

Opening the door to the secret garden – a plea for revised public guidance on how governments are formed and operate

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Executive Summary

In this submission, we examine the gaps in ministerial and executive guidance in the UK which have been revealed in the course of our work on preparing for a possible change of government, and the possibility of a hung parliament. The British public, the media and financial markets are ill prepared for a hung parliament, and there is an urgent need for greater clarification and publication of the unwritten conventions which apply, in order to avoid potentially damaging uncertainty and misunderstanding in the media and financial markets.

We have examined the ministerial guidance available in comparable Westminster systems: Australia, Canada, New Zealand, and Scotland. This is presented in tabular form in section 3 of our submission, with more detail about each country in Appendix 1. As a result of this comparison, we find that guidance in the UK is seriously lacking in several areas: guidance materials are often thin, difficult to locate, out of date, or simply non-existent. Given the forthcoming election and the uncertainty of the result, there is a serious need for drawing together, updating and in some cases drafting guidance on key aspects of executive practice.

In particular, the United Kingdom should consider

- Drafting guidance on the role of the Crown in government formation
- Drafting more detailed guidance on the caretaker convention
- Revision of the guidelines on transitions ahead of general elections
- Drafting an induction guide to ministerial life
- Updating current guidance documents, and if possible clarifying and consolidating them into one document.

The need for clearer guidance on the role of the head of state in government formation, on what happens if there is a hung parliament, and on the caretaker convention is particularly urgent. Guidelines on these issues should be published before the general election campaign starts, if necessary ahead of the completion of work on a more comprehensive statement. If a draft is available, the relevant sections could form guidance for the election campaign. These documents should be made publicly accessible; and their drafting and revision subject to consultation.

A Cabinet Manual should be comprehensive, covering the same broad subjects as the New Zealand Manual; acceptable to Ministers, who must find it a useful and practical guide; written in plain language, principle not rule based; and based upon consultation, so that it commands wider legitimacy, and will be accepted and used by future governments.

1. Introduction: the case for revision and consolidation of ministerial guidance in the UK

1.1. The British public, media and financial markets are ill-prepared for a ‘hung parliament’, in which no single party has a majority of seats in the House of Commons. Our aim in making this submission is neither to predict nor to advocate a hung parliament, a minority administration or coalition, but to argue for urgent public clarification of certain unwritten conventions and understandings that will apply if no party wins an overall majority at the forthcoming general election. Our focus here is on the procedures for the formation of governments.

1.2. Our concern arises from the work we have been doing on minority administration and transitions over the past year.¹ The discussions and seminars held following the publication of our reports on these two subjects, as well as public comments made by leading politicians and commentators about the impact of a possible hung parliament, have highlighted widespread ignorance about the constitutional and political position in this eventuality.

1.3. There is a serious danger of speculation and instability in financial markets if such an outcome begins to look probable. Warnings about the dangers of a hung parliament could become self-fulfilling, producing the jitteriness and worse in the media and the markets that they are seeking to avoid. The Financial Times reported on 8 February about the heightened fears in the government bond market that the coming election could produce a hung parliament. Much of this concern rests on the assumption that a minority administration would be indecisive and be unable to take decisive fiscal action, which is not bound to be the case. There are also fears about delays and uncertainties in the formation of any minority government. A Bloomberg report on 20 January quoted a senior financial analyst saying that the four days of negotiations after the February 1974 general election had created ‘real uncertainty’. He added: ‘One could imagine that today’s market will be flying around a lot on the uncertainty. If the result is unclear, the real-money investors will be holding back waiting for information, leaving the market to the traders’. In these circumstances there is bound to be debate about who governs until a new administration is formed and what role the monarch is playing.

1.4. There are well-established conventions for dealing with such a situation, understood by most of the main players, but less so by those outside. They were applied after the February 1974 election, and were re-examined ahead of the 1992 election when many politicians, and pollsters, expected a similar outcome, which did not, in the event, materialise. However, these conventions are largely unwritten and uncodified, partly because of a desire on all

¹ See ‘Making Minority Government Work: Hung parliaments and the challenges for Westminster and Whitehall’, December 2009, edited by Robert Hazell and Akash Paun, published by the Constitution Unit and the Institute for Government; and ‘Transitions: Preparing for Changes of Government’, October 2009, by Peter Riddell and Catherine Haddon, published by the Institute for Government.

sides to keep the monarch out of essentially party political negotiations. But such secrecy and insider understandings will no longer work in an era of 24 hour news and instant comment on the internet, let alone interlinked global financial markets.

1.5. The unwritten and implicit have to be made written and explicit. In most cases, this need not amount to any change in long-established constitutional understandings, though there are areas of ambiguity which need to be clarified. This should be via a Cabinet Manual, as in other comparable Commonwealth countries, notably New Zealand. Such a manual should cover the rules for the formation of governments and caretaker conventions to include the period after an election until a new permanent government is in place.

1.6. We therefore strongly welcome the announcement by the Prime Minister on 2 February that Sir Gus O'Donnell, the Cabinet Secretary, has been asked "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".

1.7. However, this process is inevitably likely to take some time and may not be completed until after the election campaign starts, probably around Easter if there is a general election on 6 May, as widely expected. It is therefore vital either that work on the sections affecting the formation of governments and caretaker conventions is accelerated, or that a separate statement on these matters is issued by the Cabinet Office before the end of March. This would reaffirm the existing implicit understandings and clarify some present uncertainties. In particular, there is ambiguity about the length of the pre-election 'purdah' period, when departments avoid making controversial announcements, appointments and contract decisions which cannot be put off. At present this ends on polling day, but, as in Commonwealth countries with formal caretaker conventions, such as Australia, Canada and New Zealand, this period should be extended until a new administration is appointed or re-appointed. We offer in sections 5 and 6 of this submission possible drafts of the convention on government formation, and the caretaker convention.

1.8. Any Cabinet Manual, or "single written document", bringing together "existing unwritten piecemeal conventions", should not be the property of any single political party. The process of redrafting should be under the control of the Cabinet Secretary, but there should be consultation outside Whitehall, involving Parliament and others, to ensure wider public and political acceptance. Completion of discussions and drafting will take time, and if this process cannot be completed before the campaign starts, those sections about the formation of governments and caretaker procedures could be published in draft form or as part of an interim public statement before the election campaign starts.

Comparison of Ministerial Guidance Documents in Five Countries

1.9. In preparing this submission we have examined and compared ministerial guidance documents in four other Westminster jurisdictions. On the basis of this comparison, we find that the United Kingdom is seriously lacking in several areas. There are a number of powerful reasons why the UK government should consider updating, revising and consolidating the key guidance documents on executive practice.

1.10. First, the imminence of the general election, and the attendant financial uncertainty referred to above. Given this uncertainty, the principles and rules governing executive conduct should be as clear as possible. At present, they are not. It needs to be made explicitly clear, if a general election results in no one political party attaining a majority, who governs until a new government can be formed; what role the monarch plays in determining who the government should be after an inconclusive election; and, at a more basic level, what the daily responsibilities of a Minister are, and what resources are available to him or her. Strangely, there are few if any guidelines on these matters in the UK.

1.11. Second, actors in the executive branch—ministers and officials—need guidelines on ‘best practice’. Existing rules are often insufficient or obscure; informal practices come to supplement or supplant existing rules. Good guidelines for executive practice should be capable of being beneficial to any political party (or parties) in government. Governments need to govern: we argue that updating, revising and consolidating their practical working guidelines will enable them, not constrain them.

1.12. Other Westminster jurisdictions have codified many areas of government practice: the UK lags behind in this respect. New Zealand provides a useful standard: its *Cabinet Manual* (supplemented by two other documents) is a model of what the other Westminster jurisdictions ought to follow. The *Cabinet Manual* provides comprehensive, cohesive and clear advice on a number of key aspects of executive action. It is publicly available, and broadly accepted by a wide range of actors in NZ politics: politicians across the spectrum, officials, academics and the public. Other countries, while not providing as coherent and comprehensive guidance as NZ, have also codified key areas of executive responsibility, and have done so without apparent cost to government flexibility.

1.13. Finally, there is the democratic argument: the practices of the executive have for too long been conducted in secret. Guidelines provide transparency and accountability. They may help explain to the public how and why decisions are made at the executive level. Guidance documents on executive practice are maps for executive action—not cages. The public will benefit from publication of these maps, without unduly constraining the actions of governments which need the flexibility to meet new situations.

