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Select Committee on the Constitution

13th Report of Session 2012–13

The pre-emption of Parliament

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Evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (0207 219 5314).

References in the footnotes to the report are as follows:

Q refers to a question in oral evidence;

witness names without a question reference refer to written evidence.

SUMMARY

A central principle of the UK constitution is that Parliament makes the laws, and ministers implement them. On occasion, however, the interests of efficient and cost-effective public administration require that the Government pre-empt Parliament by undertaking preparatory work in anticipation of a bill becoming law. Concerns have been raised about this practice, both in terms of the lack of understanding of when and how pre-emption occurs, and of the extent to which it takes place.

Our inquiry revealed no widespread or egregious use of pre-emption. However, we include in this report the following recommendations—

- All instances of pre-emption must be governed by certain fundamental constitutional principles, including the rule of law and effective parliamentary scrutiny.
- The Treasury plays an important role in policing this area within Government. However, the Treasury's practices carry no constitutional force, and should not be described so as to suggest otherwise. In particular, its practice of authorising certain expenditure once a bill has been given a second reading in the House of Commons is not a constitutional convention and has not been endorsed by Parliament.
- As there is no standard procedure at present, the Government must do more to inform Parliament of their pre-emptive activities. Written statements should be made to Parliament in a timely manner, setting out details of each instance of pre-emption and justifying it; and a statement should be made at the end of each session giving an annual summary of pre-emptive activities.
- Similarly, a written ministerial statement should be made at the end of each session on the number of ministerial directions issued in the session.
- Where pre-emption occurs, the Government must always state clearly the power under which they consider themselves authorised to act.
- The principles and practices governing pre-emption should be consolidated into a single, authoritative restatement for inclusion in the Cabinet Manual.
- The common law powers of the Crown are restrained by public law and constitutional principle. This should be made clear in all Government publications mentioning these powers.
- The so-called "Ram doctrine", which has been invoked to support pre-emption, is misleading and inaccurate, and should no longer be used.
- Pre-emption of Parliament should not be undertaken when it would threaten the principle of effective parliamentary scrutiny.

The pre-emption of Parliament

CHAPTER 1: INTRODUCTION

Background to the inquiry

1. A central principle of the UK's constitution is that Parliament makes the laws, while the executive implements them. A strict reading of this principle might suggest that the executive should take no action on a bill until it has completed its passage through Parliament and received the Royal Assent. However, it is widely recognised that to subject the executive to such strict restraint may on occasion be inefficient or expensive: in these circumstances the Government should be able to undertake some work to prepare for a bill's enactment. Such preparatory work may take a variety of forms. It can involve spending public money, for example through hiring project teams or conducting scoping studies. It may involve administrative reorganisation, for instance by transferring or ending the non-statutory functions of a body due for abolition.
2. During this inquiry we have described Government action in anticipation of Parliament passing a bill as the “pre-emption of Parliament.” In this Parliament there have been several examples of pre-emptive activity which have attracted concern. These include—
 - The Health and Social Care Act 2012. The Government began reorganising primary care trusts (PCTs) into management clusters (which were to replace PCTs under the Health and Social Care Bill) whilst the bill was being considered by the House of Lords.¹ It was argued during the bill's passage through the Lords that, given the scale of the pre-emption which had taken place, it would be practically impossible for the bill to be abandoned, as the resultant organisational “limbo” in the NHS would be worse than having a defective bill passed into law.²
 - The Public Bodies Act 2011. Before the bill was enacted, a number of public bodies began to wind down their activities in anticipation of abolition—in some cases before the bill had received a second reading in the House of Commons. In several cases, reorganisation work began on bodies which were subsequently removed from the bill following parliamentary debate: the Youth Justice Board³ and the Office of the Chief Coroner are two prominent examples.
 - The abolition of Regional Development Agencies (RDAs). Concerns were raised that, during the passage of the Public Bodies Act 2011, the Government indicated that they remained “open to persuasion”

¹ The power of ministers to reorganise in that way was granted by the National Health Service Act 2006 (QQ 51 and 69; HM Treasury, para 20).

² HL Deb, 8 February 2012, col 260 (Lord Owen).

³ The chair and chief executive of the Youth Justice Board for England and Wales gave oral evidence to us about their experience (QQ 23–37). We are grateful to them and to all our other witnesses.

regarding the fate of RDAs—yet considerable pre-emptive reorganisation took place in the RDA for the north east.⁴

3. In view of the concerns expressed in this area, and taking into account the lack of any previous parliamentary investigation of the subject, we decided to conduct a short inquiry into the pre-emption of Parliament. Our inquiry was motivated more by the lack of clarity and information in this area than by any suggestion that pre-emption was widespread or egregious.

Constitutional principles

4. This subject is fundamentally about the relationship between Parliament and the executive. As such, it engages a number of constitutional principles—
 - Parliament makes the law, and the executive implements it;
 - ultimately, Parliament (in particular the House of Commons) controls the supply and expenditure of public money;
 - the rule of law, including the principle that, in a democratic society, the exercise of state power requires legal authority; and
 - the effective scrutiny of the executive by Parliament—as we recently observed, ministers are constitutionally responsible to Parliament for the discharge of all their functions and the exercise of all their powers.⁵
5. Our inquiry has not revealed widespread disregard for these principles. Rather, we have sought to draw together the various practices, guidelines and rules into a single place, and to make recommendations on how these principles can better be guaranteed and understood in practice.

The legal framework of ministerial powers

6. Ministers must act under the law. However, the various sources of ministerial power, and the relationships between these sources, may on occasion be controversial. Whether pre-emption is constitutionally appropriate—indeed whether ministerial actions may properly be described as pre-emption at all—may depend to some extent on the source of the legal authority under which the minister is acting.
7. There are three sources of legal authority for ministerial actions: statute, the royal prerogative and the common law.⁶ Statutory authority is legally uncontroversial: whilst the scope of statutory powers is often litigated,⁷ and although the exercise of statutory powers may be politically controversial, there is no doubt that Acts of Parliament are capable of authorising ministerial action. In any case, when ministers are exercising powers conferred upon them by Parliament, it can hardly be said that they are “pre-empting” Parliament.

⁴ Beecham.

