ALL-PARTY PARLIAMENTARY GROUP ON THE CONSTITUTION

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Notes for Presentation

LEGAL STATUS OF THE CABINET MANUAL

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OVERVIEW

1. The Foreword to the draft Cabinet Manual states explicitly that it is not intended to have legal effect:

    > *'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'* [Underlining added]

2. In this respect it is similar in intent to the New Zealand Cabinet Manual. However, the New Zealand experience demonstrates that documents of this kind can *'become part of normal accepted constitutional arrangements'* (see Professor Margaret Wilson's Notes for Presentation at p. 4). Given that a Cabinet Manual is likely to be treated as having at least some constitutional status the issues surrounding possible legal status of such a document are probably wider than whether or not the intent behind the Manual is: (i) descriptive rather than prescriptive, (ii) subject to revision, (iii) designed to promote greater transparency and (iv) not to create a *de facto* written Constitution.[1]

3. The core question is whether or not the judiciary is likely to be asked to and, if so, whether it will respond to invitations to, adjudicate on elements of the Cabinet Manual once it has been finalised. A secondary (and contingent) question is whether if the judges do decide to resolve particular questions relating to the Cabinet Manual

[1] These attributes are all cited by Professor Wilson in her Notes for Presentation as essential features of the New Zealand Cabinet Manual.

this create opportunities for the judges to pronounce on constitutional questions on which they have, thus far, remained silent or at least reticent to decide.

4. If judges were to pronounce on in this way on matters contained in the Cabinet Manual it would be hard to deny that, although not intending to have legal effect, the Manual was operating as a constitutional catalyst and, at least in that sense, possessed arguable legal status. In any event, it is in this sense that I use the concept of legal status in what follows.

APPROACH TAKEN IN THIS PAPER

5. In this Paper I sketch short responses to the following questions:

   - Is a Cabinet Manual in substance a written Constitution or at least the first stage towards a written Constitution?[2]
   - Are there any constitutional axioms? If not, can matters of law be separated from constitutional questions?
   - If there is some overlap between law and constitutional questions what is the potential for a Cabinet Manual to be the subject of judicial adjudication?
   - What potential for legal status might the processes of creating and/or revising the present draft Cabinet Manual involve?
   - What potential for legal status might the content of the present draft Cabinet Manual involve?

QUESTION 1 – IS THE CABINET MANUAL A WRITTEN CONSTITUTION OR AT LEAST THE FIRST STAGE TO ONE?

[2] This Question is conceptually separate from the others. If a Cabinet Manual were, indeed, the precursor to a written Constitution its legal status would be the same as that of any written Constitution. It would then alter our entire constitutional arrangements. As explained below, however, I do not consider this to be its effect. The remaining Questions are linked each to the other and address what I have described as the core question of how the judges are likely to treat both the processes by which a Cabinet Manual evolves and the content of such a document.

6. There is a key distinction between a written Constitution operating as the source of legal authority within a State ('the first sense') and a codified Constitution which, though it may be in writing, does not purport to be more than an attempt to describe a number of current constitutional arrangements reflected in a hitherto unsystematic set of constitutional principles, laws and practices ('the second sense').

7. I have no difficulty in identifying the intended Cabinet Manual, at least at this stage, as the start of a codified Constitution in the second sense. The present document makes clear in a number of places that it merely seeks to record and to clarify present practices. It is not intended in any way to be a reforming document but it is concerned to be comprehensive and to represent an agreed position on the operation of central government.

8. Thus (from the Foreword):

> *'... it will be a record of incremental changes rather than a driver of change ...*
>
> *Publishing the Cabinet Manual in draft has two main aims:*
>
> > *first, to ensure that – as far as possible – the Cabinet Manual reflects an agreed position on important constitutional conventions. Where there is doubt or disagreement, we hope consultation will help clarify the position and achieve a common understanding*
> >
> > *second, to check that the draft covers the issues which need to be covered (that there is nothing missing which should be included and that nothing is included which does not need to be included in a Cabinet Manual), and that it does so in a way which is easy for the intended audience to follow.*
> >
> > *It is important to remember that the Cabinet Manual is intended to record the current position on the operation of central government. We are not seeking comments on laws, rules or conventions that people may wish to see changed in the future.'*

9. Further, whatever the professed intention of the Cabinet Manual, and whatever its actual content, it could not as a matter of current constitutional theory ever operate to create a written Constitution in the first sense. This is because of the doctrine of Parliamentary sovereignty which places the Queen in Parliament acting by Act of Parliament as the supreme legislator with no superior authority and with unlimited legal effect.

