HOUSE OF LORDS

SELECT COMMITTEE ON THE CONSTITUTION

The pre-emption of Parliament

Oral and written evidence

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Dr. Nicholas D.J. Baldwin, Fairleigh Dickinson University, New Jersey, USA—Written evidence

Overview: the constitutional framework

1. 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?

   I do not think that it is either constitutionally or legally appropriate for the Government to use its pre-existing powers to act in the anticipation of the enactment of bills

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

   No. If there is an appropriate alternative, it should be through a bill (an Act) to stipulate any such parameters.

Government expenditure in advance of legislation

3. 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?

   No

   If so, what is the content of this convention?

   I do not believe that any such convention exists

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

   See answer to question 3

5. Is it appropriate for the Government to regard Commons second reading as granting a sufficient parliamentary mandate for expenditure?

   No

   Is this properly understood and taken into consideration by the House of Commons during second reading debates?

   No, I do not believe so

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

I do not think that it is either constitutionally or legally appropriate for the Government to use its pre-existing powers to act in the anticipation of the enactment of bills, regardless of which Chamber legislation originates.

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

It would certainly be interesting to know if the Government believe there are and, if so, what they believe them to be

Organisational change in advance of legislation

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

I do not believe that it is appropriate at all – it is not appropriate for the Government to take the support of Parliament – either the House of Commons or the House of Lords - for granted.

9. 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?

Again, I do not believe that it is appropriate at all – it is not appropriate for the Government to take the support of Parliament – either the House of Commons or the House of Lords - for granted.

January 2013

Dr Stephen Barber, Reader in Public Policy at London South Bank University—Written evidence

I am very pleased to be able to offer some thoughts on this matter which is both timely and important. In drawing together these comments, I have been informed by the views of my Masters in Public Administration class, the students on which are experienced public managers operating in and around health and social care. This brief submission reflects some of the discussions we have had though I accept responsibility for the views expressed.

1. Overview – approach and caveats

1.1. The thrust of this response argues from both constitutional and pragmatic public administration viewpoints, that significant public monies should not usually be committed by Ministers nor should public bodies undergo substantial structural re-organisation prior to necessary Parliamentary approval. There are, however, three general points to be made in mitigation of Departments. The first is a basic recognition that government is often complex and there are practical administrative considerations involving vertical and horizontal policymaking. Consequently, the efficient and indeed cost-effective running of government might periodically require the exercise of discretion by Ministers and government. Secondly, incoming governments can legitimately claim an electoral mandate for programme implementation. This is accepted where a party has included a pledge in a manifesto (indeed the Salisbury Convention is such that the House of Lords does not oppose second readings of government sponsored legislation originating in election manifestos). Further, the case can be made that governments have broad mandates to exercise power in given areas even where there is an absence of a specific manifesto commitment. The current administration is a notable case where (not withstanding high profile exceptions such as University top-up fees and NHS reform) the government's programme was set out in the Coalition Agreement; negotiated by respective leaderships but accepted by wider party memberships. And it should be noted that single party or coalition governments coming to office following an election must command the confidence of Parliament. Thirdly, there is a view of the role of Parliament in the public policy and administrative functions of the state and that is its essential function of providing 'manifest legitimation' to government decisions.

1.2. These caveats aside, there is a longstanding narrative detailing the sidelining of Parliament by the executive and the perceived decline of Parliament as an institution. There have been positive signs to the contrary since 2010 in particular demonstrated by the effectiveness of a number of Select Committees, for the first time helmed by elected chairs. Nonetheless, parliamentary decline has been a feature of constitutional criticism for more than a century including Lord Bryce's comparison with the nineteenth century 'golden age', Richard Crossman's critique

that 'party loyalty has become the prime political virtue', Lord Hailsham's 'elective dictatorship', and the more recent 'better government' initiative aimed at improving scrutiny. Government and the status of the Prime Minister have consistently undermined Parliamentary authority via the party system, the Royal Prerogative and powers of patronage. Large Parliamentary majorities during administrations led by Margaret Thatcher and Tony Blair respectively, contributed to the view that Parliament does not matter. And yet Parliament must be recognized as sovereign; representing the authority of the voting public.

1.3. The context of the Committee's investigation is a period of tighter control and greater scrutiny over public spending. With government promising value for money as well as increased accountability, the pre-emptive activities of Ministers and their attitude towards the sovereignty of Parliament should be of paramount interest.

2. Pre-Emption of Parliament

2.1. There are several recent examples of the executive pre-empting the will of Parliament both in terms of committing public funds and initiating substantial re-organisations. The Committee might look to the NHS reforms and the so called 'Bonfire of the QUANGOs' (for example the closing of the QCDA) where substantial changes took place in the operations of organisations before Parliament was in a position to debate respective policy proposals. Some instances here include public bodies themselves anticipating change.

2.2. It is also noteworthy that such pre-emption is not always about committing public new monies but can mean the practice of a Secretary of State freezing spending and with it suspending functions previously mandated by Parliament. This is as important a consideration for the Committee.