Scope of the exercise

1.14. What constitutes ‘key aspects of executive practice’? Our trawl through ministerial guidance documents included guidance on:

- An outline of the constitution

- The role of the head of state
- Cabinet processes and procedures
- Ministerial responsibilities (individual/collective) and ethics
- Ministerial relations with the civil service and arm's-length bodies
- Executive relations with Parliament and the legislative process
- Elections, transitions and government formation
- Administrative decision-making
- Freedom of information
- Day-to-day administration.

1.15. For each jurisdiction, a search was done on key executive websites to determine what guidance documents were publicly available, using the checklist above. Cabinet Offices and academics in these jurisdictions were also asked for advice about the guidance documents. But we acknowledge that there may be gaps in the material covered; and conversely, that some documents may have been given more weight than they bear in practice.

2. A Comparison of Ministerial Guidance in five Westminster countries

2.1. This section summarises what guidance documents are available to Ministers in New Zealand, Australia, Canada, Scotland and the United Kingdom. There is also a set of tables which follow. These should be treated as rough maps to bring out some of the differences between the UK and other Westminster jurisdictions. They differ in terms of coverage; depth and breadth (principled/procedural; general/detailed); the audience for whom they are intended; the degree of formality; and their overall coherence. More detail on each jurisdiction's coverage can be found in the country descriptions in Appendix 1.

Ministerial Codes and Cabinet Procedures

2.2. All jurisdictions have a document devoted to formal cabinet processes and procedures. These documents usually set out in detail matters such as preparing cabinet committee papers, format, consultation, and rules on confidentiality and security. All five countries have a ministerial code, which sets out the rules of ministerial responsibility, ministerial conduct, conflicts of interest, and so on.

2.3. These two kinds of documents are the centrepiece of executive guidance (especially the ministerial code). These guidelines were the first to be codified, and they relate to the central institutions of executive government.

2.4. The content of these documents is "lore, not law". They set down working practices, not rigid rules which must be followed to the letter, or which could be litigated. They are the instruments of the Prime Minister (or First Minister): he, or she, is the ultimate arbiter of the content and judge of any purported breach.

An Outline of the Constitution

2.5. NZ, Australia, and to a lesser extent Canada also provide an outline of their respective constitutions in their key ministerial guidance documents. NZ provides the most comprehensive outline, but it is by no means legalistic.

The Role of the Head of State

2.6. Only NZ offers comprehensive guidance on this, no doubt as a result of the adoption of proportional representation in 1996, making government formation a more contentious and drawn-out matter. Recent events in Canada show the difficult situations which can arise when there is no clear guidance.

Ministerial Relations with the Civil Service and Arm's-length Bodies

2.7. All jurisdictions have codified civil service values and principles. However, guidance on the relationship between Ministers and arm's-length bodies (executive agencies, 'quangos', non-departmental public bodies, and so on) remains, at best, scattered. NZ again has comprehensive advice; Australia and Canada offer brief guidance. In the UK, the relationships between Ministers and arm's-length bodies may be too variable and complex to be dealt with by a broad statement.

Executive Relations with Parliament and the Legislative Process

2.8. All jurisdictions have guidance on executive relations with Parliament and the legislative process.

Elections, Transitions and Government Formation

2.9. All countries provide guidance on elections. But the guidance provided ranges from brief to very detailed. For instance, only Australia, NZ and Canada² provide detailed information for Ministers about the caretaker convention. NZ alone appears to provide broader guidance on transitions ('transitions' here referring to a government's loss of confidence or change of Prime Minister at mid-term) and government formation. The caretaker convention in NZ can apply mid-term if the government loses the confidence of Parliament.

Guidance on Administrative Decision-Making and Judicial Review

2.10. All jurisdictions, with the apparent exception of Scotland, provide guidance on administrative decision-making.

Guidelines on Access to Official Information

2.11. All jurisdictions provide guidance on access to official information: this is usually an introduction to freedom of information legislation.

Induction Guide on Ministerial Life

2.12. All jurisdictions, with the exception of the UK, have a generic guide setting out the practicalities of ministerial life (e.g. the role of civil servants within a ministerial office), sometimes written in a formal manner, sometimes in plain unadorned speech. Some of these are not made publicly available (Scotland, NZ).

Comprehensiveness, Coherence and Availability

2.13. Two more general observations on executive guidance documents in Westminster jurisdictions can be made. First, many but not all guidance documents on executive practice are now available via the websites of these jurisdictions' executives.

2.14. Second, some jurisdictions offer comprehensive and coherent guidance; some jurisdictions consolidate guidance into one location and/or document, while others have guidance spread over a large number of documents and over various websites. The NZ Cabinet Office has the most coherent and unified set of documents relating to executive practice, with its *Cabinet Manual* (supplemented by the *Cabinet Guide* and the *Ministerial Office Handbook*) covering more key aspects of executive practice than any other comparable document or set of documents. With the exception of the Ministerial Office Handbook, these are located on a specific website.

2.15. In terms of comprehensiveness, coherence and accessibility, the guidelines and documents listed on Australia's Department of the Prime Minister and Cabinet website come in at a close second. Again, all these documents were found on a specific website.

² Our understanding is that Canada does provide written guidance on the caretaker convention in the election period. This may be published shortly following an FOI request.

2.16. Scotland has a relatively coherent set of documents, but on a narrow range of topics. However, the Scottish government website is less straightforward to navigate. Searches were required to find guidance for the same range of executive practice guidance as NZ and Australia: documents were scattered across the websites rather than being drawn conveniently together on a single webpage.

2.17. Canada is similar to Scotland: what is offered is relatively comprehensive but its key executive guidance documents are spread out over a number of different websites and not consolidated.

2.18. Least cohesive and least comprehensive is the UK. There are a large number of documents, but some very noticeable gaps. These guidance documents are spread across different locations; many are directed at civil servants rather than Ministers; and differ in depth and coverage.

Table 1: Websites of Westminster Executives

| Jurisdiction | Main Executive Website |
|----------------|---|
| New Zealand | http://www.dPMC.govt.nz/Cabinet/index.htm |
| Australia | http://www.dPMC.gov.au/guidelines/index.cfm |
| Canada | http://www.pco-bcp.gc.ca/index.asp?lang=eng |
| Scotland | http://www.scotland.gov.uk/About/14944 |
| United Kingdom | http://www.cabinetoffice.gov.uk/ministers_and_government_business.aspx |

2.19. Table 2 below attempts to represent visually what areas of executive practice are covered by each jurisdiction's 'central guidance document', by which is meant the following:

| | |
|----------------|---|
| NZ | <i>The Cabinet Manual</i> |
| Australia | <i>The Cabinet Handbook</i> |
| Canada | <i>Accountable Government: A Guide for Ministers and Ministers of State</i> |
| Scotland | <i>The Scottish Ministerial Code</i> |
| United Kingdom | <i>The Ministerial Code</i> |

Table 2: Areas of Executive Practice Covered by Central Guidance Document

| Area of Executive Practice | New Zealand | Australia | Canada | Scotland | United Kingdom |
|---|-------------|-----------|--------|----------|----------------|
| The Constitution | Y | N | Y | N | N |
| Head of State and relations with Cabinet | | | | | |
| <i>Description of Head of State's role/powers</i> | Y | N | Y | N | N |
| Ministers | | | | | |
| <i>Powers and functions of the Prime Minister</i> | Y | Y | Y | Y | Y |
| <i>Ministerial responsibility</i> | Y | Y | Y | Y | Y |
| <i>Ministerial conduct</i> | Y | Y | Y | Y | Y |
| Ministers and state machinery | | | | | |
| <i>Relationship with civil service</i> | Y | N | Y | Y | Y |
| <i>Relationship with arm's-length bodies</i> | Y | N | Y | N | N |
| Ministers and the law | Y | N | N | N | N |
| Cabinet decision-making | Y | Y | Y | Y | Y |
| Elections, transitions, and government formation | | | | | |
| <i>Elections</i> | Y | N | N | N | N |
| <i>Transitions</i> | Y | N | N | N | N |
| <i>Government formation</i> | Y | N | N | N | N |
| <i>The caretaker convention</i> | Y | Y | N | N | N |
| The Executive and the legislative process | | | | | |
| <i>The legislative process</i> | Y | N | Y | Y | N |
| <i>Parliamentary relations</i> | Y | N | Y | Y | Y |
| Access to official information | Y | N | N | N | N |

