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THE CABINET MANUAL AND THE WORKING OF THE BRITISH CONSTITUTION

THE HIDDEN WIRING EMERGES

REPORT

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EXECUTIVE SUMMARY

Genesis

- The origins of the *Cabinet Manual* are threefold:
  - the 'written constitution' project pursued by Gordon Brown in the late stages of his premiership
  - the desire to introduce an equivalent to the document already used in New Zealand, and
  - the need to establish a clear, publicly available set of ground rules for dealing with inconclusive general elections.

  The third of these provided the most powerful imperative.
- The *Cabinet Manual* is intended to provide efficiency, effectiveness and transparency, which in turn means communicating with two different audiences: the executive and the wider public. It is its public role that is the most significant feature of the manual.
- However, it eschews inspirational language – it is without a single sentence that sticks to the Velcro of memory.

Significance

- The manual can be seen as a manifestation of a process that, over the past 20 to 30 years, has involved an increasing but non-statutory codification of the operation of UK governance. It is also a qualitatively new entity: a 'code of codes'. It is a code in its own right which, at the same time, provides a contextual framework within which a number of other codes are placed, alongside other components of the UK constitution such as acts of Parliament.
- Although it is an executive-owned document, the manual is more than simply an operating guide for the London-based executive, extending widely to issues such as the role of supranational institutions, devolution settlements, the upholding of human rights, Parliament, and the nature of UK democracy. In fact, the manual provides the broadest description of the constitutional landscape to be found in any single official document yet published in the UK. But the manual is not – and does not purport to be – the expression of a fully codified UK constitution. Moreover, the *process of codification* to which the manual is a significant contribution should not be confused with *full codification* as it might generally be understood from an international perspective.
- Nevertheless, while the manual may not *be* the constitution, it will impact upon it.
- It is inappropriate for any one player to seek to define conventions of the UK's constitutional settlement unilaterally, as the executive arguably is doing through the manual. In doing so, it may undermine the effectiveness of those conventions as instruments of political management, which draws in part on their nature as shared understandings. One way of avoiding this outcome would be for the text to acknowledge more explicitly that it does not claim

to present the final word on the nature of UK constitutional conventions, but is presenting the current executive view of them.

Content

- While the wide-ranging nature of the manual is not in itself a problem, it has been associated with some suggestions, including about Parliament and the judiciary, the inclusion of which in an executive document might be regarded as presumptuous.
- The contents of the document as a whole might be differentiated in terms of the source of the authority on which they draw. Here, the primary distinction is between law and convention, and it is clear that conventions make up the larger set. Because of this, it is of vital importance to the quality of the document as a whole that these conventions are approached in a satisfactory fashion.
- To assist in an appreciation of the manual – and an assessment of its accuracy – the government should provide in every case the events and reasoning underlying the conventions that are identified.
- The best means of demystifying constitutional precedents would be for the government to publish all those editions of the Cabinet Office's *Precedent Book* not currently in the public domain.[1] Possibly, this could be 'weeded' for any personally sensitive contents before being publicly issued.
- One concept referred to in the manual but perhaps not dealt with in the depth its importance requires is that of parliamentary sovereignty.
- A chapter or section is required that deals with security and intelligence and provisions for its oversight as established by the Intelligence Services Act 1994, as well as with military and other emergencies.
- The manual should make clear whether the government feels bound by the House of Commons resolution of May 2007 which described it as 'inconceivable' that any government would depart from the precedent set in 2002 and 2003 over the Iraq conflict in 'seeking and obtaining the approval of the House for its decisions in respect of military action', subject to contingencies.
- There is a need to provide a description of the Civil Contingencies Act 2004, the UK equivalent to a constitutional 'emergency powers' clause.
- The executive view of the conventions applying to the relationship between the House of Commons and the House of Lords should be described, as should the way in which the definition of a 'money bill' is applied in practice. The government should clarify whether it believes there are legal or other limits on the type of measures that could be forced through by the Commons using the Parliament acts.

1 For earlier declassified editions of the *Precedent Book* see The National Archives CAB 181 'Cabinet Office: Precedent Books'. http://www.nationalarchives.gov.uk/catalogue/DisplayCatalogueDetails.asp?CATID=59894&CATLN=3&FullDetails=True

The future of the *Cabinet Manual*

- While the UK manual has so far received relatively little attention from journalists, it is likely that in time it will similarly come to be treated by the media as *a* or even *the* primary source of information on the workings of UK government. It may even come to be considered as a surrogate constitution – even though, as we argue in this paper, it is not the real thing.
- It is also likely to be plundered by students and academics from various disciplines. The manual may become currency in political disputes, being used both to condemn and justify particular stances and courses of action.
- The manual will continue to generate discussion about the constitution, perhaps encouraging future change, which would make it much more than merely a passive, descriptive document. As well as stimulating constitutional developments, the arrangements encapsulated in the manual may come to be challenged by them.
- The manual could become not only an instigator of but also a barrier to change: it might prevent the full acceptance of an understanding that it does not include, or prolong the life of another that it continues to cite in its text. Furthermore, the discreet way in which conventions have often developed in the UK will be inhibited if their legitimacy or expiry depends to a significant extent upon recognition in this official public document.
- This possibility, alongside the public awareness of the UK settlement that the manual might stimulate, could contribute to the development of a British 'constitutional consciousness', involving wider and fuller knowledge of what our arrangements are, more extensive discussion of what they should be, and a more deliberate, overt process for change.
- The manual could be used in judicial review proceedings, to challenge decisions or actions that appear not to take the manual into consideration.
- The manual must be subjected to the maximum scrutiny in order to ensure that each new edition is as accurate and up-to-date as possible. An existing parliamentary select committee (or specially convened joint parliamentary committee of some kind) should take on the role of conducting annual assessments of the document.

INTRODUCTION

> **'[The British Constitution] presumes more boldly than any other the good sense and good faith of those who work it'**
> WE Gladstone, 1879[2]

Writing about the great showdown between the House of Commons and the House of Lords over David Lloyd George's 'People's Budget' a century ago,[3] George Dangerfield in his celebrated *The Strange Death of Liberal England*, declared:[4]

> **'To reform the House of Lords meant to set down in writing a Constitution which for centuries had remained happily unwritten, to conjure a great ghost into the narrow and corruptible flesh of a code. For this constitution … was nowhere set forth in an Instrument. It has no visible body …'**
> G Dangerfield, 1936

It has now, compared to its 1911 form or even to that which existed prior to 1997 and the great swathe of constitutional statutes steered through Parliament by the Blair and Brown governments: devolution to Scotland, Wales and Northern Ireland, as well as the Human Rights Act 1998, Freedom of Information Act 2000 and Constitutional Reform and Governance Act 2010.[5]

There are those who discern in the Coalition's draft *Cabinet Manual*[6] of December 2010 the partial outlines of what might become a Dangerfieldian 'instrument', the prototypical nuclear core of what might become a largely written British Constitution. By contrast, we think it is more a question of the hidden wiring[7] of the constitution beginning to emerge – this is in itself a substantial matter and a considerable development as yet not widely appreciated within the political class, let alone what the American political scientist, Gabriel Almond, has called the 'attentive public'.[8]

Consolidated commentary on the draft *Cabinet Manual*
In drafting this commentary the authors have drawn on various sources in addition to their own research. These include the House of Commons Political and Constitutional Reform and Public Administration Select (PASC) committees, House of Lords Constitution Committee inquiries and submissions made to those inquiries. The authors are grateful to

2 Gladstone 1879: 245
3 For a lively recent account see Hattersley 2010
4 Dangerfield 1936: 34–35
5 The Constitutional Reform and Governance Act 2010 – among other measures – provided for the first time a statutory basis for the principle of a non-partisan career civil service.
6 Cabinet Office 2010a
7 For an exposition of this concept of the discreet architecture of the British constitution, see Hennessy 1996.
8 Almond 1950: 138

BOXED TEXT CONTINUED

Professor George Jones for supplying them with his submission to the Cabinet Office on the draft manual. The precise selection of material is the authors' own.

Declaratory statements
The House of Commons Committee on Political and Constitutional Reform has identified a number of 'declaratory principles, more in keeping with a written constitution than a technical manual'. They include:

(Paragraph 1) 'The UK is a parliamentary democracy …'

(Paragraph 38) '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.'

(Paragraph 186) 'Members of the House of Commons are directly elected by universal suffrage of the adult population of the United Kingdom.'

Inaccuracies or areas in need of clarification
The House of Lords Constitution Committee has noted that in descriptions of Parliament, the meaning of 'the House' is sometimes unclear and that on at least occasion the word 'Parliament' is used when the reference is to the Commons only.

There are various references to the doctrine of parliamentary sovereignty (eg paras 1, 3, 4, 9, 286) but a more nuanced definition is required than exists in the draft document.

There is a need for the manual to set out clearly whether it regards Parliament as bound, in practice, to reverse decisions made by referenda over devolution and continued participation in European integration only subject to approval from further referenda.

Paragraph 6 states that: 'The Sovereign … is entitled to be informed and consulted, and to advise, encourage and warn ministers.' In the right to be 'informed' and to 'advise', the monarch has seemingly acquired two new rights, in addition to those observed by Walter Bagehot, who noted in 1867 that 'the sovereign has … three rights – the right to be consulted, the right to encourage, the right to warn'.

Paragraph 19 notes that: 'Where a bill has completed all of its Parliamentary stages, it cannot become law until the Sovereign has formally approved it, which is known as Royal Assent.' It does not record that Royal Assent has not been withheld since 1707.

BOXED TEXT CONTINUED

Paragraph 56 states that: '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 dissolution', but does not set out what these 'circumstances' are (this process for triggering general elections will be superseded by legislation currently passing through Parliament).

Paragraph 77 makes the vague statement that the Prime Minister will 'usually take the lead on significant matters of state'.

The introduction to Chapter 4, on 'Collective Cabinet decision-making', includes the following confusing and possibly contradictory statement:

> **'Cabinet and Cabinet committees are the only groups formally empowered to take binding decisions on behalf of the Government. Cabinet and Cabinet committees consist of government ministers. Only they – since they are accountable to Parliament – can take binding decisions.'**

In fact, Cabinet and Cabinet committees are not 'formally empowered' to do anything, although the statement that ministers can take binding decisions is correct. It is later correctly stated (para 139) that:

> **'Cabinet is established by convention … Cabinet does not have specific terms of reference or powers laid down in statute.'**

Chapter 4 refers more than once to the possibility, allowed for in the Ministerial Code (para 2.1), that collective Cabinet responsibility may be 'explicitly set aside' (paras 134, 136, 168). It should note that this occurrence has been a rare one, taking place on only three occasions prior to the formation of the present Coalition government in 2010.