2.3. The Committee highlights the case of the Health and Social Care Bill where so much work was undertaken prior to Parliamentary consideration that it was argued that rejecting the Bill could cause more harm than proceeding. This is all the more concerning since there has been considerable criticism of and opposition to NHS reforms and where Parliament is by-passed, the view that government is unprepared to listen to anyone is merely compounded.

2.4. Instances such as this represent permanent structural reorganisations, affecting services, functions and jobs as well as near irreversible commitment of public monies. They are distinct from pilots which might be viewed as acceptable exercise of Ministerial discretion. The Committee might consider the view that should Parliament be faced with such circumstances, it is a clear indication that Ministers have exceeded their mandate and authority.

2.5. Potential resistance to policy plans should also be noted. Without the consent of Parliament, even in response to Ministerial directives, Directors of public bodies and Trade Unions can claim legitimacy in resisting change since it is not (yet) the law. Indeed CEOs and FDs could face criticism in spending public funds in these circumstances and could potentially find themselves in breach of contracts.

2.6. One has to be sceptical that any 'Second Reading Convention' confers any firm constitutional authority since the concept that this is how governments have acted at times in the past is an anathematic argument for continued bad practice. More importantly, such actions are assumed independently and in anticipation of rather than with the agreement of Parliament. That is the sovereign body of Parliament has not sanctioned the practice.

2.7. Ministers already enjoy numerous powers exercised under Royal Prerogative and where PASC published government's own list of such powers in the 2002-3 session. Given that pre-emption is anticipating (and therefore recognising) statute and the view that the Prerogative cannot be extended, means that such practices cannot be considered in this vein[1]. Pre-emption is essentially taking legitimation for granted, undermining the authority of Parliament and reducing the opportunity for considered scrutiny and improvement of legislation by sovereign representatives of the electorate.

3. Recommendations

3.1. The Committee should confirm the principle that Ministers should not pre-empt Parliament.

3.2. The complexities of government need to be recognized and Ministers should be encouraged to engage in pilots and consultations ahead of legislation.

3.3. There might be occasions where Ministers want to begin spending monies or engaging in structural reorganisations upon second reading; especially where legislation is of a non-controversial nature. This could be permitted where Parliament has expressed its agreement during the legislative process. It cannot be difficult to build in a vote.

3.4. Ministers who exceed their mandate either in committing undue public funds, ordering structural reorganisations or suspending functions legislatively mandated, should face Parliamentary censure.

January 2013

[1] http://www.parliament.uk/business/committees/committees-archive/public-administration-select-committee/pasc-19/ (Accessed December 2012)

Lord Beecham—Written evidence

I coined this phrase, echoing the established concepts of pre and post legislative scrutiny during the passage of the Public Bodies Bill, with particular reference to the abolition of the Regional Development Agencies. I had a particular interest in the RDA for the North east, known as One North East. Abolition of the RDAs featured in the Conservative manifesto and in the Coalition Agreement, but on his first Ministerial visit to the region Vince Cable declared that the North East was "one region where business support through a regional agency is both necessary and appreciated".

The Coalition Agreement spoke of the creation of "Local Enterprise Partnerships. Joint local authority and business bodies by local authorities themselves ... to replace RDAs" but also specifically held open the possibility of these "taking the form of existing RDAs where these are popular"

Nevertheless in June 2010 the Government affirmed its intention of abolishing all the RDAS. Interestingly the National Archive records that the RDAs "were abolished" in June 2O10, even before the Public Bodies Bill was published, and nearly two years before the curtain finally fell.

During the passage of the Bill I raised questions about consultation, as had Baroness Royall, and was assured that consultation would take place later (HL Hansard col 667). I sought particularly to establish whether the Government would look at the issue on a case by case basis, recognising that support for RDAs, especially from business, varied as between regions. I was assured by the Minister, Lord Taylor of Holbeach, for whom incidentally I have great respect, that the government was open to persuasion. The Bill received Royal Assent on 14th December 2011.

In the meantime, as One North East's Annual Report for 2011-12 demonstrates, the following major decisions had been implemented

May: Inward Investment and Strategic Account Management teams were transferred to PA Consulting.

July: Rural Development Programme transferred to DEFRA and ERDF to DCLG

August: Coalfields Portfolio to HCA

September: Grants for Business Investment to BIS and Land and Property Portfolio to HCA

October: Access to Finance Activities to Capital for Enterprise (BIS) and North East Access to Finance

December: Plugged in Places to Charge Your Car Ltd at Gateshead College.

The above involved the transfer of some 80 staff.

Presumably the same pattern applied to the other RDAS

Despite the assurances referred to above I understand there was no consultation on the future of this, or other agencies.

Second reading was on 9th November 2010 and the Bill returned from the HoC in October 2011. There was therefore ample time for consultation to take place. The Agency and all other RDAs, were dismantled during the legislative process.

The troubling course of events over this Bill has been echoed recently by concerns over the consultation process in respect of other matters, from which it appears that the claim that "the Government is open to persuasion" is, to put it mildly, highly questionable.

I raised the issue with Baroness Jay in her capacity as Chair of the Constitutional Committee during the Bill's passage and am grateful that the Committee is taking the opportunity to look into it.

