottish National Party government in Scotland has stretched already elastic understandings. Scottish political (and constitutional) consciousness has shifted—at least as permanently as many of the conventions said to be permanent in the Manual. For example see Par 26. The constitutional pecking order for assent to a regency is surely

anachronistic, whatever the Manual says. The First Minister of Scotland would have to be consulted in such circumstances if the legitimacy of arrangements were to be accepted north of the border.

2.5 Some constitutional understandings turn out to be less firm than others but the Manual offers no way of telling. Par 220 says, as if with finality, “the NAO does not audit local spending”. That now means nobody audits local spending, which is surely a fiscal if not a constitutional abomination. In August 2010 the Communities and Local Government Secretary announced the abolition of the Audit Commission. He implied in a press release that the NAO would take over some responsibility for the audit of local spending. Was that announcement in any way to be understood as “constitutional”? The CLG Secretary has of course no responsibility for the NAO. If he was announcing far-reaching changes, it showed constitutional change can be accomplished by scribbling on the back of the proverbial envelope or, in this case, by granting an exclusive interview to The Daily Telegraph.

3. Are there areas in which the Cabinet Manual appears to alter existing conventions or rules, or create new ones, rather than acting as a “factual record” based on precedent?

3.1 Yes, most obviously in the several paragraphs (see Par 52ff) devoted to handling the coalition talks last May. What the Manual does not do is consider the implications of what happened then for residual constitutional doctrines, especially the one on civil service accountability. A “strong” understanding was stated by the former Cabinet Secretary Sir Robert Armstrong (REF 3). The civil service, he said, has “no constitutional personality or responsibility separate from the duly elected government of the day”. But when there is no “duly elected government” patently the civil service does have a responsibility, which the Manual now sets out in some detail. As for “constitutional personality”, it is hard to find a more appropriate phrase to describe the role of the Cabinet Secretary and his colleagues in the negotiations in May. Is the Manual updating the “Armstrong doctrine”?

3.2 Par 152 states the Chancellor of the Exchequer’s autarkic control over fiscal policy, but this is as much an uneven matter of the respective political strengths of Chancellor, Prime Minister and others. The Manual says, as if it were “constitutional” that Cabinet colleagues are only told of Budget changes on the morning of the announcement. But how far does this convention only reflect the political strength of a recent Chancellor, Gordon Brown? How far did his successor observe it, when Mr Brown was in Number Ten? (REF 4) The Manual makes no effort to discuss the asymmetry of collective Cabinet responsibility: the Treasury proposes and other departments take it as given.

4. Are there matters that are not adequately reflected in the Cabinet Manual?

4.1 Yes. The biggest gap is the standing and responsibilities of the wider public service, and the interpenetration of “constitutional” and questions of service delivery and the management of public money.

4.2 How far is the existence or organisation of the Whitehall civil service constitutionally significant? The Armstrong doctrine denied it. The space the Manual devotes the civil service affirms it. But are we talking only about the Top 200, ministers’ private offices and permanent secretaries and not departments’ clerical and executive empires, their executive agencies and public corporations? The Manual owes its readers a strategic sense of whether the entire civil service or only certain of its functions matter to the safe and accountable running of the state. Outsourcing public services is rife, and those given to contractors include such sensitive functions as civil service training and personnel management. Consultants supply policy advice. The notion of Whitehall constitutionality needs more airing than it gets here. Yet the Manual spends time on the exiguous question of bringing corporate chieftains to join departmental boards.

4.3 Par 233 onwards says the old understanding holds: what civil servants do they do in the minister’s name. But that doctrine makes nonsense of the way departments actually run. It has been under assault by the managerialism introduced into Whitehall since at least the 1980s, with their performance systems and contracts for service. The notion of “the Crown” is, some would argue, an impediment to administrative rationality so the Manual, implicitly, pits service modernisation against constitutional propriety. Par 116 says parliament “will normally” understand that administrative decisions are not ones for which the minister can be held responsible; but what distinguishes one from the other on any systematic basis?

4.4 The good government of the UK depends upon “constitutional” understandings in arm’s length bodies, especially those mixing professional self regulation with state oversight, such as the Financial Reporting Council. The governance, indeed the very existence of Quangos is hotly disputed. The Manual might show some awareness of whether the functional differentiation of the tasks of government has constitutional import: the discussion is confined to Whitehall departments and does not venture further afield.

4.5 The Manual inserts a brief aside about the governance of chartered bodies, which is affected by Orders in Council. But it does not elaborate. Who, within the system, is responsible for the delivery of a vital public service by, say, the General Medical Council? Is the professional standing of doctors of constitutional import?

4.6 References to the Honours system are coy. Who advises whom, according to what criteria; why is the civil service so overrepresented in the award of honours? Few of the points made by the Commons Public Administration Select Committee are addressed (REF 5).

4.7 Similarly, the discussion of special advisers fails to carry the reader into the disputed and important territory between politics and public administration. A recent instance in the Communities and Local Government Department (REF 6) posed the question of how far a Secretary of State is legally liable for the actions of special advisers. If that question can be satisfactorily answered, might it provide a basis for reworking the deeply ambiguous responsibility of paid officials to ministers and vice versa, see 4.3 above

4.8 In the era of “localism”, the Manual’s references to local government are remarkably curt. The Commons Political and Constitutional Reform Committee may be examining central local government relations separately and there is an overlap. Should the position of local government be regarded as “constitutional” as many councillors believe it to be, sometimes citing international conventions on sub-national government? Do the paid officers of councils who carry statutory duties to act with “constitutional” propriety have no relevance to the good governance of the kingdom?