⁵ Constitution Committee, 6th report (2012–13): *The accountability of civil servants* (HL Paper 61), para 12.

⁶ Q 70.

⁷ An example relevant to this inquiry is *R v Secretary of State for Health, ex parte Keen* (1990) 3 Admin LR 180.

8. The royal prerogative is an important source of ministerial power; it is, however, a complex subject in its own right, and a detailed investigation of the prerogative is beyond the scope of our inquiry.
9. The common law powers of the Crown, by contrast, are more nebulous, and this “third source” of power is perhaps the least well understood. They are also relied on by the Government for many pre-emptive activities. We analyse the common law powers of the Crown in chapter 3.

CHAPTER 2: GOVERNMENT CONTROLS ON PRE-LEGISLATIVE ACTION AND EXPENDITURE

10. A central aspect of our inquiry has been the role played by the Treasury in authorising Government action and (particularly) expenditure before legislation. We recognise the key role played by the House of Commons Public Accounts Committee in scrutinising Government expenditure; in this chapter we focus on the constitutional implications of expenditure in anticipation of legislation.

The 1932 concordat

11. The Treasury's role in ensuring appropriate parliamentary authorisation for Government expenditure is reflected in a concordat agreed between the Treasury and the House of Commons Public Accounts Committee in 1932 ("the 1932 concordat"). This concordat established the principle that, where possible, the authority for Government expenditure should flow from a specific Act of Parliament, rather than from the general authority of the Appropriation Acts or the use of the Contingencies Fund. The position set out in the 1932 concordat is that—

“while it is competent to Parliament, by means of an annual vote embodied in the Appropriation Acts, in effect to extend powers specifically limited by statute, constitutional propriety requires that such extensions should be regularised at the earliest possible date by amending legislation, unless they are of a purely emergency or non-continuing character ... while the executive Government must continue to be allowed a certain measure of discretion in asking Parliament to exercise a power which undoubtedly belongs to it, [the Treasury] agree that practice should normally accord with the view expressed by the [Public Accounts] Committee that, where it is desired that continuing functions should be exercised by a Government department ... it is proper that the powers and duties to be exercised should be defined by specific statute.”⁸

12. The Attorney General, Dominic Grieve QC MP, informed us that: “the 1932 concordat is in a sense the recorded bottom line of the way in which the Treasury works to ensure, on a day-to-day basis, that there is proper accountability of Government expenditure to Parliament.”⁹ The Treasury Solicitor, Sir Paul Jenkins KCB QC, added that—

“there is, almost inevitably, statutory authority for spending money ... that is contained in the Appropriation Acts every year. The 1932 concordat recognises that, in that case, mere statutory authority is generally not enough. If you just rely on the Appropriation Acts, it is very difficult to say that Parliament is getting rigorous and thorough scrutiny of the spending”.¹⁰

13. It seems, therefore, that the 1932 concordat amounts to a self-denying ordinance by the Treasury, which has in general worked well. Although the

⁸ *Managing Public Money*, A.2.1.6.

⁹ Q 71.

¹⁰ Q 72.

Government could apparently rely on the Appropriation Acts to authorise lawful expenditure, they will in general not do so, in the interests of constitutional propriety.

The Treasury framework: *Managing Public Money*

14. The 1932 concordat sets out the principle of parliamentary authorisation of Government expenditure, but it does not set out detailed rules on how that principle is to be applied. Such rules have been contained in a series of Treasury documents, the current iteration of which is *Managing Public Money*, with the latest version produced in October 2007.¹¹
15. In order to engage in pre-emptive activity that involves public money, the Government must have the legal authority both to act¹² and to spend. *Managing Public Money* provides the rules under which the Treasury will authorise expenditure before a bill becomes law. These rules, known as the “new services rules”, set out the specific requirements which departments must meet in order to fund pre-emptive activities.¹³ In the words of *Managing Public Money*, these requirements are—
 - “the proposed expenditure must be genuinely urgent and in the public interest—i.e. there must be wider benefits to outweigh the convention of awaiting parliamentary authority;
 - the relevant bill must have successfully passed second reading in the House of Commons;
 - Parliament must have been made aware of the intended steps in appropriate detail when relevant previous legislative steps were taken;
 - the planned legislation must be certain, or virtually certain, to pass into law in the near future, and usually within the financial year; and
 - the department responsible must explain clearly to Parliament what is taking place, why, and by when matters should be placed on a normal footing.”¹⁴
16. These requirements clearly raise constitutional issues; from Parliament’s perspective the third and fifth requirements seem particularly important.
17. The Treasury Officer of Accounts, Mrs Paula Diggle, informed us that: “We take [*Managing Public Money*] as the essence of what Parliament wants. Parliament knows about it because it is a published document. We have no reason to think that it is not what Parliament wants, and I am sure that the PAC [Public Accounts Committee] would tell us very quickly if it was not.”¹⁵

The Treasury’s role: “Parliament’s guardian in Whitehall”

18. The Treasury is one of the oldest Government departments, and exercises a number of functions which are not analogous to those of other departments. The Treasury told us that, “there is an ancient convention that the Treasury

¹¹ *Managing Public Money* replaced the HM Treasury guidance *Public Accounting*.

¹² The Government’s legal authority to act is considered in chapter 3.

¹³ This is done by borrowing from the Contingencies Fund under the authority of the Appropriation Acts.

¹⁴ *Managing Public Money*, para 2.4.3.