February 2013

Rt Hon Lord Brown of Eaton-under-Heywood, Professor Sir Jeffrey Jowell KCMG QC, Lord Lester of Herne Hill QC and Rt Hon Sir Stephen Sedley—Oral evidence (QQ 54-68)

Evidence Session No. 4 *Heard in Public* *Questions 54 - 68*

WEDNESDAY 27 FEBRUARY 2013

Members present

Lord Irvine of Lairg (acting Chairman)
Lord Crickhowell
Baroness Falkner of Margravine
Lord Hart of Chilton
Lord Lang of Monkton
Lord Lexden
Baroness Wheatcroft

Examination of Witnesses

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, and **Rt Hon Sir Stephen Sedley**, Lord Justice of Appeal, 1999–2011.

Q54 The Chairman: The background to this rather unusual inquiry is the pre-emption of Parliament; that is to say, the concerns expressed recently in this committee and in the House that in certain instances ministers had so progressed the implementation, prior to enactment, of bills as to risk undermining effective parliamentary scrutiny. A key example is often said to be the reorganisation of the health service in England in the context of the Health and Social Care Act 2012. This led us as a committee into the so-called Ram doctrine, because the evidence of the Treasury to us, and the evidence of Sir Stephen Laws, the former First Parliamentary Counsel, claimed that under the so-called Ram doctrine government departments may "use their inherent power, relying on the fact that ministers may do anything a natural person can do, unless limited by legislation". That is a quote from the Treasury's written evidence to us.

We will wish to explore with you the validity and proper extent of the so-called Ram doctrine and whether it fits and squares with the fundamental constitutional principle of the rule of law.

More particularly, the Ram doctrine is said to derive from a memorandum written by Sir Granville Ram, First Parliamentary Counsel, in 1945, prepared in the context of debate within Government about the need for legislation to transfer departmental functions between ministers—the assumption being that such legislation was required. The

memorandum took the form of legal advice to ministers. It was not published until 2003, and we doubt very much that anyone outside Whitehall had heard of it until then.

We may not get through all the questions of which you have been given advance notice. I think, Lord Lester, you can only be with us until 12.15.

Lord Lester of Herne Hill: I could be with you till 12.30, but it seems to me by that time we will have exhausted time and trespassed on eternity.

The Chairman: I hope that you are right, so shall we just bash on and see how it goes? I propose to start, if I may, with you, Lord Lester, and then bring in the others. I start with you, Lord Lester, because it is to your credit that you first brought the Ram doctrine to light. We are very grateful for the paper that you have submitted to us, and I would like you to speak to that paper. May I emphasise that we are not embarked on an inquiry into the royal prerogative? It is the other aspects of the issues that we are more interested in. Lord Lester, may I ask you to tell us when and how you came by the Ram doctrine and the Ram memorandum? Then I will also ask you what legal status, if any, you consider the Ram doctrine and Ram memorandum to have.

Lord Lester of Herne Hill: Thank you very much. I came across it because Dr Matthew Weait, who was working with me as parliamentary legal officer, attended a seminar organised by Justice and came back to me afterwards and said, "A very strange business: the Government were relying on something called the Ram doctrine for authority to be able to transfer data from one department to another without any statutory authority." That did seem strange. It reminded me of the fallacy of Sir Robert Megarry in the Malone case when he said that governments can do whatever individual human beings can do unless Parliament says to the contrary, without recognising the difference between a public authority subject to public law and a private person in private life.

I then did a cascade of Questions for Written Answer, which were answered by Baroness Scotland of Asthal, all of which are on the record. So that is how I came across it. I did eventually, I think, get answers that indicated that the so-called Ram doctrine was subject to the Human Rights Act 1998. As for the legal status, it is the opinion of a distinguished government lawyer: that is its status.

Q55 The Chairman: May I ask the rest of you? Sir Stephen, I must confess that it was news to me. When did you first learn of the so-called Ram doctrine?

Sir Stephen Sedley: I think it was probably on reading the Lester–Weait article. I was unable actually to find the memorandum until Lord Lester showed it to me in the corridor this morning outside your committee room. The memorandum is extraordinary. It does not contain a doctrine. It contains some fairly elementary advice to civil servants about what their powers are. I do not see anything exceptionable in it. The proposition that where you have power to do something, you also have power within reason to take ancillary measures or steps is universal in the law.

What I did not see in it is any proposition that this means that ministers are able to do anything in the name of the Crown that a private individual can do. Indeed, the very proposition is the reverse of the truth. A minister can only do what his public office permits him to do. That will mean, for example, that whereas a private individual can act out of caprice, out of malice, out of whim—as, for example, an employer or a landlord—and common law does nothing to stop him, government cannot do any such thing. It is only

empowered to do what is reasonably ancillary to its public duties. I am therefore concerned that what is dressed up as the Ram doctrine is not part of the Ram doctrine at all.

The Chairman: I have been careful to say "the so-called Ram doctrine". Sir Jeffrey?