5. *Are there matters currently included in the Cabinet Manual that should not be, or that should be given lesser prominence?*

5.1 “Cabinet Manual” is a misnomer. This is a partial constitutional vademecum. The Cabinet is only one of a set of “owners” or holders of constitutional licence and responsibility and the pluralism might better be reflected. The space given certain anomalies is not explained, for example the Crown Dependencies and other overseas anomalies. The treatment of Nato seems disproportionate too: this is only one of many treaty obligations and its “existential” significance is nowadays much less than in the days of the Cold War.

6. *Personal details*

6.1 David Walker is contributing editor to *Guardian Public*, former Chief Leader Writer for *The Independent* and Whitehall Correspondent for *The Times*. He was till October managing director, communications and public reporting for the Audit Commission and is an honorary member of the Chartered Institute of Public Finance and Accountancy and a visiting professor in sociology at City University, London. He is chair of the methods and infrastructure committee of the Economic and Social Research Council and author of various books including, with Polly Toynbee, *The Verdict, did Labour change Britain* and, with Peter Hennessy and Michael Cockerell, *Sources Close to the Prime Minister*.

7. *References*

REF 1 PASC, Session 2003–04, Fourth Report

REF 2 guardianpublic.co.uk/lucas-whitehall-communities-department

REF 3 Civil Servants and Ministers: Duties and Responsibilities Cmnd 9841 July 1986

REF 4 Steve Richards, Whatever it takes, Fourth Estate, 2010 p 420ff

REF 5 PASC Session 2003–04 Fifth Report

REF 6 politicalscrapbook.net/2011/01/smear-by-eric-pickles-special-adviser-cost-taxpayers-50000/
10 January 2011

Written evidence submitted by Democratic Audit

ABOUT DEMOCRATIC AUDIT

Democratic Audit is an independent research organisation, based at the University of Liverpool. We are grant funded by the Joseph Rowntree Charitable Trust to conduct research into the quality of democracy in the UK and are currently conducting the fourth full Audit of UK democracy (the previous three Audits were published in 1996, 1999 and 2002).

SUMMARY

- Given its origins and its content, the Cabinet Manual will almost inevitably come to be seen as a surrogate for a written constitution, although it clearly differs from a written constitution in a number of crucial ways.
- Despite its lack of legal status in its own right, the Manual is likely to become a significant point of reference for anyone seeking to hold government to account—including journalists, opposition parties and backbench MPs.
- We have a number of concerns about the process through which the document has been produced and about the provisions for consultation. We would suggest that Parliament should have been more centrally involved in the process of producing the manual.
- A non-deliberative approach to public consultation over a 12 week period is inadequate for a document of such constitutional significance.

- The Manual should give greater recognition to the fact that not all constitutional conventions are recognised as binding and should be more explicit about the full range of constitutional issues which it does not seek to cover
- The Manual appears to invent a new convention that incumbent Prime Ministers are not expected to resign until it is accepted that someone else is better placed to form a government.

What are the constitutional consequences of the publication of the Cabinet Manual by the Government, and of the process of consultation being adopted?

Consequences of the Manual's Publication

1. The likely constitutional consequences of the publication of the Cabinet Manual, many of which are only likely to become apparent over the medium-long term, are very difficult to assess.

2. Much of the difficulty of assessing the constitutional consequences of the Cabinet Manual arises from the highly ambiguous relationship between the Manual and a written constitution.

3. While taking its inspiration from the New Zealand experience, the origins of the UK's draft Cabinet Manual cannot be divorced from the case made by Gordon Brown as Prime Minister for a wide-ranging discussion on whether the UK should seek to adopt a written constitution. It was widely understood, therefore, that the original intention was to link the production of the manual to the long-standing debate about whether the UK's constitutional arrangements should be codified in some way.

4. Clearly, the broader political context has changed since the process of writing the manual was set in train and, as a result, the publication of the manual has not been accompanied by any formal recognition that it could be regarded as a step towards a written constitution. However, the question of whether the draft Manual could, or should, constitute a foundation for a written constitution clearly remains. This reality was recognised by the Cabinet Secretary, the principal author of the document, when he said to the select committee in November, prior to the publication of the draft: "I think those who are in favour of a written constitution will start with it".

5. The publication of the draft Manual renders the ambiguities of its relationship to a written constitution all the more apparent. In his foreword to the Manual, the Cabinet secretary notes:

"... there has never been a single source of information on how the Government works and interacts with the Sovereign, Parliament, the judiciary, international organisations, the Devolved Administrations and local government" (p.2).

6. In all but two other democracies worldwide, the "single source of information" fulfilling these functions would be easily identifiable as the country's principal constitutional document (ie a written constitution). It is therefore telling that the Cabinet Secretary then goes on to explain the rationale for the Manual in the following terms:

"The Cabinet Manual is intended to be a source of information on the UK's laws, conventions and rules, including those of a constitutional nature, that affect the operation and procedures of government. It is written from the perspective of the Executive branch of government. It is not intended to have any legal effect or set issues in stone. It is intended to guide, not to direct" (p.3).