¹⁵ Q 39.

should strive to look after Parliament's interests in Whitehall."¹⁶ The Treasury Officer of Accounts also described the Treasury as acting "as the guardian of Parliament."¹⁷ She drew our attention to a passage from a report of the House of Commons Public Accounts Committee from 1884—

"the Treasury is primarily responsible to Parliament for the maintenance of financial order and regularity in all the accounting Departments of the State, and in the exercise of functions it is the duty of the Treasury to lay down, or require to be laid down in the various Departments, such regulations as provide for the exercise of proper checks and precautions."¹⁸

19. The Treasury Officer of Accounts informed us that no documentation exists in support of the convention's ancient origins—she thought any such documents were "lost in the mists of time."¹⁹ She accepted that Parliament itself had probably never debated the Treasury's practice,²⁰ but she believed "that it is a long-standing arrangement that the PAC has understood and accepted."²¹ We know of no evidence to the contrary.
20. Several witnesses considered that the Treasury's description of its role in terms of "guarding" or "looking after" Parliament may not be appropriate. They thought it better to consider the Treasury as a watchdog within Whitehall, which is then held to account by Parliament.²²
21. We recognise the role of the Treasury as the department responsible for policing the proper use of public money within Government, and welcome the seriousness and diligence with which this role is performed by the Treasury Officer of Accounts. We also acknowledge that the Treasury is the principal department through which the Government are held to account by Parliament for public expenditure. However, it does not follow that the Treasury should regard itself as seeking to guard or protect the interests of Parliament. Parliament, using its undoubted power to hold ministers and accounting officers to account, can guard its own interests against inappropriate executive action, and regularly does so. We also note that, should a Government department act in contravention of the *Managing Public Money* conditions in this area, the Comptroller and Auditor General (as an officer of the House of Commons and auditor of the Government's accounts) would bring this to Parliament's attention.²³
22. Indeed, there will often be cases where Treasury ministers themselves wish to engage in actions which pre-empt legislation; in such cases the interests of Parliament and the interests of Treasury ministers may conflict. For example, we were informed of two occasions in recent years when Treasury

¹⁶ HM Treasury, para 6.

¹⁷ Q 47. The Treasury's functions in this area are primarily performed by the Treasury Officer of Accounts, who leads a discrete unit for this purpose. The Treasury Officer of Accounts' functions include liaising with the House of Commons Public Accounts Committee and the National Audit Office, setting out financial control and accounting frameworks for Government departments, and advising within Government on financial control and propriety generally.

¹⁸ Q 39.

¹⁹ Q 40.

²⁰ Q 39.

²¹ Q 40.

²² QQ 66 and 81.

²³ HM Treasury, para 17.

ministers issued ministerial directions to require expenditure on projects which the Treasury's accounting officer did not think met the tests of regularity and propriety.²⁴

23. **The Treasury is responsible to Parliament for the regularity and propriety of Government expenditure; it follows that the Treasury will wish to police these areas within Whitehall. However, it should be recognised that Parliament's interests are primarily guarded by Parliament itself.**
24. A second aspect of the Treasury's evidence in this area to draw criticism was the suggestion that its watchdog role arises from an ancient convention.
25. The word "convention" is, in constitutional parlance, a term of art. Although there is no universally accepted definition of the term, the feature common to all definitions is that, whilst a convention is not justiciable, it is nevertheless regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices which are politically binding on all involved, but not legally binding.
26. Given that Parliament has not delegated the protection of its interests to the Treasury, the Treasury's practice of taking responsibility for financial regularity and propriety within the executive cannot be considered a constitutional convention in the strict sense. In supplementary written evidence, the Treasury Officer of Accounts confirmed that, when using the term convention, she was: "using [it] in the primary sense in the OED [Oxford English Dictionary], i.e. to denote common practice rather than formal agreement."²⁵ We accept that the Treasury was not seeking to elevate its internal practices to the status of constitutional conventions. However, clarity in this area is important. **We recommend that the Treasury's practices should not be described as "conventions"**.

The "second reading convention"

27. *Managing Public Money* sets out a number of tests which must be passed before the Treasury will authorise pre-legislative expenditure under the new services rules (see paragraph 15). One of these tests is that the bill concerned must have received its second reading in the House of Commons. This test was described by the Economic Secretary to the Treasury, Sajid Javid MP, as the "second reading convention".²⁶

A true convention?

28. It is questionable whether the second reading convention is a true constitutional convention. Sir Stephen Laws KCB QC, former First Parliamentary Counsel, commented that, "whether or not the second reading rule is a convention, I would say it is a rule of thumb."²⁷
29. We are of the view that the Treasury's practice in this area is just that: a practice. Parliament is not, and does not regard itself as, bound by the

²⁴ Q 53; HM Treasury, supplementary evidence, annex 2. Please see below for more on ministerial directions.

²⁵ HM Treasury supplementary evidence, para 7.

²⁶ Q 45. HM Treasury's written evidence also used the term.

²⁷ Q 33.

Treasury's guidance. **The second reading practice is not a convention, and should no longer be described as such.**

Operation of the second reading practice

30. A number of points have arisen about the scope of the second reading practice, and its enforcement by the Treasury.
31. First, it is clear that, whilst a bill passing second reading in the House of Commons is a useful indicator of its prospects of becoming law, it is not a foolproof indicator. A bill which has received second reading in the House of Commons can be abandoned or defeated at a later stage in the parliamentary process.²⁸ We were pleased, therefore, to be informed that the Treasury's approach recognises these uncertainties: "It is a matter of judgement whether a bill is likely to get through. If a bill has gone through second reading in the Commons with a large majority, we normally take that as a strong indication. If it is a closely fought bill and lots of questions have been raised, that is a warning flag and we would exercise caution."²⁹ Sir Stephen Laws also told us that Commons second reading: "is not a green light to do whatever you want. You will not get permission [for pre-legislative expenditure] before second reading in the House of Commons. You may not get permission then."³⁰ Indeed, a bill may receive a large majority for its second reading, yet a particular clause (relevant to pre-emption) may be highly contentious and its passage through Parliament open to considerable doubt.
32. Secondly, the Treasury's practice is restricted to second reading in the House of Commons. The result is that expenditure can take place for bills introduced in the Commons at a much earlier stage than for those introduced in the Lords. The Treasury's view is that this is because the power to grant supply to the executive is vested in the House of Commons alone.³¹ Yet the House of Commons is not asked to authorise such expenditure.³²
33. Thirdly, the second reading practice is clearly limited to cases where the pre-emption is to occur under new powers proposed in a bill. It does not apply to pre-emptive reorganisation within Government departments (and public bodies for which they are responsible) carried out under existing powers and not involving new expenditure.³³ There is, therefore, a potentially wide range of pre-emptive activity to which the second reading practice does not apply.³⁴

²⁸ For example, in the current parliamentary session the House of Lords Reform Bill was withdrawn by the Government despite having received a second reading in the House of Commons.