10. This has the necessary consequence that any prior Act of Parliament can always be repealed by a later Act. It follows that no written Constitution in the first sense could ever, consistent with current constitutional theory, be established because it could never operate to bind Parliament or the Courts permanently. Expressed shortly, if Parliament can create a Constitution it may also repeal it because it is sovereign.

11. Nonetheless, it is also clear that in practice constitutional conventions can operate to have binding effect in practice. Thus (for example) whilst as a matter of constitutional theory the Westminster Parliament could legislate on devolved (non-reserved) matters without first having to seek the consent of the Scottish Parliament, a constitutional convention (the Sewell Convention) means that for all practical purposes the consent of the Scottish Parliament must be sought before this could occur.

12. A question therefore arises as to whether the development of a Cabinet Manual may, both in terms of its content and the process by which it evolves, lead to the creation of a written Constitution in practice if not in theory.

13. My own view is that it would not. If the Cabinet Manual is intended (as it seems to be) merely as a descriptive and less than comprehensive document[3] it cannot, by definition, go beyond the contours of our present constitutional arrangements. In particular, it cannot erode Parliamentary sovereignty.

14. In terms of its legal status, the risks are different. The more that a Cabinet Manual purports, by a defined process, to set out written constitutional rules as an indicator of present arrangements, the more scope there may be for judges to become involved in both the process and the content of such a document.

QUESTION 2 – ARE THERE ANY CONSTITUTIONAL AXIOMS?

15. The reason for posing the Question in this way is as follows. If there is a clear demarcation between constitutional principles that are simply not justiciable in the

[3] Being purportedly concerned solely with executive Government

courts because they represent 'first order' constitutional principles, practices or axioms (collectively 'axioms') that the Courts cannot or do not concern themselves with then it may be supposed that a Cabinet Manual that is merely descriptive of such existing 'axioms' would not raise any obvious concerns of legal status in the sense in which I have used that term in this Paper.

16. If, however, there are no such axioms or that question is itself the subject of contention between the Courts and the other arms of the State (Parliament and the Executive) then it is distinctly possible that concerns of the legal status of a Cabinet Manual could arise as described below. This is because there could be ambiguity as to the precise dividing line of that which is, on the one hand, the remit of the judiciary and, on the other, that which is the province of Parliament and/or the Executive. If that is the position then, as I seek to suggest, both the process of developing a Cabinet Manual and the content of the Manual raise clear issues as to their legal status.

17. It seems to me that, with one important exception, there are few (and perhaps no) true constitutional 'axioms'. The exception is that of constitutional conventions which have usually been thought to be outside the reach of the Courts altogether. Conventions are, it is often said, non-legal rules and the Courts do not have jurisdiction to adjudicate upon them. Although the Courts have rarely been called upon to address constitutional conventions the distinction between legal and non-legal rules has been recognised and Courts have, when confronted with the issue, recognised the existence of Conventions without adjudicating on them or being able to enforce them (see: *Attorney-General v. Jonathan Cape Ltd* (1976) and *Reference re Amendment of the Constitution of Canada* (1982)).

18. If, therefore, a Cabinet Manual were to confine itself to a recitation of agreed constitutional conventions it is not likely that this would raise issues of legal status.

19. However, conventions aside, I have some doubt as to whether any constitutional principle is unequivocally outside the reach of the courts. Parliamentary sovereignty (described above) is sometimes thought to be the bedrock of our Constitution but the historical provenance of sovereignty is by no means clear and the attitude of the judges to parliamentary sovereignty is conflicting. Similar difficulties attach to

ostensibly bedrock notions such as the rule of law and the scope of Parliamentary privilege. I will give some examples of these difficulties in my presentation.

20. For the moment I simply wish to suggest that there is no clear division between law and most constitutional axioms. That being so, great care needs to be taken in the development and drafting of a Cabinet Manual in order to avoid or at least to minimise the potential for disputes to arise in the Courts over the legal status of the Manual.

QUESTION 3 – WHAT IS THE POTENTIAL FOR A CABINET MANUAL TO BECOME THE SUBJECT OF LEGAL ADJUDICATION?

21. Given the ambiguity that can exist between law and constitutional principles a Cabinet Manual could possibly become the subject of legal adjudication in two ways, namely:

- Procedurally; or
- Substantively

22. Procedurally, a Cabinet Manual could become the subject of disputes in the Courts through legal challenges to the process or absence of process by which such Manual is created and subsequently revised.