7. In this sense, the document can be regarded as a sort of substitute for what would typically be found in a written constitution in most democracies. However, it also contrasts to a written constitution in three crucial ways. First, the Manual is written from the perspective of cataloguing "the operation of government" from the centre, rather than from a position of providing government with a source of legitimacy, as expressed by the "will of the people". Second, the document itself has no legal status and, as such, provides no basis for sanction or redress in instances where the actions of governments appear to be inconsistent with what is described in the Manual—save where any such forms of redress are already defined in statute. Third, the Manual does not clarify the arrangements through which constitutional arrangements can be amended—it simply accepts that they will change, and that the Manual will have to be revised regularly as a consequence.

8. Given these points of contrast to a written constitution, one of the more unpredictable constitutional consequences of the Manual's publication may be the way in which it is used as a source of reference by opposition parties, backbench MPs, the media and others in seeking to hold governments to account. The use of the Manual in this way is likely to become particularly evident in cases where descriptions of the legislative process and government operation contained in the Manual could be argued to be based more on a view as to what *should* happen than on widely-accepted conventions or norms.

Consequences of the process being adopted

9. We are puzzled, and to some extent concerned, that such a significant document has been published in the name of the Cabinet Secretary. Democratic Audit regards the draft Manual as a document that ought properly to have been presented to Parliament and the public by the Prime Minister and the Deputy Prime Minister who have instead merely given their approval for its publication. The Cabinet Secretary, like all civil servants, is not directly responsible to Parliament. Yet it seems that not only is he the official author of the

document, but he will also have a major role in receiving and considering comments on its contents and bring forward a revised version later this year.

10. While we very much welcome the Constitutional and Political Reform Select Committee's inquiry into the issues raised by the Manual's publication, Parliament's wider role in relation to the document is by no means clear. The manner in which the document is presented appears to suggest that the Manual's contents are a matter for the Cabinet Office to determine, albeit after allowing others an opportunity to submit written comments on its contents. It is our view that the Manual should be the subject of debate in Parliament and that ownership of the document should ultimately rest with Parliament.

11. The apparent by-passing of Parliament in the process of producing the manual is central to the wider set of concerns we have about the process that has been used so far. Prior to the Manual's publication, it would appear that Cabinet Office consultation was quite limited. In addition to private consultations between Cabinet Office officials and a small number of invited "constitutional experts", the only open consultation was with the House of Commons Justice Committee on the draft of what is now Chapter 2. We would argue that this falls far short of good democratic practice. We also take the view that a three-month consultation period on the full 147 page draft, which takes in the Christmas and New Year holiday period, is not sufficient for a document which is the closest thing the UK will have to a written constitution. The Cabinet Secretary told the committee in November 2010: "It has never existed before; we've been waiting decades and decades for this". So why the rushed consultation now that it has been published?

12. Furthermore, we have concerns about the way in which the process of consultation has been structured. Comments on the draft are to be sent to the Cabinet Office directly, and decisions about how to respond to them are apparently to rest with the Cabinet Office alone. While a "summary of issues raised" is to be published, we would question whether the consultation process can claim to be fully open and transparent. Just as significantly, we would argue that no attempt has been made to provide for a deliberative process of consultation, though which a more considered and sustained dialogue with interested parties would be facilitated.

13. The Cabinet Office's consultation may well conform to accepted norms of "best practice", but the publication of a document of this constitutional significance is by no means the norm. When Gordon Brown announced that this document was being prepared in February 2010, he presented it as the first stage in a process that would be followed by wide and full consultation and possibly lead to a written constitution. Even then, this document would not be the ideal way to start such a project—but the later stages seem to have been forgotten and the Manual is set to be the end product now, rather than the first stage of a major consultative process.

Does the Cabinet Manual accurately reflect existing laws, conventions and rules?

14. Our reading of the Manual leads us to suggest that important aspects of the law are not made wholly apparent where they should be. We would suggest that there are two significant general points to be made about how the Manual deals with points of law:

- The place of the rule of law is not recognised as clearly as it might be. Under the common law, the executive is subject to the rule of law. Parliament did, as the Manual says, choose to constrain itself to the rule of law in the Constitutional Reform Act 2005, recognising "The existing constitutional principle of the rule of law". Parliament of course has important privileges that protect its role and free speech in the House of Commons, not mentioned in the draft.
- The removal of the European Union to a late chapter means that the Manual does not do justice to the extent to which the United Kingdom is constitutionally part of the European Union and subject therefore to EU law and the rulings of the European Court of Justice.

15. As for conventions, the Manual errs when it states that they are "regarded as binding in operation but not in law". While *some* key conventions are certainly regarded as binding, many more are not and have been amended and even abolished over time. They are therefore constantly liable to change—usually by Ministers—and by definition difficult to express in written form. Accurately reflecting conventions in the Manual is therefore a difficult task and some of the descriptions of conventions risk being so vague as to be unhelpful and possibly open to abuse. To take but one example, paragraph 77 states that: "The Prime Minister has few statutory functions but will usually take the lead on significant matters of state." What does "taking the lead" mean? What are "significant matters of state"? What safeguards are there?