²⁹ Q 46. HM Treasury's written evidence states that "Proposals to anticipate Royal Assent are always declined where the bill in question is sufficiently controversial that its passage cannot be assured" (para 18).

³⁰ Q 33. HM Treasury gave examples of bills where it might have been useful for there to be expenditure in advance of Royal Assent, but none was given: supplementary evidence, annex 1.

³¹ HM Treasury, para 16.

³² A money resolution moved after the second reading of a bill in the Commons only authorises expenditure arising from any Act resulting from the bill.

³³ An example being some of the reorganisation undertaken in anticipation of the Public Bodies Bill becoming law (on which see HM Treasury, para 20). See also footnote 1.

³⁴ For example, the National Rivers Authority Advisory Committee was established to advise ministers on preparations being made by water authorities for privatisation. The water authorities' preparations were done under the Public Utility Transfers and Water Charges Act 1988; but the Advisory Committee was not established under that Act. Both that Act and the Advisory Committee were in preparation for what became the Water Act 1989.

34. **Second reading in the House of Commons may, in certain circumstances, be a useful indicator of a bill's prospects of becoming law, but it is not sufficient to justify pre-empting the legislative process. The practice of allowing expenditure after a bill's second reading in the Commons has been developed by the Treasury; it has not been endorsed by Parliament, and carries no independent constitutional force.**

Informing Parliament

35. In order to hold ministers properly to account, it is essential that Parliament receives full and timely information on Government activity. This principle applies to actions taken and expenditure incurred in advance of legislation, as it does to all other Government functions.
36. We were told that Parliament currently receives a considerable amount of information about pre-emptive activities from the Government. The Treasury told us that, where the new services rules are engaged, “a minister must warn Parliament of what action is intended, e.g. in a written ministerial statement, explaining the urgency, and setting out when matters will be normalised.”³⁵ Where it is not possible to notify Parliament in advance of such expenditure, the expectation is that Parliament must be notified retrospectively.³⁶
37. Others, however, thought that the information provided by Government to Parliament lacked transparency. Dr Katharine Dommert, Research Fellow at the University of Sheffield, argued that many of the difficulties that arose in organisational pre-emption did so because of a lack of clarity about what was happening.³⁷
38. The Treasury Officer of Accounts told us that there is no general procedure for how Parliament is notified of pre-emption, though she stressed that written ministerial statements are usually issued where expenditure is involved.³⁸ The Economic Secretary to the Treasury accepted that, “there may be a more transparent way of doing this, and I would be happy to look at any suggestions.”³⁹
39. We received a number of suggestions on how to inform Parliament of pre-emption. They include—
- a statement made orally during the second reading debate in each House on the bill;⁴⁰
 - an oral statement to the relevant House;⁴¹
 - a statement in the explanatory notes to the bill;⁴²
 - a statement in the relevant impact assessment.⁴³

³⁵ HM Treasury, para 16.

³⁶ HM Treasury supplementary evidence, para 6.

³⁷ Q 12. Christopher Skelcher, Professor of Public Governance at the University of Birmingham, agreed (Q 82).

³⁸ Q 49.

³⁹ Q 45.

⁴⁰ Q 49.

⁴¹ *ibid.*

⁴² Q 10.

40. These could be used instead of or in addition to a written ministerial statement. It might also be necessary to inform a pre-legislative scrutiny committee of action taken in preparation for a draft bill becoming law.
41. An oral declaration of pre-emptive activity during the second reading debate in each House would ensure that, in granting the bill a second reading, the relevant House would have the details of pre-emptive actions firmly in mind. It would add legitimacy to the Treasury's treatment of Commons second reading as a requirement for authorising reliance on the Contingencies Fund to pay for pre-emption. What is most important, however, is that the process by which the information is provided is regular and clear.
42. Although ministers usually inform Parliament of the fact of pre-emption, the power under which the pre-emption occurs may not always be clear. For example, the Treasury Solicitor told us that in relation to the Health and Social Care Act 2012, "the clarity about what was going on in terms of pre-emption and the *vires*—the powers—that were being used was obtained ... by Lord Owen writing to the Cabinet Secretary and getting a detailed response setting out what the *vires* were."⁴⁴ Though the Treasury Solicitor gave this as an example of how parliamentarians can obtain the information they require, we note that it took a letter to the Cabinet Secretary to secure this information. **Details of the powers under which ministers are acting should always be made clear to Parliament.**
43. **Information should be provided to Parliament on pre-emptive activities in a consistent manner. There are a number of options as to how this might occur; the key is to enable Parliament to scrutinise the Government's actions effectively. Whatever approach is adopted, it should ensure that Parliament is fully informed in a timely manner of what activities have taken place, when, how much they cost and under what powers ministers acted. We invite ministers to decide which of the options in paragraph 39 (or other possibilities) to adopt as a practice to enhance scrutiny and transparency in this context.**
44. **In addition, the Government should at the end of each session provide Parliament with a summary of pre-emptive activity undertaken across all departments. This should be provided in a written ministerial statement, and should summarise the amounts spent and the powers under which ministers acted. This statement should be in addition to information given on each individual instance of pre-emption.** Such a statement would assist Parliament in ensuring that the Government are not engaging in excessive pre-emption, and will allow Parliament to hold ministers to account for their decisions.

Ministerial directions

45. We heard evidence that, where a minister wishes to incur expenditure in contravention of the rules in *Managing Public Money*, the relevant departmental permanent secretary will seek a written ministerial direction from the minister allowing the permanent secretary to proceed.⁴⁵ In a previous report we commented on the importance of ministerial directions as

⁴³ *ibid.*

⁴⁴ Q 82.

⁴⁵ Q 41; Laws, para 21.

a safeguard against impropriety;⁴⁶ this function of the ministerial direction is also pertinent to pre-emption. In particular, where a permanent secretary receives a ministerial direction, he or she must copy it to the Comptroller and Auditor General, who in turn will usually forward it to Parliament via the Public Accounts Committee. This provides an important mechanism for ensuring transparency of and accountability for such decisions.