Professor Sir Jeffrey Jowell: I first came across the notion when Lord Lester kindly shared the information that he had recently received on that issue. I happened to be writing the seventh edition of *De Smith's Judicial Review* at the time, and we have a passage on the Ram doctrine. We went into it in a little more detail in the current edition, which we are now preparing, and we shall do more so. In both editions, we come to the conclusion that "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". I believe that strongly. I also believe strongly that the notion of the Crown or the executive altering rights and interests without parliamentary authorisation is the way of tyranny, not democracy. However, having said that, I would qualify that in a few respects which we may come to in this discussion.

Q56 The Chairman: Lord Brown?

Lord Brown of Eaton-under-Heywood: I was Treasury Counsel—I followed Lord Woolf—from 1979 and 1984 and then I became a judge and remained so for 27 and a half long years until last year.

I confess I had never heard of the Ram doctrine until I was asked to give evidence before this committee—at least, if I had as Treasury Counsel I certainly cannot recall it. That said, I have always regarded it as a truism that central government is not in the same position as local government. Mr Justice Laws, as he then was, in the Fewings case speaks of "public bodies". I have no doubt that he was confining that to statutory corporations in the shape of local authorities, statutory companies and bodies of that sort, not central government.

Contrary to what Lord Lester I think says at some point in his memorandum, I do not understand the case law to give any support whatever to the proposition that the Crown is similarly confined as is local government in the way of finding a basis for its powers. I am looking at paragraph 9 of Lord Lester's memorandum, which is of course an enormously helpful introduction to the whole area, and I am extremely grateful for it. But I do not read the passages that he refers to in paragraph 9 from the judgments in Shrewsbury & Atcham as, so to speak, supporting the view with which he agrees half way down paragraph 11: "I agree with Laws J … in … Fewings" and, following, that Megarry V.C in Malone was wrong. I disagree with that.

Of course, having said that central government has wider powers than local government, it does not mean that they are limitless. Indeed, they are plainly constrained. In the 60 years since Ram announced his doctrine, the Human Rights Act has greatly constrained them. The scope of judicial review of government action has enormously extended. The prerogative in Ram's time was regarded as unreviewable, but the argument there was sealed in my last case at the Bar, which was the deunionisation of GCHQ, the CCSU case, where prerogative powers were firmly held by the House of Lords to be reviewable. Similarly, where Parliament has legislated and occupied a field that previously was occupied by the prerogative or common-law powers, now the Crown is constrained by anything implicit in the way of constraining requirements in the legislation.

Q57 The Chairman: Lord Lester, do you want to comment on that?

Lord Lester of Herne Hill: I am not absolutely sure of the nature of our disagreement. Obviously local government operates under statute. Local authorities are corporate bodies and their powers are determined by statute. Obviously government departments are not like that; they are not statutory corporations, normally, and they are not regulated in the same way by statute. Of course they are not identical but where they are in a similar position, I think, is that, first of all, in terms of administrative law, they are all public authorities and therefore must exercise their powers and perform their duties in accordance with legality, rationality and fairness. Secondly, the Human Rights Act and the European convention treats all of them as public authorities and therefore all of them, whatever the source under English law or British law of their powers, are under duties to act compatibly with the convention rights. The principle of legality requires all of them to act in accordance with law in the proper sense, with built-in safeguards against abuse. I agree with Lord Brown that they are not identical, but for the purposes that I am talking about they are identical.

Sir Stephen Sedley: It may be helpful to be concrete about this. There are two different views of what the prerogative consists of. Sir William Wade's view was that it consisted only of those things which no individual could do, such as grant honours, make war and so on. On that basis, there cannot be any analogy between the prerogative, departments of state and private individuals; they are the converse of each other. The wider view of the prerogative, which is the one that I would prefer, is that it is part of the common law. It is 400 years since Sir Edward Coke, in the Case of Proclamations, laid down that the Crown has no prerogative except that which the law of the land allows it. I think the prerogative is best seen as an area, particularly since CCSU, within and governed by the common law.

The other thing that perhaps it is worth being specific about is where the difference lies between anticipatory acts and presumptuous acts of Government in anticipation of legislation. If you take a simple example like a contested bill that is going through Parliament for the construction of a new railway or a new runway that will cost billions of pounds, it is plainly reasonably ancillary to Government's functions to, for example, prepare office space and IT facilities against the possibility that the bill will become law. It might be irresponsible not to do so. But to start letting contracts before the bill has become law would clearly be unlawful. It would be an abuse of the power and it ought to be able to be restrained; I think it would be able to be restrained by a prohibitory order on the part of a sufficiently interested party. So there is no yes or no, I think, to the question of anticipatory action. The question is, "What action, and in anticipation of what?"

Professor Sir Jeffrey Jowell: I tend to approach this from the point of view of two constitutional principles which I think are engaged here. The first has already been mentioned and is mentioned in Lord Lester's helpful paper: the rule of law, legality—that public authorities can only do what they are authorised to do by Parliament. That must be unobjectionable by and large. The second one is the separation of powers. Parliament makes the law and the executive—we can call it the Crown; we can call it the executive; we are talking about ministers and departments here, in effect—executes the law but cannot change the law. That is clearly unobjectionable.