16. We would also suggest that it is a questionable task for a document drafted by the Cabinet Office to seek to have the final word on the meaning of conventions. In attempting to clarify conventions in relatively "Plain English", an admirable objective in itself, the Manual generally fails to demonstrate *how* it arrived at certain definitions of conventions. In reality, many conventions do require some form of justification and explanation, as well as some recognition of the "grey areas" of interpretation associated with them—as even a cursory glance at a constitutional law textbook would confirm.

17. As such, there are long-standing questions about the UK constitution that this document cannot solve and which it can in fact only highlight by attempting to write them down. To take an example, the text at the head of the section on "Collective Cabinet decision-making" (chapter 4) states—probably incorrectly—that "Cabinet and Cabinet committees are the only groups formally empowered to take binding decisions on behalf

of the Government”. Then, over the next two sentences the Manual states—probably correctly—that only ministers can take such decisions. So which is it—the Cabinet and its committees or the ministers who take the decisions?

18. We also find it surprising that there is no discussion of the widely-held and respectable view that the process of going to war in Iraq created a new convention that Parliament should be consulted over any decision that could result in the UK going to war.

19. The Manual risks being especially vague where it appeals to descriptions of “best practice” rather than cataloguing conventions or rules. For instance, in paragraph 205–8, the Manual gives consideration to the role of pre- and post-legislative scrutiny. The text states that:

“Ministers should consider publishing bills in draft for pre-legislative scrutiny, where it is appropriate to do so. Reports from the Commons Liaison Committee have identified this as good practice”.

20. Clearly, such a formulation offers Ministers a substantial amount of discretion about whether to subject draft Bills to pre-legislative scrutiny or not. Recent experience with the Parliamentary Voting System and Constituencies Bill and the Fixed-term Parliaments Bill would appear to suggest that, even for legislation with major constitutional significance, ensuring sufficient time for pre-legislative scrutiny may not be regarded as a priority by Ministers.

Are there areas in which the Cabinet Manual appears to alter existing conventions or rules, or create new ones, rather than acting as a “factual record” based on precedent?

21. It seems likely to us that considered debate about the draft Manual would reveal instances where the text appears to *crystallise* conventions—that is, it asserts the existence of a convention which had seemingly not previously been fully formed, but the existence of which can be reconciled with recently developing precedent. One example of such a tendency is the description of the Office of the Deputy Prime Minister in paragraph 84.

22. The Manual also appears to invent a new convention on the position of a Prime Minister after losing an election that is inspired by the recent controversy over Gordon Brown’s conduct in 2010 when it states that:

“The incumbent Prime Minister is not expected to resign until it is clear that there is someone else who should be asked to form a government because they are better placed to command the confidence of the House of Commons and that information has been communicated to the Sovereign.”

23. It would seem to us that this passage represents a view of what should happen in such instances in future, rather than a considered reflection of actual events in 2010 and in other instances in which elections have failed to return an overall majority for a single party in the Commons.

Are there matters that are not adequately reflected in the Cabinet Manual?

24. The foreword to the Manual underlines the specific nature of its remit, which is a focus on matters of relevance to the Cabinet, and underlines that “it would be inappropriate to include other matters, however important”. This formulation makes it somewhat difficult to judge whether specific aspects of UK governance are legitimately excluded from consideration or not. For instance, all of the following could be argued to have a bearing on the “operation and procedures of government” which the Manual seeks to summarise:

- The Electoral Commission receives only a passing reference and there is no substantial description of its functions and responsibilities.
- The Salisbury-Addison Convention (ie, that the House of Lords should not block legislation that was in a manifesto) is missing—a significant issue at the moment since it is not clear that the Coalition Agreement can be regarded as having received a mandate in the same way that a manifesto does;
- In the local government section, there is no mention of the unique status of the City of London Corporation, no reference is made to the “Central-Local Concordat” and no recognition is given to the fact that Ministers frequently establish single-purpose bodies to which local government functions in specific areas may be transferred, either temporarily or permanently.
- The devolution section does not mention devolved Greater London government, and the local government section only mentions the Greater London devolution settlement in passing.
- Significant areas of state activity are entirely missing. Policing and the security and intelligence services do not appear at all and the armed forces rate a mention only by way of formal arrangements.

25. Should the Manual come to have significant constitutional status, as seems likely, there would need to be clearer recognition both of the constitutional issues which it does not seek to cover and of those which are to some degree contested. The Manual should arguably provide an indication as to where consideration of such aspects of the constitution can be found. Some examples of core constitutional matters whose exclusion from the Manual should arguably be specifically noted:

- Citizenship law, immigration and asylum law;

- Arrangements for elections to the European Parliament, devolved institutions and local government;
- The role of bodies with a significant constitutional role, such as the Equality and Human Rights Commission, the Committee on Standards in Public Life, the Joint Committee on Human Rights in Parliament, the Northern Ireland Human Rights Commission;
- A fuller consideration of international and European treaties, including the UK's ratification of UN human rights instruments such as the International Covenants on Civil and Political and Economic, Social and Cultural Rights.

26. It is possible that the absence of such matters from the current draft render the document significantly less valuable as a guide for ministers and officials. It is also clear that were the Cabinet Manual to be regarded, at any stage, as a potential foundation for a codified constitution, this list of omissions would grow substantially

Are there matters currently included in the Cabinet Manual that should not be, or that should be given lesser prominence?