Paragraph 183 should emphasise that the Cabinet Secretariat is primarily responsible for supporting collective Cabinet government itself, rather than just the Prime Minister, Deputy Prime Minister and chairs of Cabinet committees in their management of collective Cabinet government.

Paragraph 248 should clarify whether the government believes there is a convention – or one developing – that it should accept and act to remedy declarations of incompatibility under section 4 of the Human Rights Act 1998 (at least after appeals have failed).

BOXED TEXT CONTINUED

Paragraph 295 states that: 'Local authorities are statutory bodies created by Acts of Parliament.' This depiction is legally accurate but ahistorical – local government of some form pre-dates Parliament.

Paragraph 395 should clarify whether a convention is developing whereby decisions to use the so-called 'ministerial veto' to block releases of material under section 53(2) of the Freedom of Information Act 2000 are taken at full Cabinet. The authors understand this approach was employed for both uses of the veto to date.

Apparent new departures or areas of uncertainty or controversy
Paragraph 30 states that: 'Cabinet is the executive committee of the Privy Council' – an issue over which there is a longstanding dispute. For instance, William Gladstone wrote in 1878:[9]

> **'The Cabinet wields, with partial exceptions, the powers of the Privy Council … Yet it has no connection with the Privy Council, except that every one, on first becoming a member of the Cabinet, is, if not belonging to it already, sworn a member of that body.'**

Paragraph 46 states that if a Prime Minister resigns following an inconclusive general election, the monarch will invite the person seemingly 'most likely to be able to command the confidence' of the Commons to form a government. Some commentators have argued that the actual convention in circumstances of a House of Commons with no overall majority is for the leader of the largest opposition party specifically to be given the first opportunity.

Paragraphs 48 and 50 on the expectations surrounding the possibility of the Prime Minister resigning after an inconclusive general election introduce some potentially contested concepts.

Paragraphs 51 and 52 seem to establish a new rule, that the Cabinet Secretary could be authorised to support cross-party negotiations following the election of a Commons without a single-party majority. (These paragraphs represent a reworded version of stipulations included in an earlier draft issued before the 2010 general election.)

Redundant content
Many of the descriptions of international organisations in Chapter 9 could be removed or reduced.

9 Gladstone 1879: 240–241. First published in Gladstone W (1878) 'Kin beyond sea', *The North American Review*, September 1878.

BOXED TEXT CONTINUED

Paragraphs 361–364 contain an excessively detailed description of departmental boards.

Inappropriate content
Footnote 8, to paragraph 49, quotes the current Deputy Prime Minister speaking prior to the 2010 general election, stating that the party with 'the most votes and the most seats' has the 'first right to seek to govern' if the contest produces no overall majority in the Commons. This is unnecessary and potentially contradictory, and should be removed. The government has now agreed to do so.[10]

Some statements are made which are inappropriately presumptuous given that the document is avowedly written by and from the perspective of the executive. They include references to the legislature:

> **'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'**
> Para 116

And the judiciary:

> **'Ministers' decisions, and the process by which they exercise (or fail to exercise) their powers, can be reviewed by the High Court, although the courts will usually hesitate to intervene in cases where they accept that, because of the subject matter (entering into treaties, the defence of the realm, the grant of honours etc), the decision-maker is better qualified than the Court to make a judgment.'**
> Para 230

Omissions
In general, referencing is not as thorough as it should be, particularly in establishing precedents to justify conventions, such as in paragraphs 43–45 on Commons confidence in the government.

There is no mention of departmental business plans and how they are devised and implemented.

10 Cabinet Office 2011: 6

BOXED TEXT CONTINUED

A full description is lacking of all the commitments the government has made about the preparation and presentation of legislation and regarding the conclusions of relevant parliamentary reports specifying the standards expected of the government, including in areas such as facilitating pre-legislative scrutiny and the inclusion of 'Henry VIII' clauses in bills (which enable primary legislation to be amended or repealed by subordinate legislation). In a recent report the Lords Constitution Committee made recommendations about processes for constitutional change, and that these be set out in the manual. The government has agreed there is a need to provide 'more detail' in these areas.[11]

There is no mention of the existence of any convention about consulting Parliament on committing British forces to potential or actual hostile action.

A description of the intelligence agencies, including their statutory basis and provisions for their oversight is lacking, as is a proper account of the Civil Contingencies Act 2004 (the equivalent to an 'emergency powers clause' of a codified constitution) and a description of the practice of establishing 'war cabinets' to deal with military emergencies, including the possibility that the Chancellor of the Exchequer may not be included.

Although paragraph 257 deals with the need to uphold judicial independence, it does not acknowledge the specific convention believed by some to exist that ministers do not publicly criticise particular judicial decisions that have been made.[12]

Paragraph 187 describes how the 'House of Commons has primacy over the House of Lords'. But this paragraph makes no mention of the 'Salisbury–Addison' convention, a key component of the relationship between the two Houses, or of the government's view of its status in current circumstances, nor of other associated conventions regarding the passage of government legislation that may exist, even though there is a description of such doctrines in the recent white paper on House of Lords reform (the government seems intent on correcting these omissions[13]). Nor does the manual provide an account of how the definition of a money bill, as contained in the Parliament Act 1911, is applied in practice. Finally, paragraph 187 fails to note that the House of Lords retains an absolute veto, under the Parliament Act 1911, on legislation extending the duration of a Parliament beyond five years, and does not clarify whether the

11 Cabinet Office 2011: 6

12 This point was made during discussion at an event on the Cabinet Manual held by the Constitution Unit at the Institute for Government, 24 February 2011.

13 Cabinet Office 2011: 6

BOXED TEXT CONTINUED

government believes there are legal or other limits on the type of measures that could be forced through by the Commons using the Parliament acts.

The section on devolution in Chapter 8 does not include a description of the Greater London Authority. There is no mention of statutory provision permitting Northern Ireland to detach from the UK, and stipulating how it may do so. Nor is there a description of the civil servants working for devolved bodies.

In the section on local government in Chapter 8, there is no mention of the European Charter of Local Self-Government, signed and ratified by the UK, nor of the Central–Local Concordat, from 2007, nor of the Local Government Act 2000.

The Office for Budget Responsibility should receive a clearer depiction than the passing reference in footnote 36 to paragraph 215.

While reference is made to the Seven Principles of Public Life[14] (paras 120, 281), there is no account given of the Committee on Standards in Public Life and its important constitutional role. Other bodies notable for their absence from the manual include the House of Lords Appointments Commission, the Judicial Appointments Commission and the Equality and Human Rights Commission.

The *Code of Practice on Consultation*[15] is not mentioned, despite the draft manual claiming (p7) that the consultation period to which it is subject accords with 'best practice'.

14 See the website of the Committee on Standards in Public Life: http://www.public-standards.gov.uk/About/The_7_Principles.html

15 BERR 2008

1. GENESIS

Public notice was first served of the intention to produce the *Cabinet Manual*[16] on 2 February 2010. On this day, at the Royal Society of Arts, the then-Prime Minister Gordon Brown delivered – at the invitation of IPPR – a speech entitled 'Towards a New Politics'.[17] In covering this event, the media chose to focus on (and were presumably pointed towards) his confirmation that the government would be introducing into the Constitutional Reform and Governance Bill then passing through Parliament clauses to provide for a referendum on whether to adopt the alternative vote (or AV) system for parliamentary elections. But in a more neglected part of the speech, Brown – who had already become the first Prime Minister to discuss and personally endorse the idea of a codified or 'written' UK constitution – described how:

> **'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.'**

Brown was almost certainly referring here to what became the *Cabinet Manual*; and explicitly portrayed it as a stage in a process that might lead to a fully codified UK settlement. He went on:

> **'If we are to go ahead with a written constitution we clearly have to debate also what aspects of law and relationships between each part of the state and between the state and the citizen should be deemed 'constitutional'. I can therefore also announce today that a group will be set up to identify those principles and I hereby issue an invitation to all parties to be represented on this group. And if we are to decide to have a written constitution the time for its completion should be the 800th anniversary of the signing of the Magna Carta in Runnymede in 1215.'**

This latter, more grandiose, set of objectives perished even before the change of government that followed the 2010 general election, because cross-party cooperation – unsurprisingly, at this stage in the parliamentary cycle – could not be obtained.[18] But the plan to produce 'a single written document' setting out 'the way central government operates' survived. Why? Seemingly because, alongside Brown's plans for a 'written constitution', it was motivated by other imperatives.

During the course of the previous year it had become increasingly apparent that the forthcoming general election was more likely than any since at least 1992 to

16 Title used here on the assumption that it is retained for the final publication.
17 Brown 2010
18 Authors' private information

produce a so-called 'hung parliament' – that is a House of Commons without a single-party majority. Over 5–7 November 2009, a conference held by the Ditchley Foundation, with a wide range of high-powered figures from around the world in attendance, convened to discuss 'Managing the machinery of government in periods of change'. One of the views that emerged, as described in a note by the director, was that: 'All predictable eventualities surrounding a hung parliament should be studied with some urgency, with clear guidelines written for the principal players, to the extent possible.'[19] It was probably this urgent need that was the single most important reason for the creation of the UK *Cabinet Manual*.

But the desire to clarify understandings around a possible 'hung' Parliament does not fully explain why a publication as wide-ranging as the *Cabinet Manual* was considered necessary. This solution was arrived at partly thanks to efforts of the Constitution Unit at University College London (and in particular its director, Professor Robert Hazell) and the Institute for Government (including its senior fellow, the distinguished political journalist Peter Riddell, and research fellow Dr Catherine Haddon) in promoting the potential value of a UK equivalent to the New Zealand *Cabinet Manual* both publicly and in private discussions with the Cabinet Office.[20] In addition to the work of this group, it seems the attention of the Cabinet Secretary, Sir Gus O'Donnell, had also been drawn to this document by staff in the New Zealand Cabinet Office.