46. We are concerned that information on the nature and frequency of ministerial directions may not be readily available to parliamentarians. The Treasury Officer of Accounts helpfully provided us with a list of all ministerial directions made since 1997—37 in total.⁴⁷ We consider, however, that summaries of this nature should be provided to Parliament on a regular basis.
47. **At the end of each session the Government should provide Parliament with a list of all ministerial directions made, across all departments. This should be provided in a written ministerial statement.**

Restatement of principles and practices governing pre-emption

48. Our inquiry has revealed that there is imperfect understanding in Government and in Parliament of when pre-emption may properly take place. There is also a lack of clarity about how best to inform Parliament of pre-emption when it occurs. This is in part a result of the diffuse sources of information on current Government practice, some of which are over 80 years old. We have set out a number of possibilities for improving the current arrangements. **It would be helpful if the Government would consolidate the principles and practices which govern pre-emption into a single, authoritative restatement. This could usefully be added to the Cabinet Manual, which aims to set out the main laws, rules and conventions affecting the conduct and operation of government, but which is currently silent on pre-emption.**

⁴⁶ Constitution Committee, 6th report (2012–13): *The accountability of civil servants* (HL Paper 61), para 49.

⁴⁷ HM Treasury, supplementary evidence, annex 2.

CHAPTER 3: THE LEGAL BASIS OF PRE-EMPTION

Sources of Government power

49. In chapter 1 we outlined the legal framework through which ministers are authorised to act. Of the three sources of ministerial power, the common law is perhaps the least understood. We received detailed evidence on the scope of the Crown's common law powers, and on their relationship to pre-emption. In this chapter we analyse this evidence, and the relevant case law, and seek to shed light on what precisely the common law allows ministers to do.

The Ram memorandum

50. The Crown's common law powers have been summarised as the power to do things which are ancillary or incidental to the ordinary business of central government.⁴⁸ The statement of these powers which is frequently relied on by the Government is contained in a memorandum drafted by Sir Granville Ram, then First Parliamentary Counsel, in 1945 ("the Ram memorandum"). The memorandum was first published in 2003.⁴⁹
51. The Ram memorandum contained advice to the Government of the day about whether legislation was necessary to extend the powers of government departments. The memorandum includes the following statement of ministerial power under the common law—

"A minister of the Crown is not in the same position as a statutory corporation. A statutory corporation ... is entirely a creature of statute and has no powers except those conferred upon it by or under statute, but a minister of the Crown, even though there may have been a statute authorising his appointment, is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute. In other words, in the case of a government department, one must look at the statutes to see what it may not do."⁵⁰

Status of the memorandum

52. Whatever status the Ram memorandum may subsequently have acquired within Government, it does not of itself possess any inherent legal authority. Rather, the Ram memorandum is no more than an opinion prepared by a lawyer for his client (in this case the Government).⁵¹ **The Ram memorandum itself is not a source of law, and should not be considered one.**

⁴⁸ See for example *De Smith's Judicial Review*, 6th edition (edited by Lord Woolf, Sir Jeffrey Jowell and Professor Andrew Le Sueur), para 5.022.

⁴⁹ Following a series of parliamentary questions asked by Lord Lester of Herne Hill QC. Lord Lester described to us how he discovered the memorandum: Q 54.

⁵⁰ The Ram memorandum is available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/30122wa1.pdf>

⁵¹ Q 54.

Criticisms of the memorandum

53. A large majority of our witnesses agreed that, whatever the position was in 1945, the description of the scope of ministerial common law power in the Ram memorandum is not an accurate reflection of the law today. Lord Brown of Eaton-under-Heywood, a retired Justice of the Supreme Court and former First Junior Treasury Counsel, explained: “[the common law powers of the Crown] are plainly constrained. In the 60 years since [the Ram memorandum], the Human Rights Act 1998 has greatly constrained them. The scope of judicial review of Government action has enormously extended.”⁵² The Attorney General said that the exercise of common law powers by ministers is also restricted by the rules on financial propriety as set out in the 1932 concordat.⁵³ He added that, where statutory power exists within a particular area, the Crown is unable to operate under its prerogative powers or its common law powers in the same area.⁵⁴ Professor Sir Jeffrey Jowell KCMG QC, Director of the Bingham Centre for the Rule of Law, suggested that, in addition, the Crown could not exercise its common law powers to pre-empt legislation where the effect of the pre-emption would be: “to disturb the rights or significant interests of those whom the legislation is intended ultimately to affect.”⁵⁵ The Treasury Solicitor added that “parliamentary scrutiny, including by the PAC [Public Accounts Committee], is one of the other key elements of constraint in this area.”⁵⁶
54. **The Ram memorandum is not an accurate reflection of the law today. In addition to statutory restraints, ministers’ ability to exercise common law powers is constrained by: the public law limitations on Government action as enforced through judicial review; human rights law; the pre-existing rights and significant interests of private persons; and rules on financial propriety as set out in the 1932 concordat and *Managing Public Money*.**

The “Ram doctrine”

55. The Ram memorandum is the source of another, more troubling, legal fallacy. This is the so-called “Ram doctrine”. This doctrine, purportedly derived from Ram’s 1945 memorandum, was presented to us by the Treasury as: “the fact that ministers can do anything a natural person can do, unless limited by legislation.”⁵⁷
56. We heard that the Ram memorandum provides no basis for the doctrine which the Treasury has built upon it. Sir Stephen Sedley, a retired Lord Justice of Appeal, said—
- “What appears to be being made in Whitehall, out of Ram, is a fabrication. Ram never said what is attributed to him. His proposition that government can do anything reasonably ancillary to its explicit functions is completely unobjectionable, but it is nowhere near the proposition that appears to have been derived from it in Whitehall that

⁵² Q 56.

⁵³ Q 69; Laws, para 13.

⁵⁴ Q 75. See also *Attorney General v De Keyser’s Royal Hotel* [1920] AC 508.

⁵⁵ Q 57.

⁵⁶ Q 76.

⁵⁷ HM Treasury, para 11. Sir Stephen Laws thought similarly: Laws, para 9.