27. There are numerous sections in the draft which stray significantly beyond description to offer potentially contestable interpretations of the role or status of specific institutions or processes. For instance, paragraph 1 refers to a "sovereign Parliament, which is supreme to all other government institutions". We would question whether this statement holds in light of the UK's membership of the European Union. Elsewhere, paragraph 6 describes the Sovereign as "providing stability, continuity and a national focus". While we would not necessarily seek to dispute that there is at least some truth in this statement, we would consider it a value judgement which adds little of practical significance to the task of describing the operation of government in the UK.

28. On a more specific issue, the description of departmental boards (paragraphs 361–364) should either be made less detailed or omitted. They are a recent innovation and have not yet become a clearly embedded part of the constitution. Their inclusion in the Manual while other recent innovations, such as the use of departmental business plans and the establishment of the Office for Budget Responsibility (with only a passing reference on p.76 footnote 36), are neglected, appears incongruous.

28 January 2010

Written evidence submitted by Dr Michael Pinto-Duschinsky

1. Parts of the proposed Cabinet Manual are elementary: Lord Norton of Louth has called it a, "Janet and John introduction to British Government".ⁱ However, the document as a whole presents dangers. These far outweigh the claimed educational advantages. The Manual's function is unclear. The text slips in constitutional innovations which are ill considered and arguably partisan in their effects. Moreover, the under-the-radar manner in which some of these innovations were introduced is bound in the end to prove controversial.

2. My brief replies to the first three questions of the Political and Constitutional Reform committee are as follows:

- (1) *What are the constitutional consequences of the publication of the Cabinet Manual by the Government, and of the process of consultation being adopted?*

The Cabinet Manual is controversial in parts because it attempts to bestow legitimacy on back-door innovations whose political neutrality is open to question. It thus risks the politicisation of the role of the Cabinet Secretary and Monarch.

- (2) *Does the Cabinet Manual accurately reflect existing laws, conventions and rules?*

It is inherently difficult for a written document to do this.

- (3) *Are there areas in which the Cabinet Manual appears to alter existing conventions or rules, or create new ones, rather than acting as a "factual record" based on precedent?*

Yes. In particular the paragraphs concerning governmental formation.

3. Academic discourse on constitutional matters in the United Kingdom has tended in recent years to be dominated by proponents of reform. This camp consists of a relatively tight-knit, influential elite of experts who put forward views which are not necessarily representative and which are open to dispute.

In broad terms, the academic reformers prefer the political arrangements typical in Continental Europe to the Westminster Model.

The Political and Constitutional Reform Committee already has heard in details from experts with this approach. The Committee needs also to consider opposite views.

4. I have extensive experience as an adviser on constitutional and related matters to international organisations, governments, public authorities, political parties and NGOs in over 20 countries. In a previous British general election, I was tasked with preparing advice for one of the major parties on the consequences of a hung election which did not materialise. My experience is summarised in an endnote.ⁱⁱ

5. The background to the proposed Cabinet Manual is the advice offered in 2009–2010 by a relatively narrow group of constitutional specialists particularly from the Constitution Unit at University College London and the Institute for Government about the constitutional position in the event of a hung parliament in 2010.

The grounds for criticism of this advice are: (a) under guise of setting out existing conventions, it advocated innovations; (b) these unduly favoured the third largest political party, (c) the advice was promoted on the dubious premises that a hung parliament risked bringing the Monarch into political controversy and that it could produce uncertainties on the stock market.

The Cabinet Manual may thus be seen as an attempt to legitimate controversial novelties

6. I start by addressing in more detail the Committee's initial question:

"What are the constitutional consequences of the publication of the Cabinet Manual by the Government, and of the process of consultation being adopted?"

- (a) The claim in the Foreword to the Draft Cabinet Manual (Page 2) that the Ministerial Code provides a precedent for the Draft Cabinet Manual is unhelpful and misleading.

There is a distinction between, on the one hand, advice by the Cabinet Secretary to the Prime Minister and to members of the Cabinet about very specific matters such as the rules about their private financial interests and those of family members and, on the other hand, much more general statements bearing on the nation's constitutional arrangements as a whole.

The Ministerial Code sets out the rules on such matters of detail as whether Ministers are able to claim for their personal use "Air miles" awarded by airlines or the threshold value of gifts which a Minister is permitted to retain (currently £140). This obviously is a valuable and precise tool.

By contrast, the Manual covers a much broader field.

- (b) Equally misleading is the justification of the Draft Cabinet Manual in the same Foreword on the ground that it follows the precedent of a country "with a 'Westminster-style' system similar to the UK" such as New Zealand. Despite New Zealand's origin's, its current system cannot now be characterised as "Westminster-style" since its adoption of proportional representation means for the national legislature now means that its party system now has more in common with those of Continental Europe.

Admittedly, New Zealand had a Cabinet Manual before it moved to PR, but this is no longer relevant since the existing Manual reflects the logic of a PR system and not that of the Westminster Model. It may reasonably be supposed that the appeal to New Zealand practice is attractive to those wishing to introduce Continental European models to the UK because it does so in a less obvious manner.