Table 3: The Minimum Necessary Guidance for Cabinet and Ministers

| Aspects of Executive Practice | New Zealand | Australia | United Kingdom |
|--|-------------------------------|--|---|
| The Constitution | Cabinet Manual | [A Guide on Key Elements of Ministerial Responsibility] ('Key Elements Guide') | NONE |
| Head of State and Cabinet relations | | | |
| <i>Description of HOS role/ powers</i> | Cabinet Manual | [Key Elements Guide]; Federal Executive Handbook | NONE |
| Ministers | | | |
| <i>Powers and functions of PM</i> | Cabinet Manual | [Key Elements Guide]; Standards of Ministerial Ethics | Ministerial Code |
| <i>Ministerial responsibility</i> | Cabinet Manual | [Key Elements Guide]; Standards of Ministerial Ethics | Ministerial Code |
| <i>Ministerial conduct</i> | Cabinet Manual | [Key Elements Guide]; Standards of Ministerial Ethics | Ministerial Code |
| Ministers and state machinery | | | |
| <i>Relationship with civil service</i> | Cabinet Manual | [Key Elements Guide]; APS Code of Conduct | Ministerial Code; Civil Service Code |
| <i>Relationship with arm's-length bodies</i> | Cabinet Manual | [Key Elements Guide] | NONE |
| Ministers and the law/administrative decision-making | Cabinet Manual | [Key Elements Guide] | The Judge Over Your Shoulder |
| Cabinet decision-making | Cabinet Manual; Cabinet Guide | [Key Elements Guide]; Cabinet Handbook | Ministerial Code; A Guide to Cabinet and Cabinet Committee Business |
| Elections, transitions, govt. formation | | | |
| <i>Elections</i> | Cabinet Manual | Guidance on Caretaker Conventions; Cabinet Handbook | General Election Guidance 2005: Directory of Civil Service Guidance |
| <i>Transitions</i> | Cabinet Manual | NONE | NONE |
| <i>Government formation</i> | Cabinet Manual | NONE | NONE |
| The Executive, Parliament and the legislative Process | | | |
| <i>Relations with Parliament</i> | Cabinet Manual | [Key Elements Guide] | Ministerial Code; Guide to Parliamentary Business |
| <i>The legislative process</i> | Cabinet Manual | [Key Elements Guide]; Legislation Handbook | Guide to Making Legislation |
| Official Information | Cabinet Manual | Freedom of Information 1982: Fundamental Principles and Procedures | Freedom of Information Guidelines |
| Practical and administrative guidance | Ministerial Office Handbook | NONE | NONE |

2.20. Table 3 attempts to show the minimum number of documents necessary in order for Cabinet and/or Ministers to have a basic understanding of key aspects of executive practice. In some cases, what is required as a ‘minimum’ is a fine line to draw: the UK *Ministerial Code* does draw attention to the ministerial relationship with the civil service, but it is comparatively thin, and would be best bolstered by the *Civil Service Code*. Similarly, although there is a description of the roles and powers of the head of state in the Australian guidance documents listed, these significantly make no mention of the Governor-General’s role in government formation.

2.21. The Australian *Guide on Key Elements of Ministerial Responsibility* is in square brackets to indicate its now defunct status (discussed further below). Its absence has made executive guidance in Australia far less comprehensive and more difficult to follow.

2.22. As can be seen from Table 4, in the case of New Zealand, only three ‘documents’ are necessary: the *Cabinet Manual*, the *Cabinet Guide* (in fact a webpage, or set of webpages) and the *Ministerial Office Handbook*.³ In Australia, the number of basic documents is higher, standing at around seven to eight documents. The UK has the most number of documents, standing at eleven at least; but this number should probably be higher, as there are two additional areas of executive action which require guidance: the devolution settlements, and relations with Europe and the European Union.

Table 4: Minimum Necessary Guidance for Cabinet and Ministers by Number of Documents

| New Zealand | Australia | United Kingdom |
|------------------------------------|---|--|
| <i>Cabinet Manual</i> | <i>[A Guide on Key Elements of Ministerial Responsibility]</i> | <i>Ministerial Code</i> |
| <i>Cabinet Guide</i> | <i>Cabinet Handbook</i> | <i>A Guide to Cabinet and Cabinet Committee Business</i> |
| <i>Ministerial Office Handbook</i> | <i>Federal Executive Handbook</i> | <i>Civil Service Code</i> |
| | <i>APS Code of Conduct</i> | <i>Directory of Civil Service Guidance, vols 1-2</i> |
| | <i>Guidance on Caretaker Conventions</i> | <i>Executive Agencies: A Guide for Departments;</i> |
| | <i>Legislation Handbook</i> | <i>Public Bodies: A Guide for Departments</i> |
| | <i>Freedom of Information 1982: Fundamental Principles and Procedures</i> | <i>The Judge Over Your Shoulder</i> |
| | | <i>General Election Guidance 2005</i> |
| | | <i>Guide to Parliamentary Business</i> |
| | | <i>Guide to Making Legislation</i> |
| | | <i>Freedom of Information Guidelines</i> |

³ There are also two important documents issued by the State Services Commissioner that provide additional guidance around elections and government formation. These are primarily for the public service but also for political parties and ministers to be aware of. These publications can be found at: <http://www.ssc.govt.nz/display/document.asp?NavID=114&DocID=6694> and <http://www.ssc.govt.nz/display/document.asp?NavID=114&DocID=6835>

3. Ministerial guidance in the UK

3.1. The most salient characteristic of the key guidance documents on executive practice in the UK (see Table 5) is their fragmented and piecemeal nature. While the majority of the guidance documents listed can be found on the UK Cabinet Office website (for more on this, see Appendix 3 below),⁴ these are not gathered together in one place and the location of some documents is counterintuitive. The second salient characteristic about the available documents is that the majority are aimed at civil servants, not Ministers. Finally, the guidance varies in comprehensiveness and depth: from very detailed to broad and principled.

Table 5: Key ministerial guidance documents in the UK

| Text | Length | Location |
|--|---------------|---|
| <i>Ministerial Code</i> | 28pp | http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx |
| <i>Guide to Cabinet and Cabinet Committee Business</i> | 44pp | http://www.cabinetoffice.gov.uk/media/98307/guide_to_cabinet.pdf |
| <i>Civil Service Code</i> | 2pp | http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_code.aspx |
| <i>Directory of Civil Service Guidance, vols 1-2</i> | 71pp; 57pp | http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_guidance.aspx |
| <i>Executive Agencies: A Guide for Departments</i> | 20pp | http://www.civilservice.gov.uk/Assets/exec_agencies_guidance_oct06_tcm6-2464.pdf |
| <i>Public Bodies: A Guide for Departments</i> | | http://www.civilservice.gov.uk/about/resources/public-bodies.aspx |
| <i>The Judge Over Your Shoulder</i> | 48pp | http://www.tsol.gov.uk/Publications/judge.pdf |
| <i>General Election Guidance 2005</i> | 40pp | http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/electguide.pdf |
| <i>Guide to Parliamentary Business</i> | n/a | http://www.cabinetoffice.gov.uk/parliamentary-clerk-guide.aspx |
| <i>Guide to Making Legislation</i> | n/a | http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html.aspx |
| <i>Freedom of Information Guidelines</i> | 28pp | http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/publication_scheme/pdf/foi_guidelines.pdf |
| <i>Devolution</i> | n/a | http://www.cabinetoffice.gov.uk/devolution.aspx |

3.2. The *Ministerial Code* is the central guidance document for executive practice. Previous versions of the *Code* were a mixture of principle and procedure,⁵ but in its current 2007 incarnation, the *Code* focuses strongly on the ethical facets of ministerial work. Procedural

⁴ <http://www.cabinetoffice.gov.uk/>.

⁵ On earlier versions of the *Ministerial Code* (previously *Questions of Procedure for Ministers*), see Amy Baker *Prime Ministers and the Rule Book* (Politico's Publishing, London, 2000).

matters present in previous versions (such as Cabinet and cabinet committee business or the publication of Green and White papers) have been removed. The *Code* currently sets out a general statement about the responsibilities of Ministers; Cabinet responsibility; appointments; ministerial relations with departments; ministerial relations with civil servants and special advisers; constituency and party interests; private interests; the presentation of policy; ministerial relations with Parliament; travel; and the seven principles of public life. The standard format is to set out a general principle governing the area in question, and then provide some elaboration. The *Ministerial Code* is the creature of the Prime Minister: revisions to it may be drafted by the Cabinet Secretary, but it is ultimately the Prime Minister who authorises the *Code*'s publication.

