

The Political and Constitutional Reform Select Committee inquiry into the constitutional implications of the Cabinet Manual

Written submission from Democratic Audit

About Democratic Audit

Democratic Audit is an independent research organisation, based at the University of Liverpool. We are grant funded by the Joseph Rowntree Charitable Trust to conduct research into the quality of democracy in the UK and are currently conducting the fourth full Audit of UK democracy (the previous three Audits were published in 1996, 1999 and 2002).

Summary

- Given its origins and its content, the Cabinet Manual will almost inevitably come to be seen as a surrogate for a written constitution, although it clearly differs from a written constitution in a number of crucial ways.
- Despite its lack of legal status in its own right, the Manual is likely to become a significant point of reference for anyone seeking to hold government to account – including journalists, opposition parties and backbench MPs.
- We have a number of concerns about the process through which the document has been produced and about the provisions for consultation. We would suggest that Parliament should have been more centrally involved in the process of producing the manual.
- A non-deliberative approach to public consultation over a 12 week period is inadequate for a document of such constitutional significance.
- The Manual should give greater recognition to the fact that not all constitutional conventions are recognised as binding and should be more explicit about the full range of constitutional issues which it does not seek to cover
- The Manual appears to invent a new convention that incumbent Prime Ministers are not expected to resign until it is accepted that someone else is better placed to form a government.

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

Consequences of the Manual's Publication

1. The likely constitutional consequences of the publication of the Cabinet Manual, many of which are only likely to become apparent over the medium-long term, are very difficult to assess.

2. Much of the difficulty of assessing the constitutional consequences of the Cabinet Manual arises from the highly ambiguous relationship between the Manual and a written constitution.

3. While taking its inspiration from the New Zealand experience, the origins of the UK's draft Cabinet Manual cannot be divorced from the case made by Gordon Brown as Prime Minister for a wide-ranging discussion on whether the UK should seek to adopt a written constitution. It was widely understood, therefore, that the original intention was to link the production of the manual to the long-standing debate about whether the UK's constitutional arrangements should be codified in some way.

4. Clearly, the broader political context has changed since the process of writing the manual was set in train and, as a result, the publication of the manual has not been accompanied by any formal recognition that it could be regarded as a step towards a written constitution. However, the question of whether the draft Manual could, or should, constitute a foundation for a written constitution clearly remains. This reality was recognised by the Cabinet Secretary, the principal author of the document, when he said to the select committee in November, prior to the publication of the draft: 'I think those who are in favour of a written constitution will start with it'.

5. The publication of the draft Manual renders the ambiguities of its relationship to a written constitution all the more apparent. In his foreword to the Manual, the Cabinet secretary notes:

'... there has never been a single source of information on how the Government works and interacts with the Sovereign, Parliament, the judiciary, international organisations, the Devolved Administrations and local government' (p.2).

6. In all but two other democracies worldwide, the 'single source of information' fulfilling these functions would be easily identifiable as the country's principal constitutional document (i.e. a written constitution). It is therefore telling that the Cabinet Secretary then goes on to explain the rationale for the Manual in the following terms:

'The Cabinet Manual is intended to be a source of information on the UK's laws, conventions and rules, including those of a constitutional nature, that affect the operation and procedures of government. It is written from the perspective of the Executive branch of government. It is not intended to have any legal effect or set issues in stone. It is intended to guide, not to direct' (p.3).

7. In this sense, the document can be regarded as a sort of substitute for what would typically be found in a written constitution in most democracies. However, it also contrasts to a written constitution in three crucial ways. First, the Manual is written from the perspective of

cataloguing ‘the operation of government’ from the centre, rather than from a position of providing government with a source of legitimacy, as expressed by the ‘will of the people’. Second, the document itself has no legal status and, as such, provides no basis for sanction or redress in instances where the actions of governments appear to be inconsistent with what is described in the Manual – save where any such forms of redress are already defined in statute. Third, the Manual does not clarify the arrangements through which constitutional arrangements can be amended – it simply accepts that they will change, and that the Manual will have to be revised regularly as a consequence.

8. Given these points of contrast to a written constitution, one of the more unpredictable constitutional consequences of the Manual’s publication may be the way in which it is used as a source of reference by opposition parties, backbench MPs, the media and others in seeking to hold governments to account. The use of the Manual in this way is likely to become particularly evident in cases where descriptions of the legislative process and government operation contained in the Manual could be argued to be based more on a view as to what *should* happen than on widely-accepted conventions or norms.

Consequences of the process being adopted

9. We are puzzled, and to some extent concerned, that such a significant document has been published in the name of the Cabinet Secretary. Democratic Audit regards the draft Manual as a document that ought properly to have been presented to Parliament and the public by the Prime Minister and the Deputy Prime Minister who have instead merely given their approval for its publication. The Cabinet Secretary, like all civil servants, is not directly responsible to Parliament. Yet it seems that not only is he the official author of the document, but he will also have a major role in receiving and considering comments on its contents and bring forward a revised version later this year.