Government can do anything that a private individual can do. The converse is the case.”⁵⁸

57. Sir Jeffrey Jowell thought that equating the powers of ministers with those of a private individual is “a constitutional heresy. Even if it were a settled convention, it would be overridden by a constitutional principle, which has higher authority: namely, the rule of law.”⁵⁹
58. The Attorney General appeared to agree with these criticisms of the Ram doctrine—
- “I think that Sir Granville Ram was emphasising that the Crown is not a creature of statute. Therefore, it has inherent powers that it can exercise, apart from prerogative powers, as if it were a natural person. But ... it is circumscribed by public law; by propriety; by human rights ... I do not think that Whitehall thinks the Government can do everything a private individual can do, because it is circumscribed by those very things I have just listed.”⁶⁰
59. It is clear that the description of the scope of Government power denoted by the term “Ram doctrine” is unhelpful and inaccurate: it does not reflect important restrictions on ministerial powers under the common law, and creates an impression that ministers possess greater legal authority than is the case. It also fails to recognise that, whereas lawful expenditure incurred by a private person involves his or her own money, expenditure by the Government does not: it is public money.⁶¹
60. **The description of the common law powers of the Crown encapsulated by the phrase “the Ram doctrine” is inaccurate, and should no longer be used.**

The scope of the common law powers of the Crown

61. We heard more general evidence on the scope of the Crown’s common law powers. Some witnesses viewed the common law powers as limited to those powers ancillary or incidental to express statutory or prerogative functions. For example, Lord Lester of Herne Hill said—
- “If the Crown has common law as well as statutory or prerogative powers then I agree that they are ancillary only and extend to such matters as entering into contracts, paying rents or salaries and conveying property. They do not extend so far as to enable the Government to pre-empt Parliament’s legislative process, and to contend otherwise would be contrary to the rule of law.”⁶²
62. Others argued that, though the common law powers of the Crown are subject to the public law restraints described above, they are wider than being merely ancillary to statutory or prerogative powers. Lord Brown of Eaton-under-Heywood, for example, said, “central government ... have the

⁵⁸ Q 67. Lord Lester of Herne Hill took a similar view.

⁵⁹ *ibid.*

⁶⁰ Q 74.

⁶¹ The relationship between public money and restraints on Government powers was explored by the High Court of Australia in the 2012 decision *Williams v Commonwealth of Australia* [2012] HCA 23.

⁶² Lester, para 10. Sir Stephen Sedley made a similar point (Q 61).

powers to govern the state in the public interest in general terms.”⁶³ Similarly, the Attorney General said, “I do not entirely agree ... that [the common law powers of the Crown] are just ‘reasonably ancillary’ to its express functions, because I think that the powers are more extensive than that. But the powers are also circumscribed by the principles [of public law]”.⁶⁴

Decisions of the courts

63. There are two decisions of the Court of Appeal which are of particular relevance to the scope of the Crown’s common law powers. In *R v Secretary of State for Health, ex parte C*⁶⁵ the issue was whether it was lawful for the Secretary of State to maintain a list of persons unsuitable to work with children. There was no express statutory authority for the list to be maintained, and neither is there a prerogative power to maintain such a list. Hale LJ⁶⁶ for a unanimous Court of Appeal cited the following statement contained in *Halsbury’s Laws of England*: “At common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual”. Hale LJ also cited with approval a passage from Wade and Forsyth’s *Administrative Law*, which observed that the Crown’s common law powers include the powers to make contracts, employ servants and convey land. Hale LJ ruled that private persons could have maintained a list such as that maintained by the Secretary of State and that, therefore, the Secretary of State was acting lawfully. Maintenance of the list did not of itself interfere with the rights of others.
64. The issue was revisited by the Court of Appeal in *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government*,⁶⁷ in which Carnwath and Richards LJ expressed divergent views on the matter. At issue was whether the Secretary of State had acted lawfully in embarking on an exercise of local government reorganisation before the relevant statutory powers had been enacted. The Court of Appeal held unanimously that the Secretary of State had acted lawfully, having accepted that it was bound by the decision in *ex parte C*. However, Carnwath LJ⁶⁸ expressed a number of reservations about that decision. First, he noted that the scope of the common law powers of the Crown was a matter of “continuing academic controversy”. Secondly, he expressed “some sympathy” with the suggestion that the clock should be rewound “to a time when the accepted wisdom was that Ministers had only two sources of power: statute or prerogative”. Thirdly, he noted that the passage from Wade and Forsyth’s *Administrative Law* which Hale LJ had cited with approval in *ex parte C* was “of limited assistance”. For Carnwath LJ, powers such as those to make contracts and convey property are “in the nature of ancillary powers, necessary for the carrying out of any substantive ... function”. He added that “The obvious need for such powers to my mind throws no light on what, if any, non-statutory substantive functions the Crown retains”.⁶⁹ Carnwath LJ stated that

⁶³ Q 60.

⁶⁴ Q 74.

⁶⁵ [2000] 1 FLR 627.

⁶⁶ Now Baroness Hale of Richmond JSC.

⁶⁷ [2008] EWCA Civ 148.

⁶⁸ Now Lord Carnwath of Notting Hill JSC.

⁶⁹ *op. cit.*, para 45.

“analogies with the powers of natural persons seem to me unhelpful ... The Crown is not a creature of statute. As a matter of capacity, no doubt, it has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably ‘governmental’ purposes within the limits set by the law”.⁷⁰ He cited with approval the following statement in *De Smith’s Judicial Review*: “The extension of the Ram doctrine beyond its modest initial purpose of achieving incidental powers should be resisted in the interest of the rule of law”.⁷¹ The matter is not clear-cut, however. Carnwath LJ’s remarks in this case were *obiter dicta* and in his judgment in that case Richards LJ expressly distanced himself from what Carnwath LJ said.⁷²

References in Government publications

65. The true extent of the common law powers of the Crown may be definitively determined only by the courts. What is clear is that, although the Crown possesses powers under the common law, and so is in a qualitatively different position from statutory public bodies such as local authorities,⁷³ the exercise of its powers is constrained by the public law principles described in this chapter. However, the constrained nature of the Crown’s common law powers is seldom made clear in Government documents. We note in particular that the Cabinet Manual describes the power of a minister to exercise “any of the legal powers of an individual”,⁷⁴ but makes no reference to the fact that, whereas private individuals are free to exercise their powers irrationally (for example), ministers are not. **We recommend that, where Government publications refer to the Crown’s common law powers, it is made clear that these powers are limited by the restraints of public law and constitutional principle.**

⁷⁰ *op. cit.*, para 48.