3.3. The *Guide to Cabinet and Cabinet Committee Business* provides detailed information on Cabinet procedure. The content is 'informative' rather than procedural and the Guide itself contains several flowcharts to explain various processes.

3.4. Although there is guidance on the relationship between Ministers and the civil service (in the form of the *Ministerial Code*, the *Civil Service Code*), guidance on broader 'state sector' relations is weaker to non-existent. *Executive Agencies: A Guide for Departments* and *Public Bodies: A Guide for Departments* are directed at civil servants and are more concerned with implementation.

3.5. A number of guidance documents for civil servants have been gathered together and published in the *Directory of Civil Service Guidance*. The *Directory* consists of two volumes, one volume setting out briefly where guidance on various matters is to be found (e.g., copyright or machinery of government changes); the other being a compilation of already-published guidance documents. The guidance in the two volumes offered is useful. However, the *Directory* itself has not been updated in some time, the most recent version being published in 2000 under the direction of Sir Richard Wilson (then Cabinet Secretary). Thus, some of the matters covered in the *Directory* are out of date—for instance, the section on freedom of information notes that the Freedom of Information bill has yet to be enacted.

3.6. *Guide to Parliamentary Work* is directed towards officials; the main ministerial guidance on executive-legislative relations is a short section in the *Ministerial Code*. The *Guide to Making Legislation* is also directed at officials, setting out the various stages of the legislative process. It is written simply and is useful and informative.

3.7. *The Judge Over Your Shoulder* provides detailed guidance on administrative decision-making and the possibility of judicial review, but at 48-odd pages this is not a lightweight document. (Of course most administrative decisions are made not by Ministers but by civil servants; but Ministers themselves ought to have a modicum of knowledge about these matters).

3.8. The guidance documents on general elections (*General Elections Guidance 2005* is the most relevant document: there are others relating to European elections) are directed towards civil servants and those in agencies and NDPBs. There is no mention of the caretaker convention. The guidance documents mostly cover the period up to the election,

but not what happens after an election. There is no discussion of the government formation process, or the head of state's role in this process.

3.9. Thus, in comparison with the other jurisdictions surveyed, the UK appears to be lacking in important respects. Set out below are the main omissions:

Guidance on the role of the head of state

3.10. The most serious omission in available guidance is the lack of any discussion of the role of head of state, either in the period leading up to a general election, or more generally—for instance, in a situation when the government has lost the confidence of parliament. The lack of guidance about the role of the Sovereign in these areas could contribute to media or public misunderstanding of the political neutrality of the monarchy.

The caretaker convention

3.11. There is very thin guidance on the role of an incumbent government in the election period (*General Election Guidance 2005*), and no guidance at all on the role of an incumbent government where a general election has no clear result—i.e., a hung parliament. There is also a question of whether or not the caretaker convention should apply more broadly to any situation where it is unclear who has the confidence of Parliament.

Clear guidance on ministerial relationships with departments, agencies and NDPBs

3.12. The relationship between Ministers, the civil service and departments is set out both in the *Ministerial Code* and the *Civil Service Code*, although some have argued for greater clarification.⁶ But there is only very thin guidance on the relationship that Ministers have with more 'arm's-length' bodies such as executive agencies and non-departmental public bodies (NDPBs). Although there are a variety of relationships between these bodies and Ministers, a broad statement could be made to clarify the general position.

An outline of the constitution

3.13. NZ, Australia and Canada all have descriptions of the constitutional framework within which Ministers work. These descriptions may be brief (Australia, Canada) or they may be more detailed (NZ). The UK has no equivalent; and a mere consolidation of its guidance documents could still leave a reader puzzled about the overall framework.

Europe

3.14. There is no general guidance on the UK's relationship with Europe and the European Union. Given the growing interconnections between Europe and the UK, this seems an extraordinary omission.

Induction guide on day-to-day ministerial work

3.15. At present it would appear that what is given to a new ministerial incumbent depends very much on the department he or she works in; otherwise Gerald Kaufman's *How to be a Minister* (1980) remains a DIY guide.

⁶ Better Government Initiative, *Good Government: Reforming Parliament and the Executive*, available at: <http://www.bettergovernmentinitiative.co.uk/sitedata/Misc/Good-government-17-October.pdf>.

3.16. Finally there is no ‘narrative’ which draws all this information together—this *might* be provided by a discussion of the constitution. There is also a question of audience: to whom is this executive guidance addressed? At present it would appear that most of it is directed at civil servants rather than ministers.

3.17. To end on a more positive note, the guidance on devolution under Ministers and Government Business is good: it is clear, succinct and covers the main points and principles of the devolution settlements. While it is located too many links away from the central website (see Appendix 3), this section is a model of how usefully to provide information on a difficult subject.

4. Codifying the conventions on government formation and caretaker government

4.1. The most glaring deficiencies in the UK guidance are the absence of any explanation of the process of government formation; and the brief and inadequate explanation of the caretaker convention, to be found in the UK's *General Election Guidance 2005*:

During an election campaign, the Government retains its responsibility to govern, and Ministers remain in charge of their Departments. Essential business must be carried on. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long-term character. Decisions on matters of policy on which a new Government might be expected to want the opportunity to take a different view from the present Government should be postponed until after the Election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.

4.2. By contrast New Zealand has a detailed and carefully articulated account of both conventions, in chapter 6 of the *Cabinet Manual*, entitled Elections, Transitions and Government Formation. Since the introduction of MMP in 1996, they have thought through the application of these principles and recorded them in growing detail.⁷ The Manual sets out guidance on government formation after an election; government formation mid-term; early dissolution of parliament; and the operation of the caretaker convention before and after an election, and mid-term. The key sections of the Manual are in Appendix 2, with the essentials summarised below.

4.3. Government formation

- The process of forming a government is political, and the decision to form a government must be arrived at by politicians.
- Once the political parties have reached an accommodation, and a government is able to be formed, the parties will make public statements of their intentions.
- It is not the Governor-General's role to form the government or to participate in any negotiations
- the Governor-General will abide by the outcome of the political parties' negotiations, and accept the political decision as to who can command the confidence of parliament.

4.4. Mid-term transitions

If the government loses the confidence of the House during its parliamentary term:

- the Prime Minister will advise that the administration will resign
- a new administration may be appointed from the existing Parliament (if an administration that has the confidence of the House is available)

⁷ For the evolution of the Manual, see McLeay E, 'What is the Constitutional Status of the Cabinet Office Manual?' Public Law Review 1999 March 1999 at 9-17; and Kitteridge R, 'The Cabinet Manual: Evolution with Time' paper to 8th Annual Public Law Forum, 20 – 21 March 2006.

- or an election may be called
- in the interim, the incumbent government continues in office, governing in accordance with the caretaker convention.

4.5. *Early election*

- The Governor General will grant a request for an early election, as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government.
- A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention. A caretaker Prime Minister must consult other parties on an early election.

4.6. *Caretaker convention*

- The caretaker convention applies after an election, until a new government is sworn in; and mid term, if a government loses the confidence of Parliament.
- The incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. It is likely to state that it is operating as a caretaker government.
- If decisions are required on significant or controversial issues, such decisions should: be deferred, if possible; handled by a temporary arrangement (eg extending a board appointment, or rolling over a contract for a short period); or made only after consultation with other political parties.
- Such decisions will be referred to the Minister, who must consult the Prime Minister in cases of doubt, or before approaching other political parties.

4.7. Not all the detail of the New Zealand rules is necessarily transferable to the UK, but the underlying principles are the same. The key points are that the process of forming a government is political, and the decision to form a government must be arrived at by politicians. It is not the Monarch's role to form a government, or to facilitate negotiations. The Monarch may occasionally wish to seek advice from experts, but her prime source of advice must be the leaders of the political parties, who at the conclusion of their negotiations will inform her who can command the confidence of Parliament.

4.8. New Zealand has developed the rules in one respect where the UK might wish to follow. This is to provide that the caretaker convention should apply not just after an election, but also mid term, if the government has lost the confidence of the House. The Prime Minister continues to be the Queen's principal constitutional adviser, but the caretaker convention would help to ensure that he is doubly careful that his advice will command support across the House. Significant decisions will require consultation with other political parties, to establish whether the proposed action has the support of the majority of the House.