But there is some doubt in this discussion, because of the nature of the evolution of the executive in this country—different from other countries—under our unwritten constitution over the years. In reality, our executive has taken on a broader role than mere implementation—mere enforcement—of Parliament's will. It therefore possesses an inherent constitutional function, for example, of assisting Parliament with its law-making. It issues white papers. So it is involved in the law-making process in that sense. It is acting as a

kind of executive agent, as it were, of Parliament; it is assisting Parliament in devising legislation.

In respect of its preparatory role for legislation that is forthcoming, I think it also has a role in preparing the way for proposed legislation to take effect. Again, under the function of executive agent of Parliament, it has a duty to prepare the way for the implementation of new legislation, but there are limits there, and I agree with Sir Stephen in this respect and, I think, to some extent also with Lord Brown. There are limits: in preparing the way for legislation, it should not disturb the rights or significant interests of those whom the legislation is intended ultimately to affect.

That is the limit. It is a preparatory role, but not one that clashes with rights and interests. So if the bill is to provide a new airport runway, the process of preparation may include lining up a potential chief executive or tenderers or seeking accommodation, but not digging trenches or displacing individuals or evicting people. That is because of the notion of the rule of law—there are no powers yet to disturb those rights or interests—and also for reasons of constitutional integrity. It should never be assumed or taken for granted that a bill will be passed, for to do so would be disrespectful of the integrity and authenticity of the legislative process.

Q58 Lord Crickhowell: We have heard that anticipatory action is okay—the duty to prepare for legislation—but one must not assume that the legislation is going to pass; I think that is the advice that we have been given so far. We heard from Treasury witnesses of certain sorts of convention—I am not sure they were constitutional conventions, but certain conventions in the wider sense—that have developed in practice. It was asserted that before the second reading of a bill in the House of Commons, it would be wrong to take anticipatory action. I think that was the general rule observed, we were told, by the Treasury and the practice that had come to be accepted, at least, I think, since 1932 by the Public Accounts Committee. Therefore, it was known to Parliament. Can I come back to where the duty to prepare begins, and how far in advance of the legislation it would be reasonable to proceed without breach of the principles that have been enunciated?

Lord Brown of Eaton-under-Heywood: I had a serendipitous conversation with Lord Hart of Chilton about a month ago, and he mentioned to me the concept of paving legislation. That struck me as quite interesting, so I did a certain amount of research, not least with the help of the House of Lords Library. They produced amongst other documentation a, to my mind, enormously useful short document of October 2007 issued by the Treasury entitled *Managing Public Money*, and in particular an annexe to it, 2.5, under the heading of "New services". That goes in some little detail into this very question. There are various boxes that indicate what can properly be done and what cannot be properly done, absent Royal Assent.

What can be done are, for example, "pilot studies informing the choice of the policy option … scoping studies designed to identify in detail the implications of a proposal in terms of staff numbers, accommodation costs", et cetera, "in-house project teams … use of private sector consultants", and so forth. What cannot normally be incurred by way of expenditure before Royal Assent is "recruitment of chief executives and board members of a new body; recruitment of staff for a new body; significant work associated with preparing for or implementing … eg renting offices or designing or purchasing significant IT equipment". Then how do you proceed before Royal Assent? Basically, with a paving bill, but that creates or can create its own problems. Then there is a much larger paper that I also found helpful, issued by the House of Commons Library, on the Planning-gain Supplement (Preparations)

Bill, which was paving legislation before a project in 2006–07 trying to tax the financial profit from the grant of a planning permission.

Having discussed the possibility of paving bills, and their pros and cons, this document deals with the possibility—this is the second reading point—that in certain circumstances, where there is urgency and there is evident public interest involved, you can go ahead, if you have consulted the Treasury and so forth, because there are financial consequences: "Parliament must have been made aware of the intended steps in appropriate detail when relevant previous legislative steps were taken" and "the planned legislation must be certain, or virtually certain, to pass into law in the near future". The examples given are where the second reading has been achieved, or "a bill is enacted but activating secondary legislation is not yet complete". That paper, I would suggest, is a useful vade mecum to this general area.

The Chairman: Can I ask whether you agree with it?

Lord Brown of Eaton-under-Heywood: I do agree with it, except that I feel rather less qualified than most others here. This is not judicial territory. This is highly parliamentary—the relationship between the Treasury and the Government as a whole. I do not know that it would be easy to get the courts to excite themselves about a review of the niceties of the dividing lines in this area.

Q59 The Chairman: Sir Jeffrey?

Professor Sir Jeffrey Jowell: I agree with it up to a point, but what the document does not say specifically—and I think it would help to have it elucidated by this committee, and perhaps even enacted as some guideline or other—is the issue I raised. I think it is a function of the executive to assist Parliament in the implementation of its laws. Preparatory action would come within that, but it cannot anticipate the passing of legislation to the extent that it interferes with rights, duties or significant interests in advance of the Act coming into force. If it is seeking to move in that direction, or if there is a grey area, this should be disclosed, and openly disclosed, one way or another and tested.

The Chairman: Tested in the courts?

Professor Sir Jeffrey Jowell: It may be tested in the courts, but it should possibly be discussed in some way, I would think. I have not really considered carefully what mechanisms could be used to consider areas which may be grey, but I think that there is a bright line to be drawn between general preparatory action and action that interferes with rights, property and significant interests.

