

## **Dr Andrew Blick – written evidence (RCM0002)**

### **House of Lords Constitution Committee Inquiry into Revision of the Cabinet Manual**

1. I am pleased that the Committee has chosen to conduct an inquiry into this important text and its future. Please find my answers to questions 1-4 below. I am happy to deal with any further queries the Committee might have.

#### **What role does, and should, the Cabinet Manual play as a public facing document?**

2. The Cabinet Manual purports to be a description of aspects of the United Kingdom (UK) system of government from the point of view of the executive. In as far as it performs this role it is not only a means of guiding those within government, but of enabling those outside to understand the set of rules according to which ministers and officials operate, against which their performance might be judged. In this sense, as well as providing guidance within the institution that issued it, as a public text, the Manual is educative, and is a tool of accountability. It can also, in theory, help promote public understanding of and confidence in the constitution.
3. Another public role the Manual could in theory come to play is of a legal nature. In the Preface to the Manual, the then-Cabinet Secretary, Sir Gus (now Lord) O'Donnell, noted that it was:

*'not intended to be legally binding...'* ( p.iv)

4. Nonetheless, some legal experts (of which I am not one) seem to find it plausible that a court could take the Manual into account as part of a judicial review proceeding.
5. In the Preface, O'Donnell described the purpose of the text as one of:

*'recording the current position rather than driving change...The Cabinet Manual records rules and practices, but is not intended to be the source of any rule.'* (p.iv)

6. However, the Manual performs a more subtle and extensive role than that of depicting what is, significant though this function is. It exerts influence on perception, important in any system, but particularly so in the context of the 'unwritten' or 'uncodified' UK constitution. Decisions about which rules to present as important enough for inclusion in the Manual, and the particular interpretations placed upon them, influence what people believe the constitution to be. The principal source of authority for arrangements such as conventions that lack hard legal force is their ability to command acceptance that they exist and that they operate in a certain way. There is a long history in the UK of commentaries on and descriptions of the constitution coming to be regarded as a part of it. The writings of, for instance, Walter Bagehot and A. V Dicey, though presenting themselves as depictions of the system as it functioned, became part of its defining conceptual fabric. We can reasonably assume that a text such as the Manual, can – by virtue of being publicly regarded as authoritative – shape which it purports only to provide an account of.

7. Furthermore, in at least one case, the Manual had no option but to be prescriptive rather than descriptive. In its account of the principles that should apply in circumstances where a government lost a confidence vote within the terms of the *Fixed-term Parliaments Act 2011* (see: para 2.31), it was of necessity speculating, since no such incident had taken place (and now, it seems, never will do). There was no precedent to draw on, and the Act itself did not offer any guidance. In this respect, the Manual appeared to be attempting to bring new rules into being.
8. Are these two general public roles – the informative and the formative – desirable? In principle, it is difficult to argue against the value of the former. Openness in government is widely accepted as a virtue. That the Manual was specifically designed with public consumption in mind is a clear illustration of how much has changed from earlier times (at least as recently as the 1970s) when documents such as *Questions of Procedure for Ministers*, the forerunner to the *Ministerial Code*, were classified. Furthermore, a document that helps clarify the sometimes difficult to comprehend UK constitution has democratic value, raising awareness among the public of the nature of the system. To perform such tasks effectively is certainly useful. However, to do so in a way that is somehow flawed is problematic, potentially promoting inaccurate interpretations and even undermining public confidence in the system.
9. The shaping role should be approached with more caution still. It creates potential for one branch of the constitution – the executive – to influence the nature of the set of rules, the constitution, to which it is subject. This proposition seems less than satisfactory. Such concern is heightened by the Manual's dealing with matters that extend well beyond those that exclusively concern the executive. It engages, for instance, with the UK Parliament and the legal system. The Manual, from this perspective, is potentially a means by which the executive can – largely unilaterally – wield shaping influence across the constitution.