4.9 In New Zealand, the Cabinet Manual makes clear that governments are not bound by the caretaker convention in the period immediately before the election. However, it notes

that “Successive governments... have chosen to restrict their actions to some extent at this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent. For example, significant appointments have been deferred, and some otherwise unexceptionable government advertising has been considered inappropriate during the election campaign, due to the heightened risk of perception that public funds are being used to finance publicity for party political purposes.”⁸

⁸ New Zealand Cabinet Manual, para. 6.9.

5. Drafting a Cabinet Manual

5.1. There are a number of considerations to keep in mind:

5.2. The target audience. Key executive documents are intended first and foremost for Ministers – the Prime Minister and his colleagues. Any draft Cabinet Manual must be acceptable to those in office, or those who could potentially take office. There is no point in drafting guidance which does not meet their approval.

5.3. The tone and language. The Manual may be drafted in a formal style but should not be legalistic. The New Zealand Manual provides a good example (see Appendix 2). The language is simple and informative: it is principle rather than rule based. Each chapter begins with an introduction and general principles, before going into practical details.

5.4. The need for flexibility. The manual provides a guide to how the centre of government works, not a restrictive set of rules. It needs to be drafted throughout to ensure sufficient flexibility for the government of the day.

5.5. The need for consultation. To be useful to successive governments, the Manual needs to command legitimacy outside as well as inside Whitehall. It should be shown in draft to the leaders of the main opposition parties, at least in its first iteration. One might also consider laying a draft before Parliament for approval, though this does not happen in New Zealand.

5.6. The Manual needs periodically to be revised. In NZ, this occurs every five to six years, which is roughly two parliamentary terms. Any revisions undergo a similar process to the initial drafting procedure, involving consultation with relevant actors, and ultimately it is Cabinet as a whole which approves the changes after the draft is put to them by the Prime Minister. It is also expected that there may be some minor revisions during a change of government—for instance, in order to recognise unusual governing arrangements (e.g., the changes made to the NZ Cabinet Manual sections on collective responsibility in 2001, recognising a coalition partner’s right to ‘agree to disagree’).

5.7. This consultative process may help in promoting a sense of ownership in the draft manual, which ideally describes accurately in writing the practices of those consulted. Opposition parties may also need to be consulted, although this is at the discretion of the Cabinet Office and the Prime Minister. Academics may be consulted about some proposed changes, as in NZ.

5.8. It is also worth noting the point made by former PM Helen Clark in the foreword to the Cabinet Manual that “the Cabinet Manual does not effect change, but, rather, records incremental changes in the administrative and constitutional arrangements of executive government...”

5.9. The manual should be made publicly available: it is a record of the internal working practices of the executive. This is something that the public ought to know about and have access to.

Appendix 1: Key guidance documents in New Zealand, Australia, Canada and Scotland

New Zealand

Key Guidance Documents for Executive Practice in New Zealand

| Text | Length | Location |
|--|--------|--|
| <i>The Cabinet Manual</i> | 180pp | http://cabinetmanual.cabinetoffice.govt.nz/ |
| <i>The Cabinet Guide</i> | n/a | http://cabguide.cabinetoffice.govt.nz/ |
| <i>The Ministerial Office Handbook</i> | 226pp | Not publicly available. It can be obtained from the NZ Ministry of Internal Affairs, Ministerial Services Section. |

All the major guidance documents are found on the NZ Cabinet Office website.⁹ Guidance for the NZ public service is on the State Services Commission website.¹⁰

The centrepiece of guidelines to executive practice in NZ is the *Cabinet Manual*. At 180 pages of large print (although only about 140 pages have substantive content), it provides cohesive and comprehensive guidance on a wide range of executive activities. It has been described by the current Secretary of the Cabinet in New Zealand as “the executive’s own internal practical working guidelines.”¹¹ It has been publicly available since 1996.

The *Cabinet Manual*, beginning with a note outlining the basics of the NZ constitution, consists of eight chapters. These cover the Head of State; a broad discussion of Ministerial duties and powers; ministerial relationships with the state sector; Ministers and the law; Cabinet decision-making; elections, transitions and government formation; legislation and parliamentary relations; and official information.

There are a number of matters to note about the *Cabinet Manual*. First, the *Manual* is not simply a code of ethical conduct: it gives guidance on a very broad range of matters. Second, the format is principled and procedure-heavy rather than being rule-based. There is also a coherence about the guidance: each aspect is dealt with in roughly the same depth and tone. Third, key players in NZ politics adhere to the *Cabinet Manual*. One of the first actions of a new administration is an affirmation of the *Manual*: the ‘leading’ political party and those parties with executive responsibilities¹² agree to be bound by the provisions of the *Manual*.¹³ Fourth, the *Manual* has a broad audience: the Head of State, those in the executive, and officials. Finally, while the *Manual* offers coherent and comprehensive advice

⁹ New Zealand Cabinet Office: <http://www.dpmc.govt.nz/Cabinet/index.htm>.

¹⁰ New Zealand State Services Commission: <http://www.ssc.govt.nz/display/home.asp>.

¹¹ Rebecca Kitteridge “The Cabinet Manual: Evolution with Time” (8th Annual Public Law Forum, 2006), available at:

<http://www.dpmc.govt.nz/cabinet/reports-and-speeches/pdf/the-cabinet-manual-evolution-with-time.pdf>.

¹² Since the adoption of MMP, NZ governments are usually multiparty associations.

¹³ See, for instance, the National-Maori Party confidence and supply agreement, where the Maori Party specifies that those of its members with ministerial roles will adhere to the provisions of the Cabinet Manual with respect to their ministerial conduct: http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf.

on executive practices, those who make use of it insist that it is not a legal document: its authority derives from Cabinet. It is descriptive, not normative.

It is hard to put across the depth and quality of the *Cabinet Manual's* coverage of issues: simply listing the contents does not do it justice. Three examples may illustrate this. The first example is the six-page description of the NZ constitution, written by Sir Kenneth Keith, then President of the NZ Law Commission, later Supreme Court judge and currently a Judge of the International Court of Justice. It is elegant and succinct, covering all key matters—sources, amendment, key principles and responsibilities of key actors. The second example is the chapter on elections, transitions and government formation, which includes in detail the principles covering elections (including the caretaker convention), mid-term transitions (for instance, where there is a change of Prime Minister) and dissolutions, and government formation. The third example is the chapter on Ministers and the public sector, which sets out not just the relationship between Ministers and officials, but also between Ministers and different kinds of arm's-length bodies.¹⁴

There may be contingent reasons for this depth—for instance, the comprehensive guidance on ministerial relationships with the public sector may stem from the strong commitment NZ governments have had for the new public management, which stresses clear, transparent relations between 'principal' and 'agent'. Similarly, the chapter on elections and transitions is the distillation of various experiences faced under proportional representation.

The *Cabinet Manual* is supplemented by relevant updates ('Cabinet Office circulars'), which are set out in the same format and published on the Cabinet Office webpage. These circulars include matters such as guidance on administrative arrangements for multiparty governance, and outlines of the annual legislative programme. Some circulars are incorporated into later editions of the *Manual*. The *Cabinet Manual* is updated every five to six years by the Cabinet Office: proposed revisions may be discussed with relevant parties (for instance, the chapter on legislation is sent to the Clerk of the House of Representatives; the chapter on Official Information is sent to the Ombudsman and the Privacy Commissioner), although ultimately it is the Cabinet which approves the changes.

The *Cabinet Guide* is in fact a website devoted to the detail of Cabinet and Cabinet committee procedures. Originally part of the *Cabinet Manual*, it was removed in 2001 and placed online partly to maintain the *Cabinet Manual's* 'principled' approach.

The *Ministerial Office Handbook* provides comprehensive guidance to Ministers and Ministerial staff on administrative and support services. The *Handbook* is not publicly available, although it can be obtained (if necessary) under an Official Information request. It is composed and revised by the Ministerial Services section of the Ministry of Internal Affairs. The Handbook covers such matters as ministerial offices and staff; finances and expenditure; support services; training topics; IT; transport (domestic and overseas); correspondence; protocol; security; and ministerial residences.

¹⁴ The one matter which NZ is lacking is a code for special advisers, but this is currently being drafted by the State Services Commission.