Lord Hart of Chilton: But if not the courts, where would the proper forum be to discuss where that line should be drawn?

Professor Sir Jeffrey Jowell: I think it would be better if the issue were open rather than behind closed doors. I do not think it is beyond the wit of this very distinguished committee to devise some institutional mechanism for doing so. It certainly would be possible to provide guidelines. How these guidelines are implemented is a matter for consideration.

The Chairman: And you are not ready to draft for us yet.

Professor Sir Jeffrey Jowell: I am not ready to draft them quite yet.

Lord Lester of Herne Hill: I think it is a matter for Parliament to ensure that it is kept well informed about the preparatory steps that the executive are taking during the passage of

legislation. It does not just affect contracts and matters of that kind. For example, if the executive say, "We intend to make rules", then it is up to Parliament to say, "Then can we please see them in draft?" If they say, "We are going to consult the judiciary about changes in the Civil Procedure Rules", again Parliament can say, "Although it is a matter for the judiciary, we would like to see those to make sure that, as the legislation is going through, we are properly informed about government intentions."

The beauty of a parliamentary democracy like ours is that the executive and the legislature have to work together in this area; I do not think these are matters for the courts. A classic example is when the Equality Act 2006 was enacted, and the equality agencies were all to be brought together into a single Equality and Human Rights Commission. That involved an enormous amount of administrative steps affecting contracts, property and so on. It would have been entirely wrong in my view for actual property and contractual rights and obligations to have changed before the Equality Act 2006 came into force; but on the other hand it would have been ludicrous if the executive, under some new kind of limitation, could not have taken all kinds of steps to ease the amalgamation of the existing bodies, as they did.

Q60 Lord Lang of Monkton: I would like to go back to the answers that our distinguished panel gave to questions relating to the Ram doctrine. I was going to ask whether or not there were any material differences between the powers of ministers of the Crown and those of statutory authorities. Lord Brown, you said in one of your answers that central government is not in the same position as local government. Is it possible to define these differences in your view, either by principle or by category, or to give examples?

Lord Brown of Eaton-under-Heywood: What I said about local government and other statutory bodies of that sort is that their powers are confined precisely within the statutory limits imposed upon them. They cannot do anything which they are not explicitly authorised by statute to do. Mr Justice Laws, as he then was, in Fewings put it in terms of "You carry no heritage of rights with you"; that is not so with the Crown. It seems to me an unhelpful distraction to discuss it in terms of a corporation sole or whether government is like a private individual—as central government you have the powers to govern the state in the public interest in general terms. In fact, Blackstone described the prerogative as—it is cited in the Shrewsbury case—"the discretionary power of acting for the public good, where the positive laws are silent". That was the original scope of the prerogative.

As Sir Stephen Sedley points out, very often if you issue passports or grant pardons or create honours and so forth, you are doing things that are not provided for by statute but which no private person could do. Correspondingly, particularly now, you are subject to all the constraints of the rule of law on the exercise of public power—rationality, fairness, legality and all the rest of it. But they are different starting points, and the Crown therefore is subject to the inhibitions of the rule of law constraints developed over recent years in administrative law, and subject to human rights constraints. There are various cases which make plain that legislation must authorise any invasion—any interference—of human rights in clear and unambiguous terms; cases like Simms established that.

Q61 Lord Lang of Monkton: Can I ask if any of your colleagues would like to add to or subtract from that?

Sir Stephen Sedley: The concept of rights is not appropriate to government. Government has powers, as Lord Brown has said, and it has an ability to exercise those powers undisturbed by law for the most part, but it has no rights in the sense in which we

understand rights as inhering in individuals. That perhaps is an important difference of more than simply language.

The anticipatory acts question can be perhaps rather slickly reduced to the difference 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. But of course there are different stages of inactivity of legislation. When a bill is a bill, it is not law at all; but there is also in many of these cases a phase in which legislation has become law but does not come into operation, by its own provisions, until a minister says so. A minister there may be in quite a different position, being able, since it is within his or her power to bring the Act into operation, to act much more boldly in anticipation of its coming into operation than when it was a bill.

Lord Lester of Herne Hill: I do not agree with Sir Stephen when he says that governments do not have rights. Obviously they have rights if, for example, someone is going to break a contract with the Government or act in breach of confidence and matters of that kind. But I agree with him in a broader way.

Sir Stephen Sedley: Yes, I am sorry, I should have said that prerogative gives the Government no rights, but if in the exercise of the prerogative it enters into private law relationships such as contracts then it is a contracting party like anybody else.

Lord Lester of Herne Hill: What I do not think you can do easily in the committee, chairman, is to ignore the prerogative in your discussions, because it seems to me that it is central, really, to what is preoccupying the committee.

The Chairman: We hear what you say.

Lord Lang of Monkton: Sir Jeffrey, is there anything you would like to add?

Professor Sir Jeffrey Jowell: Only that the discussion becomes rather technical here: what is a prerogative? What is its extent? Lord Brown is right that even the prerogative power has limits, and we are talking about the limits of the power. We are talking, in everyday language, about the power of the executive, ministers and their departments. By and large those powers are covered by legislation, but there are a few areas where that is not quite so. Then one has to look at their function: what are they there to do? There are a few particular functions like providing passports, pardons and so on and we say, "These are the powers of the Crown", but here too they are exercised by the executive in practice. That is what we are talking about, what everyday people would understand to be the actual recipient of the power.