### **Should the Cabinet Manual be updated and, if so, what changes are required?**

10. The Manual should be updated and reissued periodically; and such an exercise is now overdue. This approach was planned at the outset. The document described itself as the '1ST edition', implying that more would follow. In the Preface to the Manual, O'Donnell made this intention clear, and in the process identified some key justifications for this plan:

*'The content of the Cabinet Manual is not static, and the passage of new legislation, the evolution of conventions or changes to the internal procedures of government will mean that the practices and processes it describes will evolve over time. If the Cabinet Manual is to continue to play a useful role as a guide to the operations and procedures of government, it will need to be updated periodically to reflect such developments.'* (p.iv)

11. The Manual contains content of exceptional constitutional importance. In some instances, it presents what are the most definitive official, public statements of key aspects of the UK system of government. They include:

*'The government of the day holds office by virtue of its ability to command the confidence of the House of Commons.'* (para 2)

*'Prime Ministers hold office unless and until they resign.'* (para 2.8)

'[when no one party has a majority in the House of Commons] *Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed.*' (para 2.13)

12. These stipulations, alongside various others found in the Manual, are key to the operation of the UK as a democratic constitutional monarchy. From this perspective, failure to update the Manual is problematic in two ways. First, it means that some of this important content is becoming outmoded, overtaken by events. Second, it means that, even if where it remains up to date, its authority arguably suffers from being part of a document the general relevance of which has declined. Furthermore, as we will see, failure to update means that content that has been identified as problematic remains within the text, a difficulty in its own right that is also to the overall detriment of the document.
13. An obvious example of a development suggesting the need for a revision of the Manual is UK departure from the European Union (EU). The text contains numerous references to the EU that need amending if it is to avoid the appearance of having lost relevance. Departure from the EU has further consequences – for instance, for the role of the courts and for the relationship between devolved and UK-level institutions – that might require reflection in the Manual.
14. A further change with significant implications for the content of the Manual seems likely. As discussed above, the text makes significant references to the *Fixed-term Parliaments Act 2011*. Newly-passed at the time that the first edition of the Manual appeared, the present government now intends to repeal the Act. Assuming (entirely reasonably) that this proposal is enacted, the Manual would become outdated in another important way. A revised text (if issued after the repeal of the 2011 Act) would need to refer to the new (or revived) means by which dissolutions of Parliament are obtained (presumably via a request from the Prime Minister to the monarch). It might offer a description of the non-statutory constraints to which premiers are subject in the exercise of their right to seek approval for the instigation of a General Election, to ensure there is no perception of abuse. A clear statement of principles of this type is absent from existing government proposals for repeal of the 2011 Act. Revision of the Manual might create the opportunity to correct this omission, protecting the integrity of the democratic system and insulating the head of state, avoiding their association with matters of party-political controversy.
15. Various other aspects of the Manual would, in the light of developments, benefit from revisiting in a revised edition, adding force to the case for such an exercise. I offer some examples here: there are no doubt numerous others.
16. The existing text makes some references to the practice of the prorogation of Parliament. But just as it would be helpful to clarify principles applying to requests for a Dissolution, it would also be useful for the executive (especially following the *Miller II* judgment) to set out what it believed to be appropriate grounds on which to advise the monarch to prorogue Parliament.
17. The 2011 text makes surprisingly few references to referendums and their constitutional role. An update could provide an account of matters such as the types of decision that require authorisation through referendum; how to

determine it is necessary to hold such a vote; and, once it has taken place, when a further referendum on the same or a similar subject is appropriate.

18. Another example of specific text from the Manual that needs attention and consideration is the statement that:

*'Ministers are under an overarching duty to comply with the law, including international law and treaty obligations...'* (para 3.46).

19. This statement replicated content from the then-current *Ministerial Code*. But in the following, 2015, edition of the Code, the reference to 'international law and treaty obligations' was removed. At the time, the official government position seemed to be that the change was simply a drafting decision, and did not reflect an actual dilution of commitments in this area. However, recent developments with respect to UK obligations over Northern Ireland following departure from the EU suggest a modification of approach has taken place. A new edition of the Manual could provide the government with the opportunity to clarify what are the circumstances in which it feels it is appropriate for the UK to violate international law, and what is the difference between – on the one hand – a reasonable unilateral alteration of the terms of an agreement, and – on the other hand – a violation of a treaty obligation or of international law.

20. It should be noted at this point that – while it is possible to construct arguments in favour of such changes to the Manual – the desire to avoid difficult issues of this type could well be a reason that the executive seems uninterested in producing a revised edition. There are further matters that a new version of the text could address, but that the executive might not wish to. They include the role of ministers in upholding further aspects of the rule of law. For instance, what are the protocols regarding how they should respond publicly after losing judicial reviews? Furthermore, are there circumstances in which they should seek publicly to rebut media attacks upon the integrity of the courts?