Australia

Key Guidance Documents for Executive Practice in Australia

| Text | Length | Location |
|---|--------|---|
| <i>Cabinet Handbook</i> | 40pp | http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf |
| <i>[Guide on Key Elements of Ministerial Responsibility]</i> | 35pp | http://australianpolitics.com/executive/howard/pre-2002/1998_code-of-conduct.pdf |
| <i>Standards of Ministerial Ethics</i> | 9pp | http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf |
| <i>Federal Executive Council Handbook</i> | 45pp | http://www.dpmc.gov.au/guidelines/docs/executive_handbook.pdf |
| <i>APS Code of Conduct</i> | n/a | http://www.apsc.gov.au/conduct/index.html |
| <i>Legislation Handbook</i> | 119pp | http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf |
| <i>Guidance on Caretaker Conventions</i> | 12pp | http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.pdf |
| <i>Freedom of Information Act 1982: Fundamental Principles and Procedures</i> | 77pp | http://www.dpmc.gov.au/foi/docs/FOI_principles_procedures.pdf |
| <i>Foundations of Governance in the Australian Public Service</i> | 141pp | http://www.apsc.gov.au/foundations/foundations.pdf |

All the major guidance documents are found on the Australian Department of the Prime Minister and Cabinet website (under ‘Guidelines and procedures’).¹⁵ In terms of comprehensiveness, the ‘downgrading’ of one key guidance document, the *Guide on Key Elements of Ministerial Responsibility*, may have reduced coverage. The only major flaw is the lack of official guidance on the role of the Crown (the Governor-General).

Currently, the key guidance document is the *Cabinet Handbook*, which sets out in detail Cabinet principles and procedures: the organisation of Cabinet; Cabinet conventions and principles; the Cabinet program and business; consultation; appointments; security; and in an annex a brief note on the caretaker convention. Curiously, there is no mention of the role and function of the Governor-General. The *Handbook* is formal in style—legalistic and with numbered paragraphs. It is heavily procedural in nature. This was first published by the government in 1983.¹⁶ The *Federal Executive Council Handbook* (equivalent to the Privy Council) is the Federal Executive Council’s equivalent of the *Cabinet Handbook*.

Previously, the *Cabinet Handbook* was supplemented by the *Guide on Key Elements of Ministerial Responsibility* (‘Key Elements’). *Key Elements* was intended as a source of quick reference for ministers and staff, setting out in 35 pages key aspects of executive practice. No longer available on the DPMC website, it set out in summary form the basic principles and procedures for government at the Commonwealth (federal) level, each aspect dealt with in 1-3 pages. *Key Elements* covered the Australian constitutional and legal framework; ministries; Cabinet; the Executive Council; ministerial conduct; Ministers’ relationships with

¹⁵ <http://www.dpmc.gov.au/guidelines/index.cfm>.

¹⁶ For a history of the Australian Cabinet Handbook, see Patrick Weller *Cabinet Government in Australia, 1901-2006* (UNSW Press, Sydney, 2007).

departments; administrative decision-making; ministerial facilities and services; parliamentary business; correspondence and travel. The language was plain; the style was informal and informative rather than legalistic. Originally issued by then Prime Minister John Howard, it has apparently fallen into disuse, perhaps because of the change in administrations—although chapter five of the guide has been updated and published as a separate document, *Standards of Ministerial Ethics*. Its absence means that there is no general introduction to executive government in Australia. There are some suggestions that the entire *Key Guide* is being updated.¹⁷

The *Australian Public Service Code of Conduct* also comes with a guide, the *APS Values and Code of Conduct In Practice: A guide to official conduct for APS employees and agency heads*, which sets out the practical application of the *Code*.

Guidelines on Caretaker Conventions provides comprehensive guidance on the caretaker convention—noticeably, it is only seen to apply to government action during the election period, and not in periods where it is unclear where the confidence of Parliament lies. Moreover, there is no mention of the role and function of the Governor-General under either situation.

Finally, attention should be drawn to the excellent *Foundations of Governance*: this provides comprehensive guidance for agency heads (the functional equivalent of permanent secretaries) to help them meet their obligations and responsibilities. It is the Australian Public Service ('APS') equivalent of *Key Elements*, and is published by the Australian Public Services Commission, the body responsible for the APS. *Foundations* covers such matters as agency head relationships with Ministers; the Australian Constitution; delegation; APS values and code of conduct; whistleblowing; various legal obligations (e.g., anti-discrimination law); financial management and budgets; employment matters; government information; administrative decision-making; criminal liability; security; native land title and environmental issues. Much of the information provided is drafted by various federal agencies and consolidated by the Public Services Commission.

¹⁷ See *Foundations of Governance in the Australian Public Service* (2009), which still lists *Key Elements* as an important reference document, and states that *Key Elements* is "being revised" at p26; and *Standards of Ministerial Ethics*, which states *Key Elements* will soon be "revised and reissued".

Canada

Key Guidance Documents for Executive Practice in Canada

| Text | Length | Location |
|---|--------|---|
| <i>Accountable Government: A Guide for Ministers and Ministers of State</i> | 84pp | http://www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2008/docs/ag-gr-eng.pdf |
| <i>Guide to Making Federal Acts and Regulations</i> | 206pp | http://www.pco-bcp.gc.ca/docs/information/publications/legislation/pdf-eng.pdf |
| <i>Values and Ethics Code for the Public Service</i> | 44pp | http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/dwnld/vec-cve-eng.pdf |
| <i>Access to Information Guidelines – General</i> | n/a | http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13773&section=text |
| <i>Policies and Guidelines for Ministers' Offices</i> | 83pp | http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/mg-ldm/gfmo-eng.pdf |
| <i>Guidance for Deputy Ministers</i> | n/a | http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/doc-eng.htm#TOC2_2 |
| <i>Guidebook for Heads of Agencies</i> | n/a | http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=guide2/able-eng.htm |

The key guidance documents for the Canadian executive are not easily located. Many of them can be found on the Privy Council Office (the Canadian equivalent of the Cabinet Office) homepage, but this requires some navigation.¹⁸ For instance, the key guidance document for executive practice, *Accountable Government*, is found under the rubric 'PCO Secretariats/machinery of government secretariat'. But in fact, many documents are provided to new Ministers in an *ad hoc* manner in briefings by senior officials (for instance, information on conventions, relevant legislation and responsibilities).

The centrepiece of guidance on executive practice in Canada is *Accountable Government: A Guide for Ministers and Ministers of the State*. An 84 page document, it sets out in relatively formal prose the business of being a minister. It covers ministerial responsibility, portfolio responsibilities, standards of conduct, relations with Parliament, and consultation and coordination. In annexes are also set out, amongst other matters, a summary of Canada's constitutional arrangements (which includes a thin outline of the head of state's role) and

¹⁸ PCO website: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&Page=index>.

the broad principles and procedures of Cabinet. It is produced by the Machinery of Government secretariat in the Privy Council Office.

The general approach of *Accountable Government* is much like the Australian *Guide to Key Elements of Responsibility*: it is a summary of principles, with detailed guidance found elsewhere—for instance, the annex on Cabinet process is only five pages. Thus while *Accountable Government* does cover a wide range of areas of executive action, detail is often thin. Having said that, *Accountable Government's* coverage is very broad: it is an invaluable introduction to the work of the Canadian executive.

The Guide to Making Federal Acts and Regulations consists of the 1999 *Cabinet Directive on Law-Making* and then more detailed guidance on the legislative process. The *Directive* is the foundation document, setting out the objectives and expectations of Cabinet in passing legislation; the remainder of the *Guide* sets out the processes and procedures by which legislation (and regulations) is developed and enacted. The *Guide* is directed mostly at officials.

The senior public service equivalent of *Accountable Government* is the *Guidance for Deputy Ministers*. 'Deputy Ministers' are the Canadian equivalent of permanent secretaries. *Guidance for Deputy Ministers* sets out in detail the responsibilities and accountabilities of Deputy Ministers: supporting Ministers; management of the Department; portfolio management; supporting Ministers in Parliament; responsibilities to parliamentary bodies; and accountabilities to the Prime Minister, Minister, the Clerk of the Privy Council, the Treasury Board and the Public Services Board. *Guidance for Deputy Ministers* while more comprehensive than *Accountable Government* (as it only deals with one kind of actor) is also principle-based rather than legalistic and detailed. There is also a *Guidebook for Heads of Agencies*, of a similar quality.

Some guidelines are found on the Treasury Board of Canada website, the Treasury Board being the body in charge of the federal public service. Guidelines to be found there include the *Values and Ethics Code for the Public Service* (the Canadian equivalent of the *Civil Service Code*) and the *Access to Information Guidelines* (on freedom of information).