The New Zealand *Cabinet Manual*[21] (until 2001 known as the 'Cabinet Office Manual') has been described as providing '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.'[22] A UK version of the *Cabinet Manual* would come to serve a purpose not as ambitious as that intended by Brown, but its scope would be broader than simply helping to clarify the approach to a hung parliament. The draft *Cabinet Manual* describes itself as:[23]

> **'[I]ntended 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.'**

Professor Hazell and Dr Ben Yong of the Constitution Unit have justified the manual as a means not only of dealing with 'the threat of uncertainty caused by a hung parliament' but also helping to fulfill 'the need for more efficient and effective government, and greater transparency'.[24]

19 Director 2009; see also Hennessy 2010: 3–13
20 See Riddell and Haddon (2009) and Hazell and Paun (2009), particularly Chapter 6 and Appendix A
21 New Zealand Cabinet Office 2008
22 Hazell and Riddell 2010: 5
23 Cabinet Office 2010a: 3
24 Hazell and Yong 2011

Serving efficiency, effectiveness and transparency meant in turn communicating with two different audiences. In the words of Sir Gus, speaking about the manual in February this year: 'It is written primarily to provide a users' guide for government, but I hope that it will also be a useful reference tool for everyone else'.[25] It is attempts to perform the latter function which have led Lord Powell of Bayswater – former Foreign Affairs Private Secretary to Margaret Thatcher and John Major at Number 10 – to remark, perhaps unkindly, that: 'Quite a lot of it, to be honest, is a bit of a Janet and John guide to the Queen and so on. In that sense it is almost like a guidebook for foreign tourists.'[26] However, as we will argue, it is its public role that is the most significant feature of the manual, since most of its contents were seemingly already available within Whitehall, though spread throughout various different documents.

Here a distinction can be drawn with the origins of the New Zealand Cabinet Manual. In 2006, Rebecca Kitteridge, Deputy Secretary of the (New Zealand) Cabinet described how:[27]

> **'In 1979 it was a restricted document with very limited distribution. In 1991 it became available to all public servants as a loose-leaf publication. The 1996 bound edition was made available for public purchase … That edition became the first online version, in 1998.'**

While the New Zealand manual was initially intended solely for the consumption of an inner group within an inner circle, with access gradually expanding over time, the UK version is intended from the outset to be universally available.

With the immediate concern of a possible 'hung parliament' in mind, a draft of the chapter from the manual on 'Elections and Government Formation' was submitted to the House of Commons Justice Committee on 23 February 2010.[28] This text was produced within the Cabinet Office, with consultation with a small number of experts – this technique was also used for the drafting of the full manual that was published on 14 December 2010.

The process up to this point might be seen as a remarkably – or perhaps typically – casual exercise of British constitutional delineation. One of the present authors, as both a participant in the Ditchley Conference and an informal consultant to the Cabinet Office on the text, told the House of Commons Political and Constitutional Reform Committee (PCRC):[29]

> **'Out of that syndicate discussion [at Ditchley] there was a sort of recommendation – although Ditchley doesn't do that – that**

25 O'Donnell 2011
26 House of Lords Constitution Committee, oral evidence session, 2 February 2011, Q46.
27 Kitteridge 2006: 10
28 Then billed as Chapter 6, in the full draft subsequently produced it became Chapter 2.
29 PCRC 2010: Ev 5

> **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 [author of *The Governance of England*, first published in 1904] so that they are made more explicit.'**

A 12-week consultation was held on the document, closing on 8 March 2011. Three parliamentary committees – the PCRC and PASC in the House of Commons and the Constitution Committee in the House of Lords – have held inquiries. It was initially intended that the Cabinet's Home Affairs Committee would endorse a final version of the manual later in the year, though whether it will be approved by Cabinet is now seemingly being reconsidered.[30] It will be sent to all ministers and their private offices and published online. Sir Gus says that he expects it will be 'updated as required and then endorsed by each new Cabinet after a General Election', and that the executive will 'own' the manual.[31]

The remainder of this paper considers the significance of the manual, assesses its content, and speculates about the role it may play in the future.

30 Cabinet Office 2011: 3–4
31 O'Donnell 2011

2. SIGNIFICANCE: A CODE OF CODES?

The manual can be seen as one manifestation of a process that has involved an increasing but non-statutory codification of the operation of UK governance. There have been ethical and operational rules and guidance issued publicly that apply to official institutions and public officeholders and which could be seen as being of a constitutional nature – some arguable examples of this are included in the boxed text below. The effect has been that conventions – non-legal understandings that are central to the UK constitution – have increasingly come to be written down in openly available official form, a development that may have implications for the concept of what a convention is.

Examples of constitutional codes in the UK

- The 'Croham directive' of 1977, instructing civil servants to separate background information from policy recommendations in order to facilitate disclosure of the former, which was published after being leaked to the press[32]
- The Barnett Formula for determining annual increases in funding in Northern Ireland, Scotland and Wales, which became operational in 1979 (1980 for Wales)[33]
- The formal issue in 1980 of what are commonly known as the 'Osmotherly rules', governing what officials can and cannot say in front of parliamentary committees[34]
- The Armstrong Memorandum, which dates from 1985, setting out the values of and constitutional limits upon the Civil Service[35]
- The publication in 1992 of *Questions of Procedure for Ministers* (now known as the *Ministerial Code*)[36]
- The *Code of Practice on Access to Government Information*, which came into force in 1994[37] (since superseded by the Freedom of Information Act 2000)
- The *Seven Principles of Public Life*, first issued by the Committee on Standards in Public Life in 1995[38]
- The *Civil Service Code* of 1996[39] (since placed on a statutory basis by the Constitutional Reform and Governance Act 2010)

32 See Birkenshaw 1996: 332
33 See Select Committee on the Barnett Formula 2008
34 For the most recent edition, see Cabinet Office 2005
35 See written answer by the Prime Minister in *Hansard*, HC col 130–132, 26 February 1985.
36 For the most recent edition, see Cabinet Office 2010b
37 Cabinet Office 1994
38 See http://www.public-standards.org.uk/About/The_7_Principles.html
39 Cabinet Office 1996 (reissued 2006, 2010)

BOXED TEXT CONTINUED

- Since the late 1990s, the various concordats drawn up between devolved and central tiers of governance in the UK, and the devolution 'Memorandum of Understanding'[40]
- The *Code of Practice on Consultation*, first issued in 2000[41]
- The *Code of Conduct for Special Advisers* of 2001[42] (also now with a basis in the Constitutional Reform and Governance Act)
- *Core Tasks for Select Committees*, 2002, setting out the work programmes of House of Commons select committees[43]
- 'The Lord Chancellor's Judiciary-Related Functions: Proposals' (commonly known as 'the Concordat'), 2004[44]
- The *Central–Local Concordat* of 2007, setting out the appropriate relationship between central and local government.[45]

The manual represents one more step down this path, as well as being a qualitatively new entity, because it can be seen as a 'code of codes' – a code in its own right which at the same time provides a contextual framework within which a number of other codes are placed, alongside other components of the UK constitution, such as acts of Parliament.

As we will argue, the manual is likely to be treated by many – including within the media – as the most definitive available description of the moving parts of the constitution as they touch upon the day-to-day work of the executive, both ministers and officials. It is more than simply an operating manual for the London-based executive, extending widely as it does to issues such as the role of supranational institutions, devolution settlements, the upholding of human rights, Parliament and the nature of UK democracy. The manual is in fact the broadest description of the constitutional landscape to be found in any single official document yet published in the UK. But it is not – and does not purport to be – the expression of a fully codified UK constitution; and the *process of codification* to which the manual is a significant contribution should not be confused with *full codification* as it might generally be understood from an international perspective.[46]

Key features that might be expected in a document setting out a fully codified settlement are lacking from the manual. The inclusion of rules, conventions or

40 See for example Gay 1999
41 BERR 2008
42 Cabinet Office 2001 (reissued 2005, 2010)
43 See for example Maer and Sandford 2004
44 See http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/lcoffice/judiciary.htm
45 HM Government/LGA 2007
46 For further discussion see for example Gordon 2011

laws within it does not *explicitly* afford them any legal status beyond that which they already possess (although it may come to play a part in legal proceedings, as is discussed below). It neither entrenches its contents nor prescribes a procedure through which it can be amended.

Moreover, the production of the manual does not accord with the democratic principles that could arguably be expected if it were intended to be a codified constitution. As noted above, initial drafting has been carried out within the executive and the only public involvement has been through a three-month consultation period on a draft text, with the executive presumably making the final decisions. By contrast, the establishment (or significant alteration) of a codified constitution could be expected to involve express approval from the legislature and/or the electorate, and perhaps more-active public engagement than a basic consultation provides.

Another clear difference between the manual and what might be expected of a codified constitution lies in the question of ownership. The manual is the property of the executive. While the apparent initial intention that it would be owned specifically by the Cabinet now seems to be under review,[47] it will nonetheless be an executive document. By contrast, codified constitutions tend to portray themselves as the wider property of society, usually invoking the concept of popular sovereignty through such phrases as 'We the people', found in the preamble to the United States Constitution.

Also absent from the manual is the literary quality of some of the most famous world constitutional statements. The *Cabinet Manual* lacks poetry – not one of its phrases is likely to cling to the Velcro of memory. Instead of lines such as 'We hold these truths to be self-evident'[48] or 'Men are born and remain free and equal in rights',[49] what could be seen as the preamble (the foreword) begins:[50]

> **'The way in which government operates is a vital part of the United Kingdom's (UK) democracy, but it can be complex for those involved in, and for those outside of, government.'**

And closes:[51]

> **'We envisage that an updated version will be available on the Cabinet Office website, with an updated hard copy publication at the start of each new Parliament.'**

If the UK eventually adopts a 'written' constitution, the manual will probably come to be seen as a step in this direction. But, in New Zealand, the document on which the UK Cabinet Manual is modelled has not yet followed this path.

47 PASC 2011b: 1
48 From the US Declaration of Independence, 1776
49 From the French Declaration of the Rights of Man and of the Citizen, 1789
50 Cabinet Office 2010a: 1
51 Cabinet Office 2010a: 7

Moreover, the introduction of a codified settlement for the UK is not inevitable. Indeed it is, one of the present authors thinks, high unlikely. A full discussion of the chances of a 'written' UK constitution coming into being cannot be had here. But while the lack of such an entity is an international peculiarity, to change it would be a substantial task, for which there is no immediately apparent public demand.

Yet regardless of its not amounting to a codified constitutional document, the manual is a significant and welcome document in its own right, primarily because of the insight it provides into how the executive sees itself and its interactions with other institutions.

While the manual may not *be* the constitution, it will impact upon it. In fact it is already doing so, given the attention paid to it in draft by both Houses of Parliament. The manual purports to reflect the existing position, not drive change,[52] but this claim may prove unrealistic. There is likely to be an 'uncertainty principle' at work. Attempts to clarify an entity as amorphous as the UK constitution – and particularly the parts of it that exist as conventions, which are often loosely defined – may in the process change it. For instance, a convention that is included in the manual might be afforded an enhanced status simply by virtue of this incorporation. Rebecca Kitteridge, while downplaying the constitutional impact of the New Zealand version, notes that: 'By reflecting and promulgating' constitutional developments 'the Manual gives them the weight of its authority'.[53] The intention of the government to include in the final text of the manual a statement that the purpose of this document 'is to record rules and practices, not to be the source of any rule'[54] will probably not prove sufficient to prevent this tendency.