23. It is now established in at least some contexts that even where there is no obligation to act in a particular way (as for example no obligation to give reasons or to engage in consultation) where a process is started it must be conducted lawfully, rationally and fairly so as to comply with public law standards. Closely related to this is the concept of public law legitimate expectation whereby if a public body makes a clear promise or gives a clear assurance or engages in a specific past practice it may be compelled to comply with the promise or assurance or continue the past practice or, at the very least, to consult before the promise, assurance or practice can be altered.

24. Thus if and to the extent that the creation of a Cabinet Manual depended on a process of consultation, the fairness of the consultation process (in terms of length, sufficient

information etc, breadth of consultation) might be capable of being challenged in the Courts as might a failure to comply in the future with specific procedural statements or promises made in that Cabinet Manual.

25. Substantively, in terms of its content, a Cabinet Manual could become the subject of disputes in the Courts if the accuracy of its content were to become the subject of an application for judicial review for a declaration as to the incorrectness of particular statements.

26. It is also established that the accuracy of guidance issued by a public body may be challenged in the Courts by way of judicial review for declaratory relief.

27. If, therefore, a Cabinet Manual were to make any statements considered to be of a legal nature it might be open to third parties to bring proceedings by way of judicial review in the public interest for a declaration that the Cabinet Manual had stated the law incorrectly.

QUESTION 4 – PROCEDURAL CHALLENGES TO THE PROCESSES FOR CREATING AND/OR REVISING THE CABINET MANUAL

28. There would appear to be 2 possible temporal points for a legal challenge to the procedure by which a draft Cabinet Manual becomes converted into a final document. These are:

(i) The fairness of the initial consultation process.[4]

(ii) Any failure to follow a fair (perhaps the same) procedure whenever the Manual comes to be revised. As the Foreword states:

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

[4] In practice I find it difficult to see how the consultation process itself could, sensibly, be regarded as unfair.

<u>QUESTION 5 – SUBSTANTIVE CHALLENGES TO THE CONTENT OF THE CABINET MANUAL</u>

29. If the Cabinet Manual confined its ostensibly descriptive statements to statements of clearly agreed constitutional conventions or day-to-day administrative matters it is unlikely that there would be much, if any, scope for judicial interference.

30. However, at least the current version of the draft Manual intrudes into constitutional matters that could raise judicial hackles. For example:

    - *'In the exercise of its legislative powers, Parliament is sovereign. In practice, however, Parliament has chosen to be constrained in various ways – for example by its commitment to the rule of law, through its Acts, and elements of European and other international law'* (Paragraph 9)

    - *'Ministers act pursuant to statutory powers conferred on them by Parliament, to the Royal Prerogative <u>and to inherent or "common law" powers</u>. They are required to act in accordance with the law. The courts and other bodies have a role in ensuring that ministerial action is carried out lawfully'* (Paragraph 12) (underlining added)

    - *'Equally, however, the courts can recognise prerogatives that were previously of doubtful provenance, or adapt old prerogatives to modern circumstances. For example, the Secretary of State's prerogative power to act to maintain law and order where no emergency exists was not widely recognised until identified by the Court of Appeal in 1989*' (Paragraph 110)

31. It is not appropriate (given the time constraints for present purposes) to seek to unravel or analyse the above statements in any detail. Taking each of them briefly in turn, however:

    - The notion that the rule of law is merely adhered to by Parliament out of choice is by no means uncontroversial. The rule of law is seen by many judges as a prior constitutional check on both Parliament and the Executive.

    - The scope of the so-called *Ram* doctrine by which Ministers may act save as constrained by law in the same way as a natural person because they are emanations of the Crown is highly controversial. Parliamentary Questions have been raised as to its content and its origin is a Ministerial memorandum as opposed to a judgment of the Court.

- The Courts have never held that they can expand the royal prerogative. The statement here appears to derive from the perceived logic of a single case *(R v Home Secretary, ex p, Northumbria Police Authority*) in which the Court of Appeal held that the S/S could maintain a central store which provided police riot equipment both in statute and under the prerogative. However, the Courts have consistently held that the manifestations of the prerogative are fixed and cannot be expanded.

32. The underlying point is that if the Cabinet Manual comes to be used as a source of guidance but contains incorrect statements of law it could be the subject of declaratory relief by the Court (see cases such as *Royal College of Nursing v. Department of Health and Social Security; Gillick v. West Norfolk and Wisbech Area Health Authority* where the Courts granted declarations to settle arguments about the legality of action recommended in circulars issued by Government Departments which themselves had no direct legal force). A possible trend here is that if judges become used to issuing declaratory relief about constitutional matters it may lead to greater judicial involvement in areas that have previously been regarded as 'off-limits'.

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