The executive guidance documents on elections in Canada are not publicly available, although they do exist. Similarly, the Governor-General (Canada's head of state) is given an extensive briefing on his or her role, but this is also not publicly available. There is a very limited discussion of the role of the Governor-General in *Accountable Government*, but no real substance.

Policies and Guidelines for Ministers' Offices provides extensive information on administrative matters for Ministers, including topics like conflicts of interest, security, human resources, pay, benefits, leave, funding, travel, and the official language policy.

Scotland

Key Guidance Documents for Executive Practice in Scotland

| Text | Length | Location |
|--|--------|---|
| <i>Key Information for Ministers</i> | 51pp | Not publicly available |
| <i>Ministerial Code</i> | 49pp | http://www.scotland.gov.uk/Resource/Doc/276226/0082926.pdf |
| <i>Guide to Collective Decision-making</i> | 21pp | http://www.scotland.gov.uk/Resource/Doc/244314/0068319.pdf |
| <i>Civil Service Code</i> | 2pp | http://www.scotland.gov.uk/Resource/Doc/76007/0061082.pdf |
| <i>Freedom of Information Overview</i> | 13pp | http://www.scotland.gov.uk/About/FOI |
| <i>UK General Election and by-election campaigns: Guidance to Scottish Government civil servants</i> | n/a | http://www.scotland.gov.uk/Publications/2008/07/uk-election-guidance |
| <i>Scottish Parliament Election Guidance 2007</i> | n/a | http://www.scotland.gov.uk/Publications/2007/02/election-guidance2007 |
| <i>Handling EU Obligations</i> | 55pp | http://www.scotland.gov.uk/Resource/Doc/274450/0082138.pdf |

The key guidance documents on executive practice in Scotland are relatively easy to locate on the Scottish government website.¹⁹ Finding more specific guidance (such as information on elections or EU obligations), however, requires a wider search. In terms of comprehensiveness, the Scottish government has slightly more coverage than the UK, but apparently lacks guidance on administrative decision-making; government formation; and the caretaker convention.

The centrepiece of guidance on executive matters is the Scottish *Ministerial Code*. It is very much like the UK *Ministerial Code*, although there is more detail. It covers basic Cabinet procedure; legislation and parliamentary relations; ministerial duties and responsibilities; appointments; ministers and civil servants; constituency and party interests; planning matters; ministerial visits; the presentation of policy; ministerial private interests; and pensions. The First Minister is the ultimate arbiter in determining whether there has been a breach of the *Code*, and what consequences follow. As with the UK *Ministerial Code*, the focus is on propriety rather than ‘best (executive) practice’.

The *Guide to Collective Decision Making* is a detailed document given over to Cabinet procedure and processes.

The *Ministerial Code* and *Guide to Collective Decision-Making* is supplemented by *Key Information for Ministers*, a ‘rough guide’ to ministerial life. *Key Information* sets out in frank, informal English the practicalities of ministerial life—what a minister’s private and diary secretary does, claiming allowances, the key executive bodies and so forth. There is little discussion of principle or convention, although there is a brief section devoted to the civil service code. There is also a section outlining the budget of the Scottish government. *Key Information* was a compilation of material prepared ahead of the 2007 Scottish election and

¹⁹ The Scottish government website: <http://www.scotland.gov.uk/Home>. Some of the main guidance documents are found under ‘About/Cabinet and Ministers’.

was not published at the time. The Scottish Government is currently reviewing the material provided to new Ministers. *Key Information* is an excellent document, which might be used as a model for other governments developing guidance for new ministers.

These three documents are key: the other documents listed in the table above are what is available on the Scottish government website and cover key areas of executive practice (e.g. *EU obligations* and *Freedom of Information* overview). The *Scottish Civil Service Code* is virtually the same as the UK version; except that it has been amended to state Scottish civil servants owe their loyalty to the Scottish government.

The guidance documents on elections are directed towards civil servants and those in agencies and NDPBs: these follow very closely the election guidance given by the UK Cabinet Office in relation to general elections. There is no mention of the caretaker convention. The guidance documents mostly cover the period up to the election, but not what happens after an election. The guidance document on Scottish elections notes (in the same language used in UK CO guidance on general elections) that Ministers are expected to defer, or at least exercise discretion about policy of a long-term character during the election, but there is no discussion of what happens in an extended period of government formation. This is odd, given that proportional representation makes government formation in Scotland much more prolonged, typically requiring a couple of weeks after the election.

Appendix 2: Extracts from the New Zealand Cabinet Manual²⁰

Caretaker Convention

General

6.16 On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or (after an election) until a government is sworn in following the government formation process. During such periods, the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. However, governments in this situation have traditionally constrained their actions until the political situation is resolved, in accordance with what is known as the convention on caretaker government.

6.17 There are two circumstances in which the government would see itself bound by the caretaker convention:

- a. After a general election, one of the two arms of the caretaker convention applies until a new administration is sworn in. (See paragraph 6.19.)
- b. If the government has clearly lost the confidence of the House, the caretaker convention guides the government's actions until a new administration takes office, following either negotiations between the parties represented in the current Parliament or a general election.

6.18 In both situations the government is likely to state explicitly that it is to operate as a caretaker government until the political situation is resolved.

Principles of the caretaker convention

Two arms of the convention

6.19 There are two arms to the caretaker convention:

- a. where it is not clear who will form the next government (see paragraphs 6.20 - 6.23);
- b. where it is clear who will form the next government, but they have not yet taken office (see paragraphs 6.24 - 6.25).

The principles that apply in each situation are set out below.

Unclear outcome

6.20 Where it is not clear which party or parties will form the next government following a general election or mid-term loss of confidence in the government, the following principles apply to government business (at every level).

- a. In general terms, the normal business of government and the day-to-day administration of departments and other agencies in the state sector may continue during the caretaker period.

²⁰ The full manual is at: <http://www.cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>

- b. Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government (subject to paragraph 6.21).
- c. Matters may arise, however, that would usually require decisions, such as those concerning:
 - significant or potentially controversial issues;
 - issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as signing a major contract or making a significant appointment);
 - new policy initiatives;
 - changes to existing policy.
- d. Decisions relating to those matters should:
 - be deferred, if possible, until the political situation is resolved; or
 - if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (for example, by extending a board appointment or by rolling over a contract for a short period); or
 - if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue. (See also paragraph 6.32.)

6.21 Occasionally a significant policy decision that was made before a caretaker period will need to be implemented during the caretaker period. Usually the implementation of such decisions can proceed during a caretaker period. If the proposed action would be difficult or impossible to reverse, however, it may be appropriate to consult with other political parties about it.

6.22 The caretaker convention colours the whole conduct of government, and requires careful judgement by Ministers, public servants, Crown entities, and other state sector agencies as to whether particular decisions are affected.

6.23 No hard and fast rules are possible. Ministers may need to take into account various considerations (including political considerations), both on whether it is appropriate or necessary to proceed on a matter and on how the matter should be handled. Decisions will also be considered against the background that the incumbent caretaker government has lawful executive authority, until replaced or confirmed in office.

Clear outcome

6.24 Where it is clear which party or parties will form the next government but Ministers have not yet been sworn in, the outgoing government should:

- a. undertake no new policy initiatives; and
- b. act on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office - even if the outgoing government disagrees with the course of action proposed.

6.25 Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed.

Decision-making process under the caretaker convention

Departments and other state sector agencies

Day-to-day administration

6.26 The day-to-day administration of departments and agencies in the wider state sector will (in general terms) continue during the caretaker period. However, departmental officials and board members and employees of other state sector agencies should always take into account the fact that they are operating in a caretaker environment, and exercise special care when making decisions during this time.

Departments

6.27 Most decisions to which the caretaker convention applies are those relating to significant or potentially controversial issues, issues with long-term implications, new policy initiatives, or changes to existing policy. In the usual course of events, these decisions will be referred to the Minister. The Minister will decide (in consultation, if appropriate, with ministerial colleagues and/or the Prime Minister) how the convention applies and how the decision should be handled. The department should be ready to provide advice (if required) on applying the caretaker convention, and the options for handling the decision in terms of the convention. The Secretary of the Cabinet is available for guidance.