An example of this kind of impact was provided during the period immediately following the 2010 general election, when it was easier publicly to assert the propriety of Gordon Brown choosing not to resign immediately as Prime Minister because of the existence of the initial draft of what is now Chapter 2, 'Elections and Government Formation', including its stipulation that (para 16):

> **'Where an election does not result in a clear majority for a single party, the incumbent Government remains in office unless and until the Prime Minister tenders his and the Government's resignation to the Monarch. An incumbent Government is entitled to await the meeting of the new Parliament to see if it can command the confidence of the House of Commons or to resign if it becomes clear that it is unlikely to command that confidence.'**

Indeed, in this sense this portion of part of the manual proved its worth as a public educative tool, though – as we note below – some members of the Coalition were seemingly dissatisfied with parts of it, which have been redrafted accordingly.

52 Cabinet Office 2010a: 3
53 Kitteridge 2006
54 Cabinet Office 2011: 3

At the same time, omission of a convention from the manual could have the effect of downgrading it as a component of the UK constitution (we consider some significant omissions in the next section).

In some cases, the manual attempts to define conventions that have seemingly never previously been set out publicly in an official document. For instance, we are told (para 76):

> **'By modern convention, the Prime Minister now always sits in the House of Commons, although Prime Ministers in previous centuries have sat in the House of Lords. The Prime Minister will normally be the accepted leader of a political party or parties that commands the majority of the House of Commons.'**

While seeing these words in a public official document is a significant historical event, few would argue that their appearance will alter existing understandings of the constitution.

Elsewhere a small amount of 'constitutional creep' appears to have taken place. In his classic work, *The English Constitution*, first published in 1867, Walter Bagehot argued that:[55]

> **'The sovereign has, under a constitutional monarchy such as ours, three rights – the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others.'**

According to the draft manual (para 6):

> **'By convention, the Sovereign does not become publicly involved in the party politics of government, although he or she is entitled to be informed and consulted, and to advise, encourage and warn ministers.'**

Somehow, between 1867 and 2010, the monarch seems to have acquired the rights to be 'informed' and to 'advise ministers', in addition to the set of entitlements that, in Bagehot's judgment, a 'king of great sense and sagacity' would find sufficient in themselves. The new rights, however, may not be significant. Being 'informed' would seem to be a basic requirement to facilitate the performance of the other activities. However, there may be a confusing circularity involved in the idea of a monarch advising ministers who are – in a strict constitutional sense – his or her own advisers.

There are other instances in which the manual appears to have been used more deliberately and dramatically to affect change. The initial draft of the chapter 'Elections and Government Formation' produced in February 2010 provided for

55 Bagehot 2001: 64

the Prime Minister to authorise the Cabinet Secretary to support cross-party negotiations on government formation following a General Election with no overall winner (para 19), and suggested a need for the government 'to observe discretion about taking significant decisions, as per the pre-election period' while there was doubt that it enjoyed the confidence of the House of Commons (para 20). While both of these suggestions were reasonable, they were not clearly established features of UK constitutional arrangements before being included in this draft of the manual. In this instance, the manual is more clearly an instrument of change.

The full draft of the same chapter, published in December 2010, was changed in light of the experiences of May 2010. Important additions include the following:

> **'An incumbent government is entitled to wait until the new Parliament has met to see if it can command the confidence of the House of Commons, but is expected to resign if it becomes clear that it is unlikely to be able to command that confidence and there is a clear alternative.'**
> Para 48

> **'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.'**
> Para 50

Once again, the principles these statements seek to establish are defensible but were not present in the earlier draft and, arguably, were not clearly established components of the UK settlement. Their inclusion in the manual leaves members of the Coalition Cabinet vulnerable to the charge that, as the victors of the post-general election negotiations, they have used executive ownership of the manual to rewrite constitutional history to reflect how they believe Gordon Brown *ought* to have behaved in May 2010.

Also, there are grounds for questioning whether it is appropriate for the Cabinet to have such a prominent role in defining the rules governing the possible transition to a different government – a process in which it is clearly an interested party. Kitteridge argues that the New Zealand *Cabinet Manual* does not bring about change in its own right because the descriptions of conventions it sets out are dependent upon the authority of Cabinet, which approves the document. Yet in Britain the manual will potentially provide Cabinet with an instrument it did not previously possess, creating opportunities to impose definitions upon the more amorphous parts of the UK constitution.[56] As noted above, it seems that the initial idea that the UK Cabinet Manual would be approved by Cabinet is now being reviewed – along, as a consequence, with the title 'Cabinet Manual'.

56 Kitteridge 2006

If it is accepted that – contrary to its protestations – the manual will in fact bring about change, particularly involving conventions, certain potential problems can be identified. It is inappropriate for one constitutional player to seek to define features of the UK settlement largely unilaterally through the manual, and in doing so it may undermine their effectiveness as instruments of political management, which draws in part on their nature as shared understandings. One way of avoiding this outcome would be for the text to acknowledge more explicitly that it does not claim to present the final word on the nature of UK constitutional conventions but merely presents the executive view of them; there are signs the government is beginning to appreciate this point.[57] (For discussion of the manual's coverage of disputed conventions, see below).

57 See for example PASC 2011b: 2

3. CONTENT

A first observation that may be made about the content of the manual is its considerable scope (see Appendix A for chapter headings). It may be 'written from the perspective of the Executive branch of government',[58] but it extends far beyond the executive, taking the reader on a 'magical mystery tour' of the British constitution. Perhaps this tendency arises partly because of a difficulty in distinguishing the executive from other parts of the UK constitution, given Britain's lack of a tradition of separation of powers. While the wide-ranging nature of the manual is not in itself a problem, it has been associated with some suggestions, the inclusion of which in an executive document might be regarded as presumptuous.

For instance, it states that:

> **'Ministers' decisions, and the process by which they exercise (or fail to exercise) their powers, can be reviewed by the High Court, although the courts will usually hesitate to intervene in cases where they accept that, because of the subject matter (entering into treaties, the defence of the realm, the grant of honours etc), the decision-maker is better qualified than the Court to make a judgment.'**
> Para 230

It may be the case that the courts have in the past displayed this hesitation. However, for the manual to use the future tense in relation to decisions taken by a judiciary – the independence of which it emphasises elsewhere (paras 1, 16) – is inapt, even if it proves to be accurate. This statement is even more problematic because it is not balanced by specific reference to a convention some believe to exist, that is, that ministers should not pass public comment on particular judicial decisions that have been made (though there are general statements, such as in paragraph 257, of the need for ministers to uphold the independence of the judiciary and not to seek to influence decisions through special access).

The government is considering ways in which the different components of the manual can be more clearly distinguished.[59] When the document as a whole is considered, one way of differentiating its contents is through the source of the authority on which they draw. Some provisional assessments have been made for the purpose of this paper (see the boxed text below), drawing a primary distinction between law and convention.

58 Cabinet Office 2010a: 3
59 See for example PASC 2011b: 2

Law and convention in the *Cabinet Manual*

The law with which the manual is concerned falls into various different categories: statute law, such as acts of Parliament providing for devolution; common law, such as the Carltona principle;[60] and international law, such as UK participation in supranational organisations as provided for by treaties. Some of the legal authority the manual outlines is exercised under the royal prerogative, such as the power to appoint the Prime Minister, theoretically still a personal prerogative of the Monarch, and the power to appoint ministers, in practice exercised on the advice of the Prime Minister.

Conventions[61] – broadly defined here as non-legal understandings, excluding parliamentary rules – covered in the manual are mainly concerned with the domestic operation of the UK system of governance (such as the functioning of Cabinet) but also include some which work internationally, that is, informal arrangements not covered by treaties (such as the G8 and G20 groups). Some conventions are published in an official document for the first time in the manual, as noted above. Other conventions dealt with in the manual are included in previously published codes, such as the Ministerial Code.

A further, more anomalous category is that of parliamentary rules (which, for instance, provide a basis for the select committees referred to in the manual) – these may not be classifiable as 'law' but perhaps should be seen as something firmer than convention.

Based on this assessment, it is clear that convention is the largest of the manual's different categories of content. An initial calculation suggests that, of the 409 paragraphs in the main text of the manual, around 60 per cent refer to conventions of some kind.

Around 20 per cent refer specifically to statute law of some kind. (There is some overlap, with certain paragraphs dealing with both statute and convention, as there is between a number of the various categories considered here.)

Of the remainder, paragraphs deal with (all figures approximate):

- International law – 10 per cent
- Matters regulated using the royal prerogative – seven per cent
- Common law – five per cent

60 Deriving from a 1943 judicial decision, under which 'junior ministers in a ministerial department and civil servants working for a departmental minister may exercise powers of the minister in charge of the department' (para 114).

61 For a classic work on the subject of conventions, see Marshall 1986.

BOXED TEXT CONTINUED

- Rules with a basis in statute (three per cent), such as those contained in the *Civil Service Code* (with a basis in the Constitutional Reform and Governance Act 2010)
- Parliamentary rules, such as Commons standing orders (one per cent)
- International conventions (one per cent).

These figures are very much provisional, and there are difficulties in identifying precisely the type of authority the manual is referring to in each case (so, for example, the 'parliamentary rules' figure may be too low). In some instances, more than one type of authority is referred to within a paragraph, and so the percentage figures total more than 100. Moreover, this quantitative analysis does not indicate the relative importance of each authority concerned. Finally, how one authority in particular, parliamentary sovereignty, should be categorised, is a subject of controversy.

While the ratio of conventions to statute law seems high, it should be noted that had an equivalent to the manual been drafted before the programme of constitutional reform instigated by the Labour government elected in 1997 then the proportion of statute law would have been even lower than it is now. Many of the acts of Parliament referred to in the manual received assent in the period since 1997, including the Human Rights Act 1998, the various acts concerning devolution, the Freedom of Information Act 2000, and the Constitutional Reform and Governance Act 2010. The Coalition's legislative programme, including provisions for fixed-term parliaments and referenda on further sovereignty sharing within the European Union, will only increase the statute law content of the manual.

Because of the centrality of conventions to the manual, it is of exceptional importance to the quality of the document as a whole that they are approached in a satisfactory fashion.

In some instances, the manual performs commendably. Perhaps most effective of all is the depiction in Chapter 4 of collective Cabinet decision-making, particularly the stipulation that, in a given meeting of full Cabinet or one of its subcommittees (para 135): 'Before a decision is made, ministers are given the opportunity to debate the issue, with a view to reaching an agreed position.' There are however potential tensions between this collective approach to government and the role of a Prime Minister who it is said (para 77): '[will] usually take the lead on significant matters of state'. (For depictions of the different roles performed by the Prime Minister over time, see Appendix B.)