10. While we very much welcome the Constitutional and Political Reform Select Committee’s inquiry into the issues raised by the Manual’s publication, Parliament’s wider role in relation to the document is by no means clear. The manner in which the document is presented appears to suggest that the Manual’s contents are a matter for the Cabinet Office to determine, albeit after allowing others an opportunity to submit written comments on its contents. It is our view that the Manual should be the subject of debate in Parliament and that ownership of the document should ultimately rest with Parliament.

11. The apparent by-passing of Parliament in the process of producing the manual is central to the wider set of concerns we have about the process that has been used so far. Prior to the Manual’s publication, it would appear that Cabinet Office consultation was quite limited. In addition to private consultations between Cabinet Office officials and a small number of invited ‘constitutional experts’, the only open consultation was with the House of Commons Justice Committee on the draft of what is now Chapter 2. We would argue that this falls far short of good democratic practice. We also take the view that a three-month consultation period on the full 147 page draft, which takes in the Christmas and New Year holiday period, is not sufficient for a document which is the closest thing the UK will have to a written constitution. The Cabinet Secretary told the committee in November 2010: ‘It has never

existed before; we've been waiting decades and decades for this'. So why the rushed consultation now that it has been published?

12. Furthermore, we have concerns about the way in which the process of consultation has been structured. Comments on the draft are to be sent to the Cabinet Office directly, and decisions about how to respond to them are apparently to rest with the Cabinet Office alone. While a 'summary of issues raised' is to be published, we would question whether the consultation process can claim to be fully open and transparent. Just as significantly, we would argue that no attempt has been made to provide for a deliberative process of consultation, though which a more considered and sustained dialogue with interested parties would be facilitated.

13. The Cabinet Office's consultation may well conform to accepted norms of 'best practice', but the publication of a document of this constitutional significance is by no means the norm. When Gordon Brown announced that this document was being prepared in February 2010, he presented it as the first stage in a process that would be followed by wide and full consultation and possibly lead to a written constitution. Even then, this document would not be the ideal way to start such a project - but the later stages seem to have been forgotten and the Manual is set to be the end product now, rather than the first stage of a major consultative process.

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

14. Our reading of the Manual leads us to suggest that important aspects of the law are not made wholly apparent where they should be. We would suggest that there are two significant general points to be made about how the Manual deals with points of law:

- The place of the rule of law is not recognised as clearly as it might be. Under the common law, the executive is subject to the rule of law. Parliament did, as the Manual says, choose to constrain itself to the rule of law in the Constitutional Reform Act 2005, recognising 'The existing constitutional principle of the rule of law'. Parliament of course has important privileges that protect its role and free speech in the House of Commons, not mentioned in the draft.
- The removal of the European Union to a late chapter means that the Manual does not do justice to the extent to which the United Kingdom is constitutionally part of the European Union and subject therefore to EU law and the rulings of the European Court of Justice.

15. As for conventions, the Manual errs when it states that they are 'regarded as binding in operation but not in law'. While *some* key conventions are certainly regarded as binding, many more are not and have been amended and even abolished over time. They are therefore constantly liable to change – usually by Ministers – and by definition difficult to express in written form. Accurately reflecting conventions in the Manual is therefore a difficult task and some of the descriptions of conventions risk being so vague as to be unhelpful and possibly open to abuse. To take but one example, paragraph 77 states that: 'The Prime

Minister has few statutory functions but will usually take the lead on significant matters of state.’ What does ‘taking the lead’ mean? What are ‘significant matters of state’? What safeguards are there?

16. We would also suggest that it is a questionable task for a document drafted by the Cabinet Office to seek to have the final word on the meaning of conventions. In attempting to clarify conventions in relatively ‘Plain English’, an admirable objective in itself, the Manual generally fails to demonstrate *how* it arrived at certain definitions of conventions. In reality, many conventions do require some form of justification and explanation, as well as some recognition of the ‘grey areas’ of interpretation associated with them – as even a cursory glance at a constitutional law textbook would confirm.

17. As such, there are long-standing questions about the UK constitution that this document cannot solve and which it can in fact only highlight by attempting to write them down. To take an example, the text at the head of the section on ‘Collective Cabinet decision-making’ (chapter 4) states - probably incorrectly - that ‘Cabinet and Cabinet committees are the only groups formally empowered to take binding decisions on behalf of the Government’. Then, over the next two sentences the Manual states - probably correctly - that only ministers can take such decisions. So which is it - the Cabinet and its committees or the ministers who take the decisions?

18. We also find it surprising that there is no discussion of the widely-held and respectable view that the process of going to war in Iraq created a new convention that Parliament should be consulted over any decision that could result in the UK going to war.