6.28 On rare occasions, caretaker convention issues may arise in relation to matters that, under statute, fall solely within the decision-making authority of a chief executive or statutory officer. Where appropriate, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraphs 6.19 - 6.25) when making those decisions. The Secretary of the Cabinet is available for guidance.

Crown entities, state-owned enterprises, and other state sector agencies

6.29 The statutory provisions governing decision making within Crown entities, state-owned enterprises, and other state sector agencies impose different obligations from those applicable to decision making within departments. Cabinet expects, however, that agencies in the state sector will apply the principles of the caretaker convention (see paragraphs 6.19 - 6.25) to decision making during the caretaker period, as far as is possible (taking into account their legal obligations and statutory functions and duties). Cabinet also expects that the agencies will discuss with their Ministers any issues that have caretaker convention implications. For general guidance on applying the caretaker convention, the heads of Crown entities or other state sector agencies may wish to contact relevant departmental chief executives or the Secretary of the Cabinet.

Ministerial decisions

6.30 As a general rule, Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted. (See paragraphs 5.11 - 5.12.) Ministers may wish to discuss with their Cabinet colleagues whether the caretaker convention applies to a particular decision and how it should be handled. If Ministers are in any doubt about whether the caretaker convention applies to a particular matter, they should err on the side of caution and raise the matter with the Prime Minister or at Cabinet. If a Minister considers that a matter requires consultation with other political parties, the proposed consultation must be approved in advance by either Cabinet or the Prime Minister. (See paragraphs 6.31 - 6.32.)

Coordination and the Prime Minister's role

6.31 In cases where any doubt arises as to the application of the caretaker convention, Ministers should consult the Prime Minister. Final decisions concerning the caretaker convention rest with the Prime Minister.

6.32 All approaches to other political parties must be cleared in advance with the Prime Minister or Cabinet. Ministers should ensure that they notify the office of the Prime Minister as early as possible of all matters that may require consultation and action during periods of caretaker government.

Guidance on decisions about expenditure and the Official Information Act 1982

6.33 During a caretaker period, particular attention should be paid to decisions about expenditure, and requests under the Official Information Act 1982.

6.34 In relation to decisions on expenditure, there must always be authority from Parliament to spend money before expenditure is incurred. (See paragraph 5.65.)

6.35 The Official Information Act 1982 continues to operate during a caretaker period. In general, responding to requests for information should be seen as part of the day-to-day business of government, and should be dealt with in the usual way. On rare occasions, requests may raise issues that are likely to be of long-term significance for the operation of government and that require ministerial involvement. In this situation, it may be necessary to consider extending the time limit in order to consult with the incoming Minister. Any such extension must comply with section 15A of the Official Information Act 1982. For more information on the Official Information Act 1982, see paragraphs 8.13 - 8.51.

Government formation

General

6.36 The process of government formation occurs most commonly following an election, but may be necessary if the government loses the confidence of the House mid-term. The principles and processes set out in paragraphs 6.37 - 6.42 apply in both post-election and mid-term government formation situations.

Principles and processes of government formation

6.37 The process of forming a government is political, and the decision to form a government must be arrived at by politicians.

6.38 Once the political parties have reached an adequate accommodation, and a government is able to be formed, it is expected that the parties will make appropriate public statements of their intentions. Any agreement reached by the parties during their negotiations may need to be confirmed subsequently by the political parties involved, each following its own internal procedures.

6.39 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).

6.40 Accordingly, the Governor-General will, by convention, abide by the outcome of the government formation process in appointing a government. The Governor-General will also accept the political decision as to which individual will lead the government as Prime Minister.

6.41 During the government formation process, the Clerk of the Executive Council provides official, impartial support directly to the Governor-General, including liaising with party leaders as required on behalf of the Governor-General. The Clerk facilitates the transition between administrations if there is a change of government. The Clerk assists the outgoing and incoming Prime Ministers and provides constitutional advice, as appropriate, on any proposed government arrangements. See paragraphs 1.30 - 1.34 for further information about the role of the Clerk of the Executive Council.

6.42 Parliament must meet not later than six weeks after the date fixed for the return of the writs for a general election (see section 19 of the Constitution Act 1986), although it may be summoned to meet earlier. If, following an election, a government has not yet been formed by the time that Parliament meets, the Address in Reply debate may resolve matters as it provides an early opportunity for a confidence vote. If Parliament is in session following a mid-term government formation process, a vote of confidence may also usefully be initiated to demonstrate where the confidence of the House lies.

Outgoing Ministers

6.43 Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is sworn in, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of the entire ministry.

6.44 Section 6(2)(b) of the Constitution Act 1986 may require some Ministers in the caretaker government to resign before the government formation process has concluded, following a general election. Section 6(2)(b) requires any Minister who has not been re-elected to Parliament to resign from the Executive within 28 days of ceasing to be a member of Parliament. In this event, the Prime Minister may ask another Minister in the caretaker government to be acting Minister in the relevant portfolio(s), or may appoint a new Minister to the portfolio(s) (in a caretaker capacity).

6.45 Ministerial Services provides practical assistance to outgoing Ministers in relation to staff, office, and other practical arrangements. The Cabinet Office and Archives New Zealand provide guidance on the storage and disposal of Ministers' official papers. (See paragraphs 8.86 - 8.99.) The Cabinet Office also seeks information from outgoing Ministers about gifts they have received while in office. (See paragraphs 2.78 - 2.85.)

Appointment of a new government

6.46 Since the introduction of New Zealand's proportional representation electoral system, it has been the practice for a full appointment ceremony to be held when a government is formed after an election, even when the composition of the government has not greatly changed. The ceremony formally marks the formation and commencement of the new administration and marks the end of the caretaker period.

6.47 Section 6(2)(a) of the Constitution Act 1986 enables a swift transition between administrations. It provides that any candidate at a general election can be appointed as a Minister, before being confirmed as elected, so long as that Minister is confirmed as a member of Parliament within 40 days of being appointed to the Executive. Section 6(2)(a) does not apply to Parliamentary Under-Secretaries, who cannot be sworn in until their election as members of Parliament has been confirmed.

6.48 Further information on the appointment of Executive Councillors and Ministers is set out in paragraphs 1.23 - 1.24, and paragraphs 2.15 - 2.17.

Appendix 3: UK Cabinet Office Website

Organisation and accessibility

The website is not easy to navigate. A reader wanting to understand what are the practical working guidelines the executive follows in exercising government power would be hard-pressed to find the basic documents.

Location/organisation: material is somewhat haphazardly organised. Material related to ‘Ministerial and Government business’ is located in a column on the left hand side of the title webpage (three-quarters of the way down). The *Ministerial Code* and *Civil Service Code* are found under ‘Codes of Conduct’, and not under ‘Ministerial and government business’—which would seem to be the key area for ministerial guidance. Guidance on freedom of information is found under ‘publications’, a link located at the top of the CO’s title webpage. Some information is not even found on the CO website: the rules for judicial review are found on the Treasury Solicitor’s Department website (*The Judge over Your Shoulder*); some information about governance of state bodies is found through a link under ‘propriety and ethics’ on the CO page which links to the civil service webpage on guidance on public bodies (this guidance is directed more at civil servants).

Format: there is inconsistency about format—for instance, the guide to parliamentary business is in HTML (web) format only; the Ministerial code is in PDF format; the topics under Cabinet business are a mixture of HTML, word and PDF formats; some links to documents lead to external websites.

Coverage/content

On the face of it, the structure of the ministerial and government business webpage is quite logical; but coverage is limited. As noted earlier, some guidance is not even available on the CO website itself (e.g., guidance on administrative decision-making). Sometimes the coverage is rather haphazard (e.g., ‘consultation’ only covers the release of statistics; the webpage on the European secretariat only sets out what the secretariat does, but says nothing about the relationship between the UK and Europe).

There are gaps in key areas (at least publicly)—see above.

Some links are dead.

- Guide to Parliamentary Work—the link to “Europe (Guidance on the Parliamentary Scrutiny of European Union Documents)” is dead:
<http://www.cabinetoffice.gov.uk/parliamentary-clerk-guide/chapter1.aspx>
- Ministers and government business: the link under ‘Government Communication’ is dead.
http://www.cabinetoffice.gov.uk/ministers_and_government_business.aspx

Again, there is no ‘narrative’ drawing all these matters together. There is surely an argument that a more coherently organised website and/or guidance would be beneficial to the public too. Just to take a topical example, clear guidance posted on what happens during a hung parliament or during government formation might calm an excitable media and nervous financial sector.