Clarifying convention and precedent

Conventions – which involve the interpretation of precedents – may be characterised by a lack of consensus about their precise form or even their existence. For instance, the manual states that:

> **'If the Prime Minister resigns, the Sovereign will invite the person who it appears is most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government.'**
> Para 46

Some experts have argued that, following an inconclusive general election, the true constitutional position is that it is specifically the leader of the largest opposition party who should be the first to receive this request from the Palace[62] – the wording of the manual, on the other hand, creates the impression that it may be possible to ask someone else.

To assist with an understanding of the manual – and an assessment of its accuracy – the government should provide in every case the events and reasoning that underly the conventions identified in the manual. This practice would be appropriate throughout the document, not just in contested areas. For example, at present, the section on retaining and losing the confidence of the House of Commons (paras 43–45) cites no specific relevant occurrences. In other cases, more detail is needed on the relevant precedents to avoid presenting certain procedures in a misleading way. For instance, paragraph 19 states: 'Where a bill has completed all of its Parliamentary stages, it cannot become law until the Sovereign has formally approved it, which is known as Royal Assent.' There might be value in adding that Royal Assent has not been withheld since the reign of Queen Anne, in 1707.[63] In responding to criticism of its lack of sourcing of material, the government has tended to focus more on the idea of introducing more cross-referencing within the manual itself, rather than identifying external authorities.[64]

The best means of demystifying constitutional precedents would be for the government to publish all those editions of the Cabinet Office's *Precedent Book* not currently in the public domain. This document is a collection of guidance notes and details of the events on which they rest. Possibly, this could be 'weeded' for any personally sensitive contents before being publicly issued.[65]

Furthermore, the manual should acknowledge when the particular view it is putting forward is disputed and note that it is simply depicting the view of the executive, not the undisputed truth. Otherwise, the manual appears once again to be seeking to impose, inappropriately, what is merely one version of UK

62 See Blackburn 2004 and Blackburn 2006: 79–107

63 For a bill settling the militia in Scotland. See Bogdanor 1995: 126

64 Cabinet Office 2011: 8

65 This approach has been suggested by two House of Commons select committees: see PASC 2011a: 7, PCRC 2011: 11.

constitutional arrangements. It is encouraging that the government has agreed it will 'consider how best to set out the position where the conventions may not be clear and where there are different views'.[66]

Significant weaknesses and omissions

One concept referred to in the manual but perhaps not dealt with in the depth its importance requires is that of parliamentary sovereignty (see for example paras 1, 3, 4, 9).[67] The manual provides an opportunity for the executive to provide and justify its view of issues including:

- The source of parliamentary sovereignty, and whether it was made and could possibly be unmade by judges
- The ability of Parliament to limit itself
- The ability of courts to disapply legislation, including acts of Parliament, particularly under the European Communities Act 1972. There is a need for reference to the second Factortame case[68] – Factortame is at present not mentioned in the manual, which is a significant oversight
- Whether a convention has developed or is developing that the government will accept and act to rectify declarations of incompatibility under section 4 of the Human Rights Act 1998 (at least after appeals have failed)
- Those areas in which the government considers Parliament to be politically if not legally bound, including whether it could reverse the verdict of referenda held on continued membership of the European Economic Community (held in 1975; now applying to the European Union) and on devolution (various referenda have been held since the late-1990s) without holding further referenda. The introduction to the New Zealand *Cabinet Manual* deals with this issue by stating that: 'In theory, many parts of the constitution can be amended by legislation passed by a simple majority of the Members of Parliament. That power is, however, restrained by law, convention, practice and public acceptance.'[69] A similar, though not identical form of words, could be applicable for the UK manual.

There are certain omissions in the manual that require correction. A chapter or section is required that deals with security and intelligence and provisions for its oversight as established by the Intelligence Services Act 1994, as well as with military and other emergencies. It should stipulate, among other things, that the

66 See for example PASC 2011b: 2

67 The authors are grateful to Professor Robert Blackburn of King's College London for supplying us with a written note on these issues. For an up-to-date and comprehensive discussion of the doctrine of parliamentary sovereignty, see Bogdanor 2009.

Elsewhere, in his commentary on the manual, Bogdanor has asked: 'Might it not avoid controversy were the word "sovereign" to be replaced by "supreme", a word which has no metaphysical connotations?' (Bogdanor 2011). Similarly, Professor Robert Blackburn argues in his briefing to the authors: 'The expression "parliamentary sovereignty" is always best avoided, as its meaning is generally unclear, ambiguous, and misleading.'

68 Under which the Merchant Shipping Act 1988, which conflicted with European Community law, was disapplied in 1991. See Bogdanor 2009: 28–9

69 New Zealand Cabinet Office 2008: 6

Prime Minister may choose to establish a 'war cabinet' – though it will probably not formally be labelled such[70] – and that the Chancellor of the Exchequer has in the past sometimes been excluded from such bodies, in order to avoid the distraction of financial prudence.[71] This latter point would counterbalance the statement (para 82) that the Cabinet 'will always include the Chancellor of the Exchequer'.

The manual should also make clear whether the government feels bound by the House of Commons Resolution of May 2007 (see Appendix C) describing it as 'inconceivable' that any government would depart from the precedent set in 2002 and 2003 over the Iraq conflict in 'seeking and obtaining the approval of the House for its decisions in respect of military action', subject to contingencies. It is arguable that this resolution was not fully abided by with respect to the present conflict in Libya, since it could be read as requiring *advance* approval, which the government was arguably in a position to seek in March 2011 but did not. However, during the debate on the United Nations Resolution 1973 of 21 March, the Foreign Secretary, William Hague, pledged that the government would 'enshrine in law for the future the necessity of consulting Parliament on military action'.[72]

Finally, there is a need to provide a description of the Civil Contingencies Act 2004, the UK equivalent to a constitutional 'emergency powers' clause. At present, this act receives only a passing reference in paragraph 111.

There are other individual gaps. No reference is made to the 'Salisbury–Addison' convention, the origins of which lie in an agreement made in 1945 between the Leader of the House of Lords, Lord Addison, and the Leader of the Conservatives in the Lords, Lord Salisbury, to prevent the House of Lords from delaying legislative measures that were included in the manifesto of the governing party winning an overall majority at the most recent general election. It would be valuable to know how the Salisbury–Addison convention might be regarded by the executive in application to a Coalition without a single manifesto to draw upon. Nor is there a description of any associated conventions which apply to the Lords involving government legislation in general, whether implementing manifesto agreements or not. The Coalition has now issued, as part of its proposals for House of Lords reform, a broad statement of what it believes to be the conventions in this area (see Appendix D). The government seems to be intent on correcting these omissions.[73] There would also be merit to a more detailed view than is presently available as to the official definition of a 'money bill', which can receive Royal Assent without being passed by the Lords. Finally, reference should be made in paragraph 187 to the retention by the Lords, under the Parliament Act 1911, of an absolute veto on legislation extending the duration of a Parliament

70 The National Security Council (NSC) was presented as being able to serve as a 'war cabinet' when announced last year, and its subcommittee NFC(L) is currently functioning as such for the Libyan operation.

71 See for example Blick 2005: 32

72 House of Commons 2011

73 Cabinet Office 2011: 6

beyond five years. The government should also clarify in the manual its views on whether there are legal or other limits to the type of provisions that could be forced through by the Commons using the Parliament acts.

In parallel with these additions, some unnecessary material could be culled, including descriptions of why a minister might resign (para 94), and the appropriate make-up of Departmental Boards (paras 361–363). The accounts of international organisations in Chapter 9 could be substantially reduced.

When considering the content of the manual, a final concern should be noted. The document contains within it descriptions of many of the most important provisions of the UK constitution, often of a non-statutory nature. Yet in May the government stated in its holding response to the Lords Constitution Committee report on the manual that: 'The Cabinet Manual is not binding on Ministers, although it may set out certain existing requirements, for example, those in law'.[74] In June the interim government response to the PASC report on the manual asserted that: 'The Cabinet Manual will not be binding on Ministers but it will in some places refer to existing statutory requirements'.[75] While the non-statutory parts of the manual will not *legally* be binding on ministers, many of them are key components of the UK constitution to which the government must adhere. It is unthinkable, for instance, that the requirement to retain the confidence of the House of Commons set out in paragraphs 43–45 would not be regarded as binding upon ministers. Moreover, it is curious that the government has gone to the trouble of producing a document of this nature, only to state that it is not bound by it. It is to be hoped that the government believes that while the manual itself is not the source of the obligation, ministers *are* required to follow the non-statutory principles set out in it.

74 Cabinet Office 2011: 3
75 PASC 2011b: 3

4. THE FUTURE OF THE CABINET MANUAL

It is important to consider also the possible uses to which the *Cabinet Manual* may be put in a wider public context, as these may differ from the intentions of its authors. As a point of comparison, Rebecca Kitteridge says that the New Zealand *Cabinet Manual* is 'widely used as a reference text for the inner workings of government. People quote from it; they use it to defend or attack the actions and behaviour of executive government.'[76] An example of the kind of attention it has received is provided by its central role in analysis of the break-up of the National–New Zealand First coalition government in August 1998.[77] While the UK manual has so far generated relatively little interest among journalists, it is likely that in time it will similarly come to be treated by the media as *a* or even *the* primary source of information on the workings of UK government. Eventually, it may even be considered a surrogate constitution – even though, as we have argued, it is not the real thing.

It is also likely to be plundered by students and academics from various disciplines. The manual may become currency in political disputes, being used both to condemn and justify particular stances and courses of action, perhaps in a similar way to *Questions of Procedure for Ministers* – declassified by John Major in accordance with a Conservative manifesto pledge in 1992[78] – which came to wider prominence as a means of assessing the appropriateness of the conduct of government members.[79]

Certain portions of the manual lend themselves to being cited in circumstances of controversy, such as paragraphs 48–55 on parliaments with no overall majority in the House of Commons, particularly the stipulations about when it is appropriate for an incumbent Prime Minister to resign following an inconclusive general election. In another case (in a paragraph the authors believe could be deleted from the manual anyway), a minister in political or personal difficulties might be reminded publicly of the 'examples of when a resignation might take place' (para 94). Disgruntled or departing ministers who feel decisions have been inappropriately forced through by the premier could draw attention to the 'principles of collective Cabinet government' (paras 133–136) – but then the premier might respond that they will 'usually take the lead on significant matters of state' (para 77). Ministers may attempt to deflect criticisms of departmental failure by noting the limits on their responsibility to Parliament (para116). Controversial judicial decisions might bring attention to the manual's description of deference to certain political decisions (para 230), while in return ministerial criticism of judicial

76 Kitteridge 2006: 6

77 A Cabinet decision to sell the government's shares in the Wellington International Airport Company was made after the walkout of New Zealand First members. In so doing, the Cabinet fell short of quorum stipulations in the coalition agreement negotiated in 1996 – which demanded that at least half of the Cabinet members of *each Coalition partner* be present – but met the requirements of the *Cabinet Office Manual* (as it was then known), which simply called for half the members plus one to be in attendance. See McGrath 1999: 14–18

78 'We will update and – for the first time – publish the guidance for Ministers on procedure' (Conservative Party 1992: 'Choice and the charter').