21. A new Manual could also omit, or at least heavily qualify, controversial material included in 2011. An example of such problematic content comes with the reference the Manual makes to what it describes as the 'Ram doctrine', according to which, it summarises:

*'Ministers' functions are not limited to those authorised by statute. A minister may, as an agent of the Crown, exercise any powers which the Crown may exercise, except insofar as ministers are precluded from doing so by statute and subject to the fact that a minister will only be able to pay for what he or she does if Parliament votes him or her the money...'* (para 3.31)

*'The powers that a minister may exercise include any of the legal powers of an individual, for example to enter into contracts, convey property or make extrastatutory payments. As more of ministers' powers have been codified in legislation, the extent of inherent powers has been correspondingly reduced.'* (para 3.32)

22. Many legal experts share the view that the 'Ram doctrine' is fallacious and lacks any authority in its own right. A revision of the Manual would provide an opportunity to address this issue. It could either omit reference to Ram, or better still expressly disavow it. To do so would be in accordance with the views of a predecessor to the current House of Lords Select Committee on the Constitution, as expressed in its 2013 report, *The pre-emption of Parliament*. On this occasion the Committee argued that:

*'The description of the common law powers of the Crown encapsulated by the phrase "the Ram doctrine" is inaccurate, and should no longer be used.'* (para 60)

23. A redraft of the Manual would provide the opportunity to act upon a variety of suggestions that have appeared in select committee reports emanating from both Houses of Parliament, calling for additions and alterations in areas such as Parliament and armed conflict; prime-ministerial resignations; and pre-election contacts between opposition politicians and civil servants (see eg: House of Commons Political and Constitutional Reform Committee, *Revisiting the Cabinet Manual*, 2015, HC 233, pp.22-27).

**What approach should the Government adopt to ensuring the Cabinet Manual is kept up to date?**

24. The government could commence updates of the Manual at the beginning of each Parliament. It could instigate a process of wide consultation, including with committees of the UK Parliament, devolved institutions, the judiciary, and further interested parties, such as academics and other experts. The new edition could then be published at the outset of the following Parliament, forming a basis for the next consultation process. Such a rolling programme might face disruption in the event of earlier than anticipated elections, but the one-edition-per-Parliament rule could serve as a general principle. A transparent process, whereby submissions were published (given consent from those providing them) would be desirable. The government could provide a reasoned account of its decisions, referring to evidence received, to accompany each new edition.
25. Some might favour continual piecemeal updates to the Manual, and point to the ease of doing so given the development of the Internet as the main means of dissemination of such documents. But that a technology makes such a practice possible is not sufficient reason in itself to adopt it. There might be merit in ensuring that the document was as up to date as possible. However, continual changes to the Manual could create confusion, and give it a more ephemeral and less authoritative quality. Furthermore, it is important to consider the potential – discussed above – for the Manual to be a means not only of describing, but of helping to generate or change rules. Ultimate control over the Manual rests with the executive. The possibility of updating it at, in theory, any point might provide the executive with excessive flexibility, with the ability to alter the constitutional system in ways that suited its needs of the moment. A more considered process, with other players given the opportunity at least to provide an input, is preferable. It might be appropriate, however, to log changes proposed by the executive and others somewhere in parallel to the current document.

**Recognising the Cabinet Manual is an Executive document, what role, if any, should Parliament have regarding its revision?**

26. Given the importance of the Manual and the provisions it contains, and that some of them relate to the constitutional role and practices of Parliament, it is entirely proper that Parliament should take close interest in the text. Parliamentary committees have already made a variety of recommendations regarding the text. If the executive were to announce plans to revise the Manual, Parliament might be advised to convene a special inquiry – perhaps a bespoke committee of both Houses – to review the existing document, or any draft that the executive brings forward, and make recommendations. If the present apparent lack of government interest in producing a second edition persists, Parliament should give serious consideration to producing an account, in a single document, of those conventions and other rules of the system that it believes merit treatment in this

way, in a form it judges to be appropriate. If the government produces a document containing problematic content (or omissions), then Parliament should ensure that its reservations, and proposed alternative wordings, are placed clearly in the public domain. There seems to be no obvious constitutional reason why, if the executive can produce documents such as the Manual, Parliament cannot also take an assertive approach in this field, especially with respect to rules that directly concern it.

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