- (c) As mentioned in #2 above, it is inherently difficult if not impossible for a written document to list existing, often unwritten, rules, conventions and precedents without interpreting and changing them in the process. There is a case, in the opinion of some, for the UK's adopting a comprehensive written constitution. This would reasonably require extensive public debate and adoption by a large majority of the electorate (say, two to one) in a referendum or by an equal margin in the House of Commons. If the Cabinet Manual is to be regarded as a proto-constitution, it is undesirable because it will not go through the process of review appropriate for a basic constitutional document.
- (d) Rt Hon Peter Riddell of the Institute for Government, one of those involved in its preparation, has written to assure the public that "fears the Cabinet Manual is a step towards a written constitution are unfounded".ⁱⁱⁱ The very fact that he felt it necessary to soothe public concern indicates that there is a real problem about the way its function is likely to be perceived. If the Manual is to have the radical effect suggested in Professor Rodney Brazier's memorandum to the Committee of consigning pre-2010 precedents concerning governmental formation to history, the problem concerning the Manual's status and legitimacy is even greater.

The Cabinet Secretary felt obliged to qualify the document by assurances that the Manual "is written from the perspective of the executive branch of government. It is not intended to have any legal effect or set issues in stone. It is intended to guide, not to direct". These assurances are unsatisfactory. For how can the Cabinet Secretary guarantee that it will not have any legal effect, despite stated intentions to the contrary?

If it is not intended to "direct", and it is merely written "from the perspective of the executive branch of government", what is its value? The Cabinet Secretary's formulation serves as an emollient but at the expense of storing up problems for the future.

That the document is to be "owned" by the executive alone is a weak excuse for escaping full parliamentary debate and approval.

Lack of clarity about the status of the Manual means that its contents too must inevitably be unclear.

If the objective is supply to incoming Ministers an informal constitutional guide without any formal status and without introducing anything new, the project of a Manual is trivial.

As Norton has noted, the Foreword makes the “quite remarkable” statement that “... there has never been a single source of information on how the Government works and interacts with the Sovereign, Parliament, the judiciary, international organisations, the Devolved Administrations and local government.” He comments: “I know Whitehall mandarins are supposed to be a little detached, but has no senior civil servant ever set eyes on an introductory text on British politics?”^{iv}

In fact, senior mandarins are anything but naïve and it must be supposed that the objective of the Manual is less innocent than suggested.

- (e) The form of “consultation” that has been adopted may be the worse either than having no consultation or a much fuller consultation. Since the document arguably changes the operation of the British Constitution, the consultation method is inappropriately obscure. It supplies a fig leaf of consultation as an easy but inadequate way to legitimate the proposed document.
- (f) The Foreword to the Manual gives an inadequate explanation of its rationale when it refers to the “uncertainty” of some existing conventions and rules.

Of course there are uncertainties and there always will be. This is for the simple reason that it is impossible to anticipate all the eventualities of public life by setting out the precise course of action in every conceivable future circumstance. As far as the past is concerned, there is no shortage of lengthy constitutional commentaries. The attempt to shoe horn every precedent, convention, rule and practice into a relatively short document leads to statements which either will be vague generalisations or, if more precise, will risk being the cause of dispute.

- (g) If clarification is the objective, the Manual frequently fails to provide it since it includes qualifications and vague terms. As per #362, oversight of arm’s length bodies must be “appropriate”. It would be surprising to expect anything else. According to #396, a department should consult the Cabinet Secretary “in good time”—whatever that means. In #399 the prohibition listed applies only “as a general rule” which needs to be “balanced” against other considerations. And so on.
- (h) Since 1997, there have been many reforms in the way government and politics in the UK is constituted. In few cases have their implications been set before the public or even before the House of Commons in an adequate manner. Greater caution is required about further initiatives such as the Cabinet Manual.

7. In further response to the committee’s first question, the consequence of initiatives taken by the Cabinet Secretary has been to bring him into the limelight and into political controversy. As Riddell reported, the Cabinet Manual is:

“very much the personal initiative of Sir Gus O’Donnell, the Cabinet Secretary”.^v

There has been grumbling about him, in particular in Conservative Party quarters but reportedly also in parts of the Labour camp. The lack of consensus about his initiatives has centred on the arrangements he initiated relating to government formation following a hung election. Several paragraphs of Chapter 2 of the Cabinet Manual will give rise to continuing concern since they simply do not set out the traditions of the British Constitution. Instead, they infiltrate novel practices whose political neutrality is questionable.

8. There is a crucial distinction between two different procedures for government formation following a hung election: First, the traditional procedure according to which the sitting premier resigns if he or she is unable to form a government and then the leader of the alternative party with the largest number of seats then is called to Buckingham Palace so that he or she can then try to do so. This may be called the “serial” procedure. Second, there is a procedure typical of countries with systems of proportional representation. According to this, procedure the sitting premier remains in office even if he or she is unable to form a government. The leader of the Opposition is expected to initiate discussions with smaller parties and largely to agree the terms of a formal “coalition agreement” prior to receiving and accepting an invitation from the Monarch to attempt to do so.

The second of these procedures, which may be called the “auction” procedure, is to the advantage of smaller parties. In the British context, the auction procedure clearly benefits the Liberal Democrats because it enables the party to play the two largest ones off against each other in order to gain concessions, especially on electoral reform.

9. By advocating the second of these procedures, the Cabinet Manual not only seeks to legitimate something unknown before 2010, it also acts to the advantage of the Liberal Democrats.