⁷¹ Para 48.

⁷² See, for example, para 72.

⁷³ As decided in *R v Somerset CC, ex parte Fewings* [1995] 1 All ER 513.

⁷⁴ *The Cabinet Manual*, 2011, para 3.31.

CHAPTER 4: EFFECTIVE PARLIAMENTARY SCRUTINY

66. The preceding chapters focused on the financial and legal restraints on pre-emptive activity. We have also considered whether a third category of restraint should be developed based on constitutionality.
67. Some witnesses felt that such a restraint on pre-emptive action would be inappropriate, as the propriety and legal restraints were adequate to protect the constitutional position. Sir Stephen Laws, for example, stated, “The inquiry seems to be looking at whether there is a third question ‘is it constitutionally appropriate to [pre-empt]?’ It does not seem to me that there is any room for asking that question. I do not know what principle could or should inhibit the exercise of existing statutory or other powers.”⁷⁵
68. Other witnesses thought that the constitutionality of a measure (regardless of its legality) should be a relevant consideration for ministers when deciding whether to engage in pre-emptive activities. Sir Stephen Sedley distinguished “between acting in certain ways in case draft legislation becomes law, and acting as if it were already law. The latter is prohibited in general terms; the former is not.”⁷⁶
69. When the Government are considering whether to undertake pre-emptive activities, they should always have in mind the constitutional importance of effective parliamentary scrutiny of their actions. Such constitutional restraints already exist with regard to expenditure: the 1932 concordat is, in effect, an agreement by the Treasury that it will not rely on the full scope of legal powers apparently available to it. The concordat gives the reason for this restraint as “constitutional propriety.”⁷⁷ **We consider that the principle of restraint in the name of good constitutional practice should apply to all pre-emptive actions, not just those involving expenditure under the new services rules. This recommendation particularly applies to re-organisations of public bodies.**
70. **Where the pre-emption involved is such that it threatens effective parliamentary scrutiny, it should not be undertaken. It is for Parliament, not the Government, to decide whether to change the law.**

⁷⁵ Laws, para 2.

⁷⁶ Q 61.

⁷⁷ *Managing Public Money*, A.2.1.6.

CHAPTER 5: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Government controls on pre-legislative action and expenditure

71. The Treasury is responsible to Parliament for the regularity and propriety of Government expenditure; it follows that the Treasury will wish to police these areas within Whitehall. However, it should be recognised that Parliament's interests are primarily guarded by Parliament itself. (Para 23)
72. We recommend that the Treasury's practices should not be described as "conventions". (Para 26)
73. The second reading practice is not a convention, and should no longer be described as such. (Para 29)
74. Second reading in the House of Commons may, in certain circumstances, be a useful indicator of a bill's prospects of becoming law, but it is not sufficient to justify pre-empting the legislative process. The practice of allowing expenditure after a bill's second reading in the Commons has been developed by the Treasury; it has not been endorsed by Parliament, and carries no independent constitutional force. (Para 34)
75. Details of the powers under which ministers are acting should always be made clear to Parliament. (Para 42)
76. Information should be provided to Parliament on pre-emptive activities in a consistent manner. There are a number of options as to how this might occur; the key is to enable Parliament to scrutinise the Government's actions effectively. Whatever approach is adopted, it should ensure that Parliament is fully informed in a timely manner of what activities have taken place, when, how much they cost and under what powers ministers acted. We invite ministers to decide which of the options in paragraph 39 (or other possibilities) to adopt as a practice to enhance scrutiny and transparency in this context. (Para 43)
77. In addition, the Government should at the end of each session provide Parliament with a summary of pre-emptive activity undertaken across all departments. This should be provided in a written ministerial statement, and should summarise the amounts spent and the powers under which ministers acted. This statement should be in addition to information given on each individual instance of pre-emption. (Para 44)
78. At the end of each session the Government should provide Parliament with a list of all ministerial directions made, across all departments. This should be provided in a written ministerial statement. (Para 47)
79. It would be helpful if the Government would consolidate the principles and practices which govern pre-emption into a single, authoritative restatement. This could usefully be added to the Cabinet Manual, which aims to set out the main laws, rules and conventions affecting the conduct and operation of government, but which is currently silent on pre-emption. (Para 48)

The legal basis for pre-emption

80. The Ram memorandum itself is not a source of law, and should not be considered one. (Para 52)

81. The Ram memorandum is not an accurate reflection of the law today. In addition to statutory restraints, ministers' ability to exercise common law powers is constrained by: the public law limitations on Government action as enforced through judicial review; human rights law; the pre-existing rights and significant interests of private persons; and rules on financial propriety as set out in the 1932 concordat and *Managing Public Money*. (Para 54)
82. The description of the common law powers of the Crown encapsulated by the phrase "the Ram doctrine" is inaccurate, and should no longer be used. (Para 60)
83. We recommend that, where Government publications refer to the Crown's common law powers, it is made clear that these powers are limited by the restraints of public law and constitutional principle. (Para 65)

Effective parliamentary scrutiny

84. We consider that the principle of restraint in the name of good constitutional practice should apply to all pre-emptive actions, not just those involving expenditure under the new services rules. This recommendation particularly applies to re-organisations of public bodies. (Para 69)
85. Where the pre-emption involved is such that it threatens effective parliamentary scrutiny, it should not be undertaken. It is for Parliament, not the Government, to decide whether to change the law. (Para 70)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The members of the committee that conducted the inquiry were:

Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (chairman)
Lord Lang of Monkton
Lord Lexden
Lord Macdonald of River Glaven
Lord Pannick
Lord Powell of Bayswater
Baroness Wheatcroft

Professor Richard Rawlings, Professor of Public Law at the University College London, and Professor Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow, acted as specialist advisers for the inquiry.

Declaration of interest

The following interest was declared:

Lord Goldsmith
Partner, Debevoise & Plimpton LLP (international law firm)

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (020 7219 5341).