79 Most notoriously when it emerged in November 1992 that part of the legal costs for evicting a 'sex therapist' from the private home of the then-Chancellor of the Exchequer Norman Lamont had been paid from public sources. See 'Public cash paid bill for Lamont', *Independent*, 29 November 1992

decisions may prompt reference to the need for ministers to uphold judicial independence (para 257).

Constitutional change

The manual will continue to generate discussion about the constitution, perhaps encouraging future change, which would make it much more than just a passive, descriptive document. As well as stimulating constitutional developments, the arrangements encapsulated in the manual may come to be challenged by them, as the New Zealand *Cabinet Manual* has been by the consequences of electoral reform.[80] For example, Lord Lamont of Lerwick, the former Chancellor of the Exchequer, recently asked the government 'whether under their plans for an elected House of Lords the Prime Minister could be a Member of the House of Lords'.[81] The Leader of the House of Lords, Lord Strathclyde, replied that:

> **'[A]n important part of the plans for the reform of this House is the continued primacy of the House of Commons. The presence of the Prime Minister in the House of Commons therefore underlines that primacy.'**

Lord Lamont then went on to argue:

> **'While it might not be acceptable to public opinion at the moment for a Prime Minister to sit in this House as it is presently constituted, if in, say, 10 years' time this House is wholly elected, is deemed more legitimate and is demanding more powers, would it not be appropriate and necessary for there to be more senior Ministers in this House?'**

However, we have noted how the manual states that a Prime Minister may only come from the Commons. The possible tension between developments in public perceptions as suggested by Lord Lamont and the content of the manual raises the question of how this document can be changed.

The philosophy within the New Zealand Cabinet Office, as expressed by Kitteridge, has been that:[82]

> **Like a dictionary, the Manual often lags a little behind the development of constitutional vernacular – for good reason. For a new word to be included in a dictionary, there must be evidence that it has become established in the popular lexicon. It is the same with many administrative practices recorded in the Manual.**

What precisely is the threshold for a new convention to be included in the UK manual, or for an old one to be removed? As suggested above, decisions taken as to whether a convention is 'in' or 'out' are likely to impact significantly upon

80 See for example White 2005
81 House of Lords 2011
82 Kitteridge 2006: 6

the extent to which that convention is more broadly recognised by players in political processes, and therefore on its viability.

In this way, the manual could become not only an instigator of but also a barrier to change: it might prevent the full acceptance of an understanding that it does not include, or prolong the life of another that it continues to cite in its text. Furthermore, the discreet way in which conventions have often developed in the UK will be inhibited if their legitimacy or expiry depends to a significant extent upon recognition in this official public document.

This possibility, alongside the public awareness of the UK constitution that the manual might stimulate, could contribute to the development of a British 'constitutional consciousness', involving wider and fuller knowledge of what our arrangements are, more extensive discussion of what they should be, and a more deliberate, overt process for change.

Moreover, the manual could take on a significance not anticipated by those who drafted it, a point identified by the House of Lords Constitution Committee. The foreword to the draft manual insists that 'it is not intended to have any legal effect'.[83] But the Constitution Committee has concluded: 'There is a risk … that if a minister arrives at a particular decision and expresses himself in terms which show that he has not considered the relevant parts of the manual, it could be argued in judicial review or other legal proceedings that he had failed to take into account a relevant consideration'.[84] However, what some might regard as a 'risk', others will see as an opportunity. Through this means, the conventions of the UK constitution, for so long only politically binding, could gradually take on a more enforceable character. (It is possibly partly to lessen the chances of the manual being used in legal proceedings that the idea of the Cabinet endorsing the document has been reconsidered).

Such a prospect serves to underline the conclusion that the *Cabinet Manual* matters and deserves to be taken seriously. For this reason, we believe that those beyond the executive, in Parliament and in other political circles, need to take close and continuous interest in it and its contents. It must be subjected to the maximum scrutiny to ensure that each new edition is, as a statement of the 'laws, conventions, and rules on the operation of government', as accurate and up-to-date as possible. An existing parliamentary select committee (or specially convened joint parliamentary committee of some kind) should take on the role of conducting annual assessments of the manual, taking evidence from the public and drawing attention to any problems or changing circumstances. The Cabinet Office would undertake to provide full and reasoned responses to the committee, amending the manual where appropriate. Updates may be required more frequently than at the beginning of each Parliament, as seems presently

83 Cabinet Office 2010a: 3

84 Select Committee on the Constitution 2011: 13

to be envisaged. There is certainly no technological barrier to altering an online document more often.[85]

The debate about the significance of the *Cabinet Manual* is delineated by two contrasting judgments at its rims. Lord Powell of Bayswater, as we have seen, regards it as the Cabinet Office version of a Janet and John guidebook; Vernon Bogdanor, on the other hand, has described it as 'the first step and a pretty big step towards a written constitution'.[86] Both these men have long experience of government, Lord Powell from the inside as a diplomat and Foreign Affairs Private Secretary at Number 10, and Professor Bogdanor from sustained observation of the British constitution in action and from his scholarly perspective at Oxford University.[87]

The authors of this pamphlet are on neither edge. Rather we believe in, and indeed applaud, the value and considerable significance of the *Cabinet Manual* as a window into executive practice and the executive's view of constitutional procedure. Not only enthusiastic constitutional observers, like us, should peer through that window – one never before opened in this country – at regular intervals, even though we might not always like what we see.

The utility of the document is enhanced, too, by what it tells its readers about the functions of the British Prime Minister in 2011. For this reason we have prepared as an appendix (see Appendix B) our best effort at describing that current position alongside older snapshots for comparative purposes.[88] This is but one example of how the *Cabinet Manual* can serve the needs of ministers, officials, parliamentarians, students of politics and the wider public in whose name all these activities are conducted. Within the machinery of British politics, the hidden wiring is emerging.

85 This process could be set out in the manual itself.

86 Constitution Society 2011: 6

87 Where his duties included a spell as tutor to the current Prime Minister, in whose name alongside Nick Clegg's the final document may be issued.

88 Also submitted as evidence to the PCRC for its inquiry into the role and powers of the Prime Minister: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/writev/842/m2.htm

References

Almond G (1950) *The American People and Foreign Policy*, New York: Harcourt, Brace and Company

Bagehot W (2001) *The English Constitution*, Oxford: Oxford University Press

Birkenshaw P (1996) *Freedom of Information*, London: Butterworths

Blackburn R (2004) 'Monarchy and the Personal Prerogatives', *Public Law*, Spring 2004: 546–563

Blackburn R (2006) *King and Country: Monarchy and the Future King Charles III*, London: Politico's

Blick A (2005) *How to go to War: A handbook for democratic leaders*, London: Politico's/Methuen

Bogdanor V (1995) *The Monarchy and the Constitution* Oxford: Clarendon Press

Bogdanor V (2009) *The New British Constitution*, Oxford: Hart

Bogdanor V (2011) Written evidence submitted to the House of Commons Political and Constitutional Reform Committee, 17 February 2011. http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/734/734vw13.htm

Brown G (2010) 'Towards a new politics', speech, 2 February 2010. http://www.ippr.org/uploadedFiles/events/gordon_brown_ippr_feb_10.pdf

Cabinet Office (1994) *Code of Practice on Access to Official Information*

Cabinet Office (1996) *Civil Service Code.* http://www.civilservice.gov.uk/about/values/cscode/index.aspx

Cabinet Office (2001) *Code of Conduct for Special Advisers*. http://www.cabinetoffice.gov.uk/content/special-advisers-conduct-and-guidance

Cabinet Office (2005) *Departmental Evidence and Response to Select Committees*. http://interim.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/osmotherly_rules.pdf

Cabinet Office (2010a) *Draft Cabinet Manual*. http://www.cabinetoffice.gov.uk/resource-library/cabinet-manual

Cabinet Office (2010b) *Ministerial Code*. http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf

Cabinet Office (2011) *Cabinet Manual: House of Lords Constitution Committee report, Interim response*. http://www.parliament.uk/documents/lords-committees/constitution/CabinetManual/Gvtres270511.pdf

Conservative Party (1992) *The Best Future for Britain*, manifesto. http://www.politicsresources.net/area/uk/man/con92.htm

Constitution Society (2011) *The UK Cabinet Manual*. http://www.re-constitution.org.uk/ent/documents/2011/01/07/27/file/cab_manual_briefing_paper.pdf

Department for Business, Enterprise and Regulatory Reform [BERR] (2008) *Code of Practice on Consultation*, London: HM Government

Director (2009) 'Managing the machinery of government in periods of change', conference note, Ditchley Foundation Conference, 5–7 November 2009. http://www.ditchley.co.uk/page/357/machinery-of-government.htm

Dangerfield G (1936) *The Strange Death of Liberal England*, London: Constable

Gay O (1999) *Devolution and Concordats*, House of Commons research paper 99/84. http://www.parliament.uk/documents/commons/lib/research/rp99/rp99-084.pdf

Gladstone W (1879) *Gleanings of Past Years, vol I,* London: John Murray

Gordon R (2011) 'Legal Status of the Cabinet Manual', notes for presentation to the All-Party Parliamentary Group on the Constitution, 17 January 2011. http://www.re-constitution.org.uk/ent/documents/2011/01/17/29/file/Presentation_Richard_Gordon_QC.pdf

Hattersley R (2010) *David Lloyd George: The Great Outsider*, London: Little, Brown: 239–288.