Clearly, a smaller “pivot” party (to use Bogdanor’s term) stands to gain if it is able to play off the two main parties against each other. This was the tactic recommended to the Liberal Democrat leader by Professor Hazell shortly before the 2010 poll.^{vi} In this article in the Guardian, Hazell exchanged the role of constitutional expert for that of Liberal Democrat adviser. The piece was titled, “A memo to Nick Clegg: In a hung parliament the Lib Dems could at last end the two party system. So, Nick, here’s what you should do.” The core strategy was to create an auction situation where the two main parties bid against each other on the issue of electoral reform. Hazell advised Clegg to:

“conduct simultaneous negotiations with both parties, to see which party is willing to offer the better deal”.

The effects of the auction situation in 2010 are open to dispute. According to some authoritative commentators, such as Norton and Riddell, the outcome was determined by electoral arithmetic, the personal chemistry between David Cameron and Nick Clegg and Cameron's political judgement that a comprehensive coalition agreement with the Liberal Democrats was in the Conservatives' interest.

There are grounds, however, for suggesting that Cameron's vital concession on an electoral reform referendum was the direct result of the "auction" procedure which had been facilitated and encouraged by the Cabinet Secretary in concert with the constitutional reformers.

Even if it is accepted that the auction procedure was not decisive in determining the emergence of the Conservative-Liberal Democrat coalition agreement in 2010, it remains the case that the auction procedure apparently favoured by the Draft Cabinet Manual is likely after any future hung elections to favour the "pivot" party. And it is, after all, potential future situations which are the subject of Chapter 2 of the Manual.

10. Essential to the simultaneous procedure is that the sitting premier should not resign until talks about a coalition agreement between other political parties are well advanced. According to #50 of the Draft Cabinet Manual:

"The incumbent Prime Minister is not expected to resign until it is clear that there is somebody else who should be asked to form a government because they are better placed to command the confidence of the House of Commons and that information has been communicated to the Sovereign."

There are several objections to this formulation.

- (a) It is ambiguous. In its weak form, it states correctly that an incumbent premier cannot be required to resign until he or she has been defeated in the house of Commons. However, the formulation implies something stronger, namely that the incumbent premier who feels unable to form a government following a hung election is "expected" to delay resigning until a group of other parties has hammered out a coalition agreement.

That the latter interpretation is the one intended emerges from a press article written shortly before the 2010 election by Hazell. He had been closely involved with the Cabinet Secretary in the Cabinet Manual project and one of his staff, Dr Ben Yong, had been seconded in February 2010 to the Ministry of Justice to work on the manual.

Hazell wrote on 3 May 2010, shortly before the 2010 poll, that, in the event of a hung parliament in which Gordon Brown received considerably fewer seats than the Conservatives, Brown would have a:

"duty to stay in office until it becomes clear which party or combination of parties can command the most support in the new Parliament."

He then went even further:

"... the Queen would not wish to accept his resignation until it was clear who could command confidence in his place."^{vii}

- (b) The example of 1929—when a sitting premier headed the defeated party in a hung election as in 2010—does not accord with the stronger meaning of #50 of the Cabinet Manual, certainly not as interpreted by Hazell. The incumbent Prime Minister, Stanley Baldwin was under no "expectation" and under no "duty" to delay his resignation. He:

"consulted constitutional experts who assured him that it was in the Prime minister's hands to do as he chose"

Baldwin duly went to Windsor Castle without delay to tender his resignation to King George V.^{viii}

- (c) #50 contrasts with the position as set out in a Standard Note produced in December 2009 by the Parliament and Constitution Centre of the House of Commons^{ix} and by the formulation in a standard constitutional law text by AW Bradley and KD Ewing.^x

"Where after an election no one party has an absolute majority in the House ... the Prime Minister in office may decide to wait until Parliament resumes to see whether he or she can obtain a majority in the new House with support from another party ... or he may resign without waiting for Parliament to meet (as Baldwin did in 1929 and Heath in 1974). When he or she has resigned, the Queen will send for the leader of the party with the largest number of seats ..."

Only when the leader of the Opposition fails to form a government may the Queen, according to Bradley and Ewing, then initiate coalition discussions between the parties.

Bradley and Ewing make no mention of any "expectation" that the incumbent premier delay resigning to allow coalition discussions to proceed.

- (d) It is understood that after the 2010 election, the Cabinet Secretary and the Queen's Private Secretary at one point asked Gordon Brown to delay submitting his resignation to the Queen. The constitutional basis for this is uncertain. In my opinion, a premier's decision to resign after a hung election should purely be a political matter and neither the Cabinet Secretary nor the Palace should seek to influence its timing.

If #50 is intended to mean no more than that the incumbent Prime Minister is entitled after a hung general election to wait until the House of Commons has met before submitted his or her resignation, the wording should be altered to this effect.

If the intention—as Brazier suggests in his memorandum—is to convey a sense of duty on the premier NOT to resign, then the constitutional basis for this needs to be justified.

11. According to #49:

“Where a range of different administrations could potentially be formed, discussions will take place between political parties on who should form the next government.”

This absolute formulation involves a change in the British Constitution. After the 1929 election, for example, Baldwin did not enter into any discussion with the Labour or Liberal Parties. He merely resigned, as he was fully entitled to do.