Evidence received by the committee is listed below in order of receipt and in alphabetical order. Those witnesses with * gave both oral and written evidence. Those with ** gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

*	QQ 1–22	Dr Katharine Dommett, Research Fellow, University of Sheffield
*		Professor Christopher Skelcher, Professor of Public Governance, University of Birmingham
**	QQ 23–37	Youth Justice Board for England and Wales
*		Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12
*	QQ 38–53	Sajid Javid MP, Economic Secretary, HM Treasury
*		Paula Diggle, HM Treasury Officer of Accounts
**	QQ 54–68	Rt Hon Lord Brown of Eaton-under-Heywood, Lord of Appeal in Ordinary then Justice of the Supreme Court, 2004–12
**		Professor Sir Jeffrey Jowell KCMG QC, Emeritus Professor of Public Law, University College London, and Director of the Bingham Centre for the Rule of Law
*		Lord Lester of Herne Hill QC, barrister specialising in public law
**		Rt Hon Sir Stephen Sedley, Lord Justice of Appeal, 1999–2011
**	QQ 69–83	Rt Hon Dominic Grieve QC MP, Attorney General
**		Sir Paul Jenkins KCB QC, Treasury Solicitor and Head of the Government Legal Service

Alphabetical list of all witnesses

		Dr. Nicholas D.J. Baldwin, Fairleigh Dickinson University, New Jersey, US
		Dr Stephen Barber, Reader in Public Policy at London South Bank University
		Lord Beecham
**		Rt Hon Lord Brown of Eaton-under-Heywood, Lord of Appeal in Ordinary then Justice of the Supreme Court, 2004–12

- ★ Dr Katharine Dommett, Research Fellow, University of Sheffield
- Professor Matthew Flinders, University of Sheffield
- ★★ Rt Hon Dominic Grieve QC MP, Attorney General
- ★ HM Treasury
- ★★ Sir Paul Jenkins KCB QC, Treasury Solicitor and Head of the Government Legal Service
- ★★ Professor Sir Jeffrey Jowell KCMG QC, Emeritus Professor of Public Law, University College London, and Director of the Bingham Centre for the Rule of Law
- ★ Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12
- ★ Lord Lester of Herne Hill QC, barrister specialising in public law
- ★★ Rt Hon Sir Stephen Sedley, Lord Justice of Appeal, 1999–2011
- ★ Professor Christopher Skelcher, Professor of Public Governance, University of Birmingham
- Dr Katherine Tonkiss, Research Fellow, University of Birmingham
- ★★ Youth Justice Board for England and Wales

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords Select Committee on the Constitution, chaired by Baroness Jay of Paddington, is announcing today an inquiry into the Government taking action in anticipation of Parliament passing a bill. The Committee invites interested organisations and individuals to submit written evidence as part of the inquiry.

Written evidence is sought by Friday 18 January 2013. Public hearings are expected to be held in January and possibly February. The Committee aims to report to the House, with recommendations, before the end of the current session. The report will receive a response from the Government and may be debated in the House.

It is a well-known constitutional principle that Parliament makes laws, and the Government executes those laws. Strictly read, this might imply that the Government should take no action on a bill unless and until it has received the Royal Assent. However, it is generally recognised that, in the interests of effective administration, the Government should be able to undertake some preparatory work in advance of a bill's enactment.

The extent to which the Government ought to pre-empt Parliament by undertaking preparatory work is a matter of constitutional importance. There are concerns that the Government is pre-empting Parliament to an excessive degree; in some cases the preparatory works have even affected the viability of Parliament exercising its right to reject a bill. Concerns have been expressed in a number of cases, including:

- The reorganisation of the NHS management structure whilst the Health and Social Care Bill was being considered in Parliament, to the extent that it was argued by some that rejecting the bill would have caused more harm than proceeding with it;
- The status of the Financial Services Authority during the passage of the Financial Services Bill, and the creation of replacement bodies in the Bank of England;
- The management of a number of arm's-length bodies during the passage of the Public Bodies Bill before it had been sent to the House of Commons;
- The extent of preparatory work for the Competition and Markets Authority, envisaged by the Enterprise and Regulatory Reform Bill currently before the House of Lords.

The ability of Parliament and the public to assess the appropriateness of Government action in this regard is hindered by the lack of information on the subject. The Government has referred, both in correspondence and in its internal guidance,⁷⁸ to the "second reading convention": that expenditure on preparatory work may be incurred once a bill has been given its second reading by the House of Commons. However, there seems to be very limited information as to the nature or genesis of this claimed convention; it is mentioned in neither the Cabinet Manual, produced in 2011 as an authoritative guide to governmental practice, nor

⁷⁸ *Managing Public Money*, HM Treasury, October 2007, paras 2.4.2 and 2.4.3, and annex 2.5; *Guide to Making Legislation*, Cabinet Office, June 2012, paras 18.7 and 18.8.

Erskine May. Similarly, there does not appear to be any guidance on making pre-legislative administrative changes which do not directly require additional expenditure.

The Committee would welcome written submissions on any aspect of this topic, and particularly on the following questions:

Overview: the constitutional framework

To what extent is it constitutionally and legally appropriate for the Government to use its pre-existing powers to act in anticipation of the enactment of bills?

Are conventions a suitable mechanism for regulating government action or expenditure in advance of legislation? If not, what is the most appropriate alternative?

Government expenditure in advance of legislation

Are the Government correct to assert the existence of a “second reading convention” whereby expenditure on preparatory work may be incurred once a bill has been given its second reading by the House of Commons? If so, what is the content of this convention?

If the convention exists, is it properly observed by the Government?

Is it appropriate for the Government to regard Commons second reading as granting a sufficient parliamentary mandate for expenditure? Is this properly understood and taken into consideration by the House of Commons during second reading debates?

What is the situation as regards the House of Lords? What about bills that start in the Lords (such as the Public Bodies Bill)?

Are there other conventions, either in existence or developing, in the area of government expenditure or action in advance of legislation?

Organisational change in advance of legislation

In what circumstances is it appropriate for the Government to change the structure of an organisation in the expectation that legislation will be passed?

Where organisational change is appropriate, what degree of change should be permitted? Are there any particular types of organisational alteration that should never be undertaken in advance of legislation?

Expenditure incurred in anticipation of the enactment of bills of aids and supplies (i.e. Finance, Consolidated Fund and Appropriation Bills) is not within the scope of the inquiry.