Hazell R and Paun A (eds)(2009) *Making Minority Government Work: Hung parliaments and the challenges for Westminster and Whitehall*, London: Constitution Unit/Institute for Government. http://www.instituteforgovernment.org.uk/pdfs/making-minority-gov-work.pdf

Hazell R and Riddell P (2010) 'Opening the door to the secret garden – a plea for revised public guidance on how governments are formed and operate', submission to the House of Commons Justice Committee, February 2010. http://www.instituteforgovernment.org.uk/pdfs/evidence-1.pdf

Hazell R and Yong B (2011) Written evidence submitted to the House of Commons Political and Constitutional Reform Committee, 17 January 2011. http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/734/734we03.htm

Hennessy P (1996) *The Hidden Wiring: Unearthing the British Constitution*, London: Phoenix

Hennessy P (2010) 'The British constitution shimmers through: the "hung" general election of May 2010' in A Duff (ed) *Making the Difference: Essays in honour of Shirley Williams* London: Biteback

HM Government/Local Government Association [LGA] (2007) *Central–Local Concordat*. http://www.communities.gov.uk/documents/localgovernment/pdf/601000.pdf

House of Commons (2011) 'United Nations Security Council Resolution 1973', *Hansard* HC vol 525 col 799, 21 March 2011. http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110321/debtext/110321-0004.htm

House of Lords (2011) 'House of Lords: Membership', *Hansard* HL vol 726 col 6, 14 March 2011. http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110314-0001.htm#11031412000800

Kitteridge R (2006) 'The Cabinet Manual: Evolution with Time', paper presented to the 8th Annual Public Law Forum, 20–21 March 2006. http://www.dpmc.govt.nz/cabinet/reports-and-speeches/pdf/the-cabinet-manual-evolution-with-time.pdf

Maer L and Sandford M (2004) *Select Committees under Scrutiny*, London: Constitution Unit. http://www.ucl.ac.uk/spp/publications/unit-publications/111.pdf

McGrath J (1999) 'The Crown, the Parliament and the Government', Harkness Henry lecture, 11 August 1999. http://www.crownlaw.govt.nz/uploads/HarkHenry.pdf

Marshall G (1986) *Constitutional Conventions: The Rules and Forms of Political Accountability*, Oxford: Oxford University Press

New Zealand Cabinet Office (2008) *Cabinet Manual: 2008*, Wellington: Cabinet Office. http://cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf

O'Donnell G (2011) 'The Cabinet Manual: Constitution Unit Event', speech, 24 February 2011, Institute for Government

Political and Constitutional Reform Committee, House of Commons [PCRC] (2011) *Constitutional Implications of the Cabinet Manual*, HC 734, London: The Stationery Office. http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/734/734.pdf

Public Administration Select Committee, House of Commons [PASC] (2011a) *Cabinet Manual*, HC 900, London: The Stationery Office. http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubadm/900/900.pdf

Public Administration Select Committee, House of Commons [PASC] (2011b) *Cabinet Manual: Government Interim Response to the Committee's Eighth Report of Session 2010–12*, HC 1127. London: The Stationery Office. http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubadm/1127/1127.pdf

Riddell P and Haddon C (2009) *Transitions: Preparing for changes of government* London: Institute for Government. http://www.instituteforgovernment.org.uk/pdfs/Transitions%20-%20preparing%20for%20changes%20to%20government.pdf

Select Committee on the Barnett Formula, House of Lords (2009) *The Barnett Formula: Report with Evidence*, HL 139, London: The Stationery Office. http://www.publications.parliament.uk/pa/ld200809/ldselect/ldbarnett/139/139.pdf

Select Committee on the Constitution, House of Lords (2011) *The Cabinet Manual: Report with Evidence*, HL 107, London: The Stationery Office. http://www.publications.parliament.uk/pa/ld201011/ldselect/ldconst/107/107.pdf

White N (2005) 'Deconstructing Cabinet Collective Responsibility', *Policy Quarterly* 1(4): 4–11

APPENDICES

A. Chapter headings in Cabinet Manual

Introduction

Chapter 1: The Sovereign

Chapter 2: Elections and government formation

Chapter 3: The Executive – the Prime Minister, ministers and the structure of government

Chapter 4: Collective Cabinet decision-making

Chapter 5: Ministers and Parliament

Chapter 6: Ministers and the law

Chapter 7: Ministers and the Civil Service

Chapter 8: Relations with the Devolved Administrations and local government

Chapter 9: Relations with the European Union and other international institutions

Chapter 10: Government finance and expenditure

Chapter 11: Official information

Annex A: Election timetable

Annex B: Statutory limits on ministerial salaries

Annex C: Detail on devolution settlements

B. Snapshots of the office of Prime Minister: 1947, 1995 and 2011

The idea for this particular approach to the British premiership and the workings of 10 Downing Street occurred to one of the authors when preparing his book *The Prime Minister: The Office and its Holders since 1945*.[89] The Cabinet Office had recently declassified a 1947 file in its CAB 21 series dealing with the 'Function of the Prime Minister and His Staff'.[90] As far as we can tell, neither Clement Attlee, the Prime Minister of the day, nor any of his successors saw it. It was prepared by the machinery of government division at the Treasury, in consultation with the Cabinet Office and Buckingham Palace, in response to a request from the Institute of Public Administration for help with a paper they were to present to a conference in Switzerland concerned with comparing the role and functions of chief executives in a variety of political systems. Once completed, it was placed in the then-novel 'Precedent Book', the declassification of whose lineal successor two different House of Commons select committees are currently seeking.

During the Major years in the mid-1990s, one of the authors sought to update the 1947 taxonomy, which was duly published, along with the original, in the first and subsequent edition of his *The Prime Minister* in 2000 and 2001.[91] The accumulation of functions was so great that he divided them into bundles (although some, such as 'Preparation of the "War Book"' and 'Managing the relationship between Government and Opposition on a Privy Counsellor basis' should have been included in the 1947 prototype).

In 2011, the co-authors collaborated on another update to incorporate the developments apparent during the Blair and Brown premierships plus the changes, such as the new National Security Council, made by David Cameron on his accession to the premiership and the imperatives of coalition government. All three taxonomies reflect the Prime Ministers' function as Head of Government not as Party Leader. We hope these delineations will help both teachers – both in schools and universities – and, perhaps, those who aspire to assuming responsibility for these functions themselves.

Prime Minister's functions – 1947

1. Managing the relationship between the Monarch and the government as a whole.
2. Hiring and firing ministers.
3. Chairing the Cabinet and its most important committees.
4. Arranging other 'Cabinet business', ie the chairmanships of other committees, their memberships and agendas.
5. Overall control of the Civil Service as First Lord of the Treasury.

89 Hennessy P (2000) *The Prime Minister: The Office and its Holders since 1945*, London: Allen Lane

90 ibid: 57–60. The file can be found in: TNA PRO CAB 21/1638 'Function of the Prime Minister and his staff', 1947–1948; http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATLN=6&CATID=5146565

91 ibid: 60–101

6. The allocation of functions between departments; their creation and abolition.
7. Relationships with other heads of government.
8. An especially close involvement in foreign policy and defence matters.
9. Top Civil Service appointments.
10. Top appointments to many institutions of 'a national character'.
11. 'Certain scholastical and ecclesiastical appointments.'
12. The handling of 'precedent and procedure'.

Prime Minister's functions – 1995

Constitutional and procedural

1. Managing the relationship between Government and the Monarch.
2. Managing the relationship between Government and Opposition on a Privy Counsellor basis.
3. Establishing the order of precedence in Cabinet.
4. The establishment and interpretation of procedural guidelines for both ministers and civil servants.
5. Oversight of changes to Civil Service recruitment practices.
6. Classification levels and secrecy procedures for official information.
7. Requesting the Sovereign to grant a dissolution of Parliament.

Appointments

(Made in the name of the Sovereign but chosen by the Prime Minister.)

1. Appointment and dismissal of ministers (and final approval of their parliamentary private secretaries and special advisers).
2. Headships of the intelligence and security services.
3. Top appointments to the Home Civil Service and in collaboration with the Foreign Secretary to the Diplomatic Service and in collaboration with the Defence Secretary to the Armed Forces.
4. Top ecclesiastical appointments plus regius professorships and the Mastership of Trinity College, Cambridge.
5. Top public sector appointments and appointments to royal commissions.
6. Award of peerages and honours (except for those in the gift of the Sovereign).

Conduct of Cabinet and parliamentary business

1. Calling meetings of Cabinet and its committees. Fixing their agenda.
2. The calling of 'Political Cabinets' with no officials present.
3. Deciding issues where Cabinet or Cabinet committees are unable to agree.
4. Granting ministers permission to miss Cabinet meetings or to leave the country.
5. Ultimate responsibility with the Leaders of the Houses for the government's legislative programme and the use of government time in Parliament.

6. Answering questions twice a week in the House of Commons on nearly the whole range of government activities.

Organisational and efficiency questions

1. Organisation and senior staffing of Number 10 and the Cabinet Office.
2. Size of the Cabinet; workload on ministers and the Civil Service; the overall efficiency of government.
3. The overall efficiency of the secret services; their operations and their oversight.
4. The creation, abolition and merger of government departments and executive agencies.
5. Preparation of the 'War Book'.
6. Contingency planning on the civil side with the Home Secretary, eg for industrial action that threatens essential services or for counter-terrorism.
7. Overall efficiency of the government's media strategy.

Budgets and market-sensitive decisions

1. Determining, with the Chancellor of the Exchequer, the detailed contents of the Budget. By tradition, the full Cabinet is only apprised of the full contents of the Budget statement the morning before it is delivered.
2. Determining which ministers (in addition to the Chancellor) will be involved and in which fora in the taking of especially market-sensitive economic decisions such as the level of interest rates.

Special foreign and defence functions

1. Relationships with heads of government (eg the nuclear and intelligence aspects of the US–UK 'special relationship').
2. Representing the UK at 'summits' of all kinds.
3. With the Defence Secretary, the use of the royal prerogative to deploy Her Majesty's armed forces in action.
4. With the Foreign Secretary, the use of the royal prerogative to sign or annul treaties, recognise or derecognise countries.
5. The launching of a UK nuclear strike (with elaborate and highly secret fallback arrangements in case the Prime Minister and Cabinet are wiped out by a bolt-from-the-blue pre-emptive strike).

Prime Minister's functions – 2011

Constitutional and procedural

1. Managing the relationship between the Government and the Monarch and the Heir to the Throne.
2. Managing the relationship between the Government and the Opposition on a Privy Counsellor basis.

3. Managing the relationships between UK Central Government and devolved administrations in Scotland, Wales and Northern Ireland.
4. Establishing order of precedence in Cabinet.
5. Interpretation and content of procedural and conduct guidelines for ministers as outlined in the *Ministerial Code* and the draft *Cabinet Manual*.
6. Oversight, with the Cabinet Secretary advising, of the *Civil Service Code* as enshrined in the Constitutional Reform and Governance Act 2010.
7. Decisions, with the relevant minister, on whether and when to use the ministerial override on disclosure under the Freedom of Information Act 2000.
8. Requesting the Sovereign to grant a dissolution of Parliament (unless and until Parliament passes the Fixed-Term Parliament Bill.)
9. Authorising the Cabinet Secretary to facilitate negotiations between the political parties in the event of a 'hung' general election result.
10. Managing intra-Coalition relationships with the Deputy Prime Minister.