According to established constitutional practice, the Queen may invite a party leader on an exploratory basis to attempt to form a government. The idea that coalition negotiations should be well advanced before the Queen issues such an invitation is a controversial innovation.

12. According to # 51:

“Any negotiations between political parties over the formation of a stable government need to be as well informed as possible ...”

Though this wording appears to express a truism, it incorporates assumptions that are new to British politics—namely that the aim after a hung election should a formal coalition agreement including policy details based partly on the advice of civil servants.

13. The caretaker conventions mentioned in #54 are a novelty. They are based on the assumption of a fairly long interregnum during which different parties hammer out a detailed coalition agreement. This reflects the Continental European rather than the traditional UK situation.

14. There has been a concerted attempt by the constitutional reformers to manage public expectations and to “educate” the media to love coalitions. This is not a legitimate objective of a Cabinet Manual. It should be for politicians, political parties, the press and the public, not civil service mandarins, to debate the relative merits of the Westminster Model and that of Western European countries.

As far as “expectations” (as distinct from constitutional rights and obligations) are concerned. It may reasonably be argued that the expectation was that Gordon Brown should have recognised the verdict of the voters and resigned very shortly after the results of the 2010 poll came in. Certainly, he had the right to await defeat in the House of Commons or to soldier on in the hope that he could cobble together a bare multi-party coalition. However, the principal function of his remaining was to allow the Liberal Democrats to secure from the Conservatives the concession on an electoral reform referendum.

15. Far from insulating the Queen from political pressures, the actions of the Cabinet Secretary in pressing before the 2010 election for what effectively were new rules about government formation in a hung parliament arguably risked doing the opposite. If, as has been suggested, the new arrangements were potentially to the advantage of the third party, they thereby were partisan. For this reason, the Palace should not have been expected to be involved in them.

16. The manner in which the Justice Committee of the House of Commons was involved in February 2011 in rushed hearings on the preliminary draft of Chapter 2 of the Cabinet Manual is a matter of further concern. According to the authors of *The British General Election of 2010*, was merely “a vehicle for the Cabinet Office”.^{xi}

ENDNOTES

ⁱ nortonview.wordpress.com/2010/12/22/the-draft-cabinet-manual

ⁱⁱ I have been a constitutional advisor to the Constitutional Reform Commission in Fiji (on behalf of the Commission, the United Nations and the UK Government), to the ill-fated Constitutional Review Commission in Zimbabwe, to the Supreme Rada in Ukraine, and the Civic Democratic Party in Czechoslovakia. I have been a consultant on electoral and related matters to the United Nations, World Bank, OECD, European Union, Council of Europe, Commonwealth Secretariat, Inter-American Development Bank, the United States Agency for International Development, Canadian Royal Commission on Electoral Reform and Party Financing, the Canadian International Development Agency, the National Endowment for Democracy and International IDEA. I have advised governments and public bodies on related subjects in Albania, British Virgin Islands, Bulgaria, Chile, Colombia, France, Ireland, Kenya, Kosovo, Lithuania, Macedonia, Mauritius, Nigeria, Philippines, Poland, Russia, Senegal, Serbia, Tanzania, and Ukraine. I have been an expert legal witness in the UK and South Africa, a consultant to the Policy Planning Staff of the Foreign & Commonwealth Office, Cabinet Office, Home Office, the Department for International Development and the Committee on Standards in Public Life. I was a founder governor of the Westminster Foundation for Democracy and a founder member of the steering committee of the World Movement for Democracy. I am president of the International Political Science

Association's research committee on political finance and political corruption, member of the academic panel of the Committee on Standards in Public Life, a director of the International Foundation for Electoral Systems and a former research fellow of Merton College, Oxford, Pembroke College, Oxford, and Brunel University.

iii www.institutefor-government.org.uk/blog/1398/why-fears-the-cabinet-manual-is-a-step-towards-a-written-constitution-are-unfounded.

iv nortonview.wordpress.com/2010/12/22/the-draft-cabinet-manual

v Ibid.

vi 26 April 2010. See also his article in the Mail of 3 May 2010.

vii Mail Online 3 May 2010.

viii See Keith Middlemass and John Barnes, *Baldwin: a biography*. London: Weidenfeld & Nicolson, 1969, page 527.

ix Lucinda Maer and Oonagh Gay, "The Royal Prerogative." SN/PC/03861, 30 December 2009, page 5. Their formulation mirrors that of Bradley and Ewing.

x *Constitutional and Administrative Law*: Harlow: Pearson Longman, 14th edition, pages 247–8.

xi Page 205.

ISBN 978-0-215-55714-8



Distribution by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich NR3 1GN

General enquiries: 0870 600 5522

Order through the Parliamentary Hotline *Lo-call* 0845 7 023474

Fax orders: 0870 600 5533

E-mail: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Parliamentary Bookshop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders: 020 7219 3890

General enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: bookshop@parliament.uk

Internet: <http://www.bookshop.parliament.uk>

TSO@Blackwell and other Accredited Agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

Tel 028 9023 8451 Fax 028 9023 5401

© *Parliamentary Copyright House of Commons 2011*

This publication may be reproduced under the terms of the Parliamentary Click-Use Licence, available online at www.nationalarchives.gov.uk/information-management/our-services/parliamentary-licence-information.htm

ISBN 978 0 215 55714 8