In that respect the statutory body has confined powers; the executive has functions that derive from the fact that it is there to assist and implement not only in the execution of the law, but in the preparation of that execution and to some extent even in the making of policy. It is there as the executive agent of Parliament. If the executive is seen in that light—and that seems to me the modern way that one ought to look at it in terms of how the constitution operates today—then it can carry out certain ancillary and incidental functions and fill in the gaps, but it still cannot contradict Parliament's powers, whether or not in anticipation of legislation, even where there is a fair bet that the legislation is going to pass.

Q62 Lord Crickhowell: I continue to be fascinated by this anticipatory role. A long time ago, at the beginning of 1987 or 1988—nine months at least before the second reading of the Water Bill, which established the body that I was to chair: the National Rivers

Authority—I was set up to run the National Rivers Authority advisory board. Nine months or more before the second reading, and a year at least before the bill became law, we set up a shadow board. We prepared the ground so thoroughly that that shadow board effectively became the real board; we did all the preliminary work. Under the advice we have been given, even that quite extensive operation, although not meeting the Treasury assertion that these things should not happen before second reading, was reasonable anticipatory work. It would have been a mistake if it had not been done.

However, I observe in recent Treasury evidence a new situation, which may be rather different. In previous evidence, they talked about relatively low expenditure. There are two cases that have been drawn to our attention now, involving very large sums of public money—I think £77 million in one case—in committing IT expenditure in advance of legislation, on the perfectly reasonable grounds that the organisation will need IT and that it is going to take a long time to develop; with the added justification that if you delay, it will cost more in the end and that therefore it is in the interests of the state that you get in with it sooner rather than later. But this may create a new set of circumstances, in that if you launch major IT contracts costing millions of pounds as part of an anticipatory process, you are getting into a situation where major contracts, commitments and so on are being entered into. Is this an area that perhaps ought to be explored rather further, as to how far that kind of transaction can be fitted into the anticipatory functions that you have been describing so far? It seems we are changing the scale of what is being done, not just in terms of the total potential costs but in the nature of the legal contracts and so on that are being entered into.

Sir Stephen Sedley: It is an extremely interesting question and a very difficult one. I wonder if it ties up with part of the note that was initially provided to us about the material that the committee has received so far, to the effect that the Treasury has told the committee that it is by convention—"ancient convention"—regarded as the guardian of the interests of Parliament in Whitehall. I hope that Parliament can take care of its own interests, if necessary through ministers, but the Treasury is certainly the guardian of the interests of the public, and it may be that the Treasury needs a firm hand and perhaps a more interventionist role than would otherwise be the case in departmental expenditure of the kind that Lord Crickhowell describes. That relates to the sort of thing that Sir Jeffrey and I were envisaging when you start digging trenches and letting contracts for a runway that has not yet been authorised by legislation.

It is a question of what is wise expenditure of money and what is extravagant expenditure in particular circumstances. I am sure that there is not a single formulaic answer, except that somebody needs to act as a watchdog and perhaps that is the Treasury. But they might spend their time better watching the public's interest rather than Parliament's.

Lord Lester of Herne Hill: Surely Parliament should be informed and have an opportunity at least to discuss a project involving many millions. That seems essential if we really believe that we are a parliamentary democracy.

Lord Crickhowell: The Treasury have stated that they make a practice of making announcements. It may only be a written statement, but the announcements are made. I hope that is so, because this committee has repeatedly emphasised the importance of making things public.

Professor Sir Jeffrey Jowell: I looked today at Sir Ivor Jennings's *Cabinet Government*. There is also Sam Beers's *Treasury Control*. Jennings, writing in 1936, not long after the concordat, refers to the 1931 report of the Committee on National Expenditure, which put this in

slightly different terms, and spoke about "active co-operation and goodwill between the Treasury … and the department". He said they are "jointly trustees for the efficient and economical administration" of the department. So the Treasury and Parliament were acting together. He then went on to say that, although the Treasury provided mere advice and assistance to the department, there is "a fist inside the velvet glove, attached to the … financial power" that is wielded by the Treasury. That is all very well but there comes a point—and the IT example might be such a point—where that kind of expenditure may be somewhat contemptuous of the notion of constitutional integrity. It should not be assumed or taken for granted that a bill, even at second reading, will be passed. It is a gamble which could be disrespectful of the integrity and authenticity of the legislative process. People will begin to think that the legislative process is simply a rubber-stamping exercise, at least after second reading.

Lord Lester of Herne Hill: Could I express a cautionary note? I am not disagreeing with anything that has been said, but thinking of the Treasury as the guardian, I am thinking of the judiciary. Many years ago, when Lord Browne-Wilkinson was a high court judge, he gave a famous and rather brave lecture about the independence of the judiciary.

The Chairman: I remember it.