Appointments
(Made in the name of the Sovereign but chosen by the Prime Minister.)

1. Appointment and dismissal of ministers (final approval of their parliamentary private secretaries and special advisers) in consultation with the Deputy Prime Minister for Liberal Democrat appointments and the appointment of the Law Officers.
2. Top appointments to the headships of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.
3. Top appointments to the Home Civil Service and in collaboration with the Foreign Secretary to the Diplomatic Service and with the Defence Secretary to the Armed Forces.
4. Top ecclesiastical appointments (although, since Gordon Brown's premierships, the Prime Minister has conveyed the preference of the Church of England's selectors to the Monarch without interference).
5. Residual academic appointments: the Mastership of Trinity College, Cambridge; the Principalship of King's College, London; a small number of regius professorships in Oxford and Cambridge (the First Minister in Edinburgh is responsible for the Scottish regius chairs). Since the Blair premiership the Number 10 practice has been to convey the wishes of the institutions to the Queen without interference.*
6. Top public sector appointments and regulators (with some informal parliamentary oversight).
7. Appointments to committees of inquiry and royal commissions.
8. The award of party political honours.
9. Party political appointments to the House of Lords (independent crossbench peers are selected by the House of Lords Appointments Commission and

the Prime Minister conveys the recommendations to the Monarch without interference).

* The authors understand that the Prime Minister will be withdrawing from the process soon to be underway for Trinity College.

Conduct of Cabinet and parliamentary business

1. Calling meetings of Cabinet and its committees. Fixing their agenda and, in the case of committees their membership in consultation with the Deputy Prime Minister.
2. The calling of 'Political Cabinets' with no officials present.
3. Deciding issues where Cabinet or Cabinet committees are unable to agree.
4. Deciding, with the Deputy Prime Minister, when the Cabinet is allowed an 'opt-out' on collective responsibility and subsequent whipping arrangements in Parliament.
5. Granting ministers permission to miss Cabinet meetings or leave the country.
6. Ultimate responsibility (with the Deputy Prime Minister and the leaders of the House of Commons and the House of Lords) for the government's legislative programme and the use of government time in the chambers of both Houses.
7. Answering questions for 30 minutes on Wednesdays when the House of Commons is sitting on nearly the whole range of government activity.
8. Appearing twice a year to give evidence before the House of Commons Liaison Committee.

Policy strategy and communications

1. Keeper, with the Deputy Prime Minister, of the Coalition's overall Political Strategy.
2. Oversight of Number 10 Communications Strategy and work of the Government Communication Network.
3. Pursuit and promulgation of special overarching policies particularly associated with the Prime Minister, eg the 'Big Society'.

Organisational and efficiency questions

1. Organisation and Staffing of Number 10 and the Cabinet Office (including the Prime Minister's relationship with the Deputy Prime Minister and the two senior Cabinet Office ministers dealing with policy strategy and public service reform).
2. Size of Cabinet, workload on ministers and the Civil Service.
3. The creation and merger of government departments and executive agencies.

Budget and market sensitive decisions

1. Determining with the Chancellor of the Exchequer, the Deputy Prime Minister and the Chief Secretary of the Treasury the detailed contents of the Budget.

By tradition, the full Cabinet is only apprised of the full contents the morning before the Budget statement is delivered.

2. Interest rates are now set by the Monetary Policy Committee of the Bank of England. The Prime Minister and the Chancellor of the Exchequer possess an override under the Bank of England Act 1998 if the 'public interest' requires and 'by extreme economic circumstances' but this has never been used.

National security

1. Chairing the weekly meetings of the National Security Council (which also serves, when needed, as a 'War Cabinet').
2. Oversight of the production and implementation of the National Security Strategy.
3. Oversight of counter-terrorist policies and arrangements.
4. Overall efficiency of the secret agencies, their operations, budgets and oversight and the intelligence assessments process in the Cabinet Office.
5. Preparation of the 'War Book'.
6. Contingency planning to cope with threats to essential services and national health from whatever sources.
7. With the Foreign and Defence Secretaries, the use of the royal prerogative to deploy Her Majesty's Forces in action (with Parliament, by convention, being consulted if time allows).
8. With the Foreign Secretary, the use of the royal prerogative to ratify or annul treaties, and to recognise or derecognise countries (although in certain circumstances, the House of Commons can block treaty ratification under the Constitutional Reform and Governance Act 2010).

Special personal responsibilities

1. Representing the UK at a range of international meetings and 'summits'.
2. The maintenance of the special intelligence and nuclear relationships with the US President under the terms of the 1946 Communications Agreement, the 1958 Agreement for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes and the 1963 Polaris Sales Agreement.
3. The decision to shoot down a hijacked aircraft or an unidentified civil aircraft which responds neither to radio contact nor the signals of RAF interceptor jets, before it reaches a conurbation or a key target on UK territory (plus the appointment of two or three deputies for this purpose).
4. Authorisation of the use of UK nuclear weapons including the preparation of four 'last resort' letters for installation in the inner safes of each Royal Navy Trident submarine and the appointment, on a personal basis rather than the Cabinet's order of precedence, of the 'nuclear deputies', lest the Prime Minister should be out of reach or indisposed during an emergency.

C. House of Commons war powers resolution

Hansard, HC vol 460 col 492, 15 May 2007[92]

Resolved, That this House welcomes the precedents set by the Government in 2002 and 2003 in seeking and obtaining the approval of the House for its decisions in respect of military action against Iraq; is of the view that it is inconceivable that any Government would in practice depart from this precedent; taking note of the reports of the Public Administration Select Committee, House of Commons Paper No. 422 of Session 2003–04, and of the Lords Committee on the Constitution, House of Lords Paper No. 236 of Session 2005–06, believes 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; recognises the imperative to take full account of the paramount need not to compromise the security of British forces nor the operational discretion of those in command, including in respect of emergencies and regrets that insufficient weight has been given to this in some quarters; and calls upon the Government, after consultation, to come forward with more detailed proposals for Parliament to consider.

92 http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070515/debtext/70515-0004.htm#07051555000001

D. Excerpt from the House of Lords Reform Draft Bill

HM Government (2011) House of Lords Reform Draft Bill, CM 8077, May 2011: 11[93]

8. The relationship between the two Houses of Parliament is governed by statute and convention. The Parliament Acts of 1911 and 1949 provide the basic underpinning of that relationship and set out that the House of Lords is, ultimately, subordinate to the House of Commons. They provide that, in certain circumstances, legislation may be passed without the agreement of the House of Lords. The Government does not intend to amend the Parliament Acts or to alter the balance of power between the Houses of Parliament. The Parliament Acts are, however, a long-stop which are rarely resorted to: the relationship between the Houses is governed on a day to day basis by a series of conventions which have grown up over time. These include that the House of Lords should pass the legislative programme of the Government which commands the confidence of the House of Commons; the principle that the Government of the day can continue in office only if it retains the confidence of the House of Commons and the consequence that, whether or not a Bill has been included in a Manifesto, the House of Lords should think very carefully about rejecting a Bill which the Commons has approved; and the principle that the House of Lords will consider Government Bills in reasonable time. Most important, though, are the conventions which support the financial privileges of the House of Commons.

93 http://www.official-documents.gov.uk/document/cm80/8077/8077.pdf

E. Professor Margaret Wilson, former Speaker of the New Zealand House of Representatives

Excerpt from oral evidence to House of Commons Political and Constitutional Reform Committee, 20 January 2011[94]

Professor Wilson: I'll start with the Cabinet Manual, since I know the Committee is interested. I watched your session, I think it was last week, on it. In the New Zealand context – my comments are totally related to the New Zealand context – the Cabinet Manual is seen as a guide for both Ministers and officials, and it is a document that's evolved over a period of time. It began in 1948 with the admission into Cabinet meetings for the first time of the Cabinet Secretary. I'm not quite sure whether it was that secretaries write things down or it was seen as being part of the post-Second World War tendency towards slightly more open government, but once that happened, we did start to get the beginning of what we now call the Cabinet Manual.

There was a consolidation of the content of the Manual in 1979, but it still had very restricted circulation to senior officials. In 1991, the loose-leaf Cabinet Manual was produced, and it went to everybody. In 1998, it came in a nice bound form, and it went online in 1998 as well. So there's been that evolution, if you like, from scattered documents being guides to the relationship between officials and Ministers into now what would seem to be like a more formal document. The document itself is supplemented by a Cabinet Guide, which sets out the more administrative details – that is also online – for officials and how they prepare papers for Ministers and for Cabinet.

Now, in the New Zealand context, the Cabinet Manual has no legal status. It's seen, and been described in several instances, as descriptive and not prescriptive, so there's no penalty, as such, for not observing the advice in the manual, beyond knowing that others know that you haven't followed what's in the manual, and therefore there might be some political consequences for that, in a negative publicity sense.

The Manual is drafted by Cabinet Office officials, but it is always approved by the Prime Minister after consideration by the Cabinet. I think I should also say that at the beginning of each new Cabinet – we have elections every three years – the Cabinet Manual is put before Cabinet Ministers at a Cabinet meeting, so it's formally endorsed, if you like, by that Executive. In any revision of the Manual, the draft is prepared by office officials, and it's submitted to a peer review group of senior public officials from the Crown Law Office, the Ministry of Justice, State Services, and the Treasury; also, specific chapters would go the Clerk of the House or the Ombudsman or Privacy Commissioner. Once that draft is completed, it goes to the Prime Minister, who may change it or alter it and, as I said, it goes to Cabinet. But ultimately, it is the Prime Minister who is the key person who controls the content of the Manual.

94 http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/747/11012002.htm

The Cabinet Manual certainly wasn't a result of the mixed Member electoral system, which I will refer to as MMP. Some people think it came in at that time. It did not, as you have seen. However, I would say that the complexity of MMP government has made the Manual an important source of information of what is the best practice for Government decision-making. So, it removes uncertainty in situations such as Government formation or collective responsibility when you have coalition or minority Governments.

So the Cabinet Manual today is now seen, I think, as an essential element of transparent governance. If we didn't have it, we would probably have to invent it, as they say. However, I would note the comment of a former Secretary of Cabinet, who said of the Cabinet Manual: "Like good wine and cheese, it takes time". It's seen as constantly a work in progress, and for it to remain relevant, it has to reflect the reality of whatever the situation is that confronts the Executive at the time …