19. The Manual risks being especially vague where it appeals to descriptions of ‘best practice’ rather than cataloguing conventions or rules. For instance, in paragraph 205-8, the Manual gives consideration to the role of pre- and post-legislative scrutiny. The text states that:

‘Ministers should consider publishing bills in draft for pre-legislative scrutiny, where it is appropriate to do so. Reports from the Commons Liaison Committee have identified this as good practice’.

20. Clearly, such a formulation offers Ministers a substantial amount of discretion about whether to subject draft Bills to pre-legislative scrutiny or not. Recent experience with the Parliamentary Voting System and Constituencies Bill and the Fixed-term Parliaments Bill would appear to suggest that, even for legislation with major constitutional significance, ensuring sufficient time for pre-legislative scrutiny may not be regarded as a priority by Ministers.

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

21. It seems likely to us that considered debate about the draft Manual would reveal instances where the text appears to *crystallise* conventions – that is, it asserts the existence of a convention which had seemingly not previously been fully formed, but the existence of which can be reconciled with recently developing precedent. One example of such a tendency is the description of the Office of the Deputy Prime Minister in paragraph 84.

22. The Manual also appears to invent a new convention on the position of a Prime Minister after losing an election that is inspired by the recent controversy over Gordon Brown's conduct in 2010 when it states that:

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

23. It would seem to us that this passage represents a view of what should happen in such instances in future, rather than a considered reflection of actual events in 2010 and in other instances in which elections have failed to return an overall majority for a single party in the Commons.

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

24. The foreword to the Manual underlines the specific nature of its remit, which a focus on matters of relevance to the Cabinet, and underlines that ‘it would be inappropriate to include other matters, however important’. This formulation makes it somewhat difficult to judge whether specific aspects of UK governance are legitimately excluded from consideration or not. For instance, all of the following could be argued to have a bearing on the ‘operation and procedures of government’ which the Manual seeks to summarise:

- The Electoral Commission receives only a passing reference and there is no substantial description of its functions and responsibilities.
- The Salisbury-Addison Convention (i.e., that the House of Lords should not block legislation that was in a manifesto) is missing - a significant issue at the moment since it is not clear that the Coalition Agreement can be regarded as having received a mandate in the same way that a manifesto does;
- In the local government section, there is no mention of the unique status of the City of London Corporation, no reference is made to the 'Central-Local Concordat' and no recognition is given to the fact that Ministers frequently establish single-purpose bodies to which local government functions in specific areas may be transferred, either temporarily or permanently.
- The devolution section does not mention devolved Greater London government, and the local government section only mentions the Greater London devolution settlement in passing.

- Significant areas of state activity are entirely missing. Policing and the security and intelligence services do not appear at all and the armed forces rate a mention only by way of formal arrangements.

25. Should the Manual come to have significant constitutional status, as seems likely, there would need to be clearer recognition both of the constitutional issues which it does not seek to cover and of those which are to some degree contested. The Manual should arguably also provide an indication as to where consideration of such aspects of the constitution can be found. Some examples of core constitutional matters whose exclusion from the Manual should arguably be specifically noted:

- Citizenship law, immigration and asylum law;
- Arrangements for elections to the European Parliament, devolved institutions and local government;
- The role of bodies with a significant constitutional role, such as the Equality and Human Rights Commission, the Committee on Standards in Public Life, the Joint Committee on Human Rights in Parliament, the Northern Ireland Human Rights Commission.
- A fuller consideration of international and European treaties, including the UK's ratification of UN human rights instruments such as the International Covenants on Civil and Political and Economic, Social and Cultural Rights.

26. It is possible that the absence of such matters from the current draft render the document significantly less valuable as a guide for ministers and officials. It is also clear that were the Cabinet Manual to be regarded, at any stage, as a potential foundation for a codified constitution, this list of omissions would grow substantially

Are there matters currently included in the Cabinet Manual that should not be, or that should be given lesser prominence?

27. There are numerous sections in the draft which stray significantly beyond description to offer potentially contestable interpretations of the role or status of specific institutions or processes. For instance, paragraph 1 refers to a 'sovereign Parliament, which is supreme to all other government institutions'. We would question whether this statement holds in light of the UK's membership of the European Union. Elsewhere, paragraph 6 describes the Sovereign as 'providing stability, continuity and a national focus'. While we would not necessarily seek to dispute that there is at least some truth in this statement, we would consider it a value judgement which adds little of practical significance to the task of describing the operation of government in the UK.

28. On a more specific issue, the description of departmental boards (paragraphs 361-364) should either be made less detailed or omitted. They are a recent innovation and have not yet become a clearly embedded part of the constitution. Their inclusion in the Manual while other recent innovations, such as the use of departmental business plans and the establishment

of the Office for Budget Responsibility (with only a passing reference on p.76 footnote 36), are neglected, appears incongruous.

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