Lord Lester of Herne Hill: In that lecture, he drew attention to the danger that the Treasury would encroach upon judicial independence in deciding managerial and other questions. During the debate—which you will remember very well, Lord Chairman—about creating a Supreme Court of the United Kingdom, one of the issues was whether the budget, should, as in Australia, be ring-fenced and part of the parliamentary budget or whether it should be, in the ordinary way, set by the Treasury. In the end, it was decided that the Treasury could be trusted to be the guardians of the independence of the Supreme Court. So I simply say that if one is thinking of the three branches of government, the judicial department needs to be carefully protected against a notion that the Treasury can be entirely relied upon to protect the independence of the judges.

Q63 Baroness Wheatcroft: I would like, if I may, to go back to what Lord Brown said about the Treasury document, *Managing Public Money*. I think that you said that there would be cases when things needed to be done quickly. There was a sense of it being in the public interest that ministers could go to the Treasury and say, "We want to move fast", and that Parliament would be made aware. This is what Lord Lester was talking about, but I am not sure what the mechanism is whereby Parliament would be made aware that action was going to be taken. I am also intrigued about what happens when it is not just a matter of expenditure. For instance, we heard from the Treasury that there are limits on what they would allow to go through in advance of legislation, although, as we have heard, those are sometimes breached. But what if what is at stake is the structure of an organisation? For instance, the Government decide that regional development agencies are no longer the way they want to deal with industrial planning, and legislation is going through. But even before second reading, perhaps, those organisations are effectively dismantled. Very little expenditure is involved, but what would be the position of Parliament there? The legislation may not go through but the institutions will no longer effectively exist.

Lord Brown of Eaton-under-Heywood: The courts, it seems to me, will only police areas in which they feel they have competence. If there is an asserted abuse of power, consisting of, for example, as in the Fire Brigades Union case, the Government introducing a scheme inconsistently with legislation still waiting to be brought into force, or legislation not yet repealed although it had been the Government's intention to repeal it, the courts will step

in and say, "You cannot do this. This is inconsistent with the expressed will of Parliament. The sovereignty of Parliament precludes your doing it". Similarly, if there is any question of an invasion of any human rights, raising taxation, creating offences or imposing obligations, the courts again will say, "You cannot do this". But if it is simply a question of the expenditure of money, without apparent prejudice to any particular person's rights, then I think it is probably left to Parliament to police its own processes.

The Chairman: Do you all agree with that?

Lord Lester of Herne Hill: Could I give a very good example of what Lord Brown has just said?

The Chairman: Do you agree with Lord Brown?

Lord Lester of Herne Hill: I do. The Public Bodies Bill was an extremely good example of the problem and of the way in which it is for Parliament to assert itself. You will remember that a number of bodies were on death row in various schedules to the Public Bodies Bill, including quasi-judicial bodies, and the issue was whether safeguards needed to be written into the bill or into the procedures prescribed by the bill to ensure that the executive could not simply abolish all these bodies. Great battles went on, and in the end safeguards were put in. Now, it seems to me that that is not a matter for the courts; it is a matter for Parliament.

Lord Hart of Chilton: We must also not overlook the power of direction that can be exercised by a permanent secretary or accounting officer. The evidence that we have is that in past 16 years, there have been 37 ministerial directions. I was not aware—because it is not published anywhere as far as I know—that the number of requests for a direction was as high as 37. Even if a direction is sought, it can be overruled by the minister, although I suspect there would be a parliamentary row about that. That was the case, I think, in relation to the Department for Communities and Local Government, where proposals for new unitary local government structures for Devon, Norfolk and Suffolk came back to Parliament because of the row over the direction. That is another element to this debate: that a power is vested in the accounting officer to request a direction.

Professor Sir Jeffrey Jowell: I agree with what has just been said. I think there was consensus, so I put myself in the consensus. But it may be worth looking at comparative examples here. A particular case was decided last year, Williams v the Commonwealth of Australia—your excellent legal adviser could obtain that without any problems—where the executive power provided for under section 61 of the Australian constitution was employed for the provision of certain expenditure on chaplaincies and schools. This was held unconstitutional, as the constitution simply provided that the executive power extends to the execution and maintenance of the laws of the commonwealth or the laws of Parliament. That provision is very similar to our situation; it codifies our practice. The Australian Court was rather parsimonious about permitting that kind of expenditure without parliamentary authority.

Q64 Lord Lexden: I was struck by paragraph 17 of Lord Lester's very helpful paper, on the matter of convention. In my opinion, a convention on pre-legislative expenditure would be inconsistent with the two constitutional doctrines on which our parliamentary system of government is based. Lord Lester, could you kindly expand on that point for us?

Lord Lester of Herne Hill: I am probably misunderstanding what was meant by a convention. If what was meant by a convention was some, as it were, "binding" new

convention which gave greater powers to the executive to pre-empt Parliament, I would say that would be contrary to parliamentary sovereignty or supremacy and the rule of law, for obvious reasons. If, on the other hand, it is just a way of saying that this is what is happening in practice, that is a different matter. The whole of this discussion goes to that. So, I think that those paragraphs may not be very appropriate.

Lord Lang of Monkton: We are quite interested in the issue of conventions. As Sir Stephen pointed out, the Treasury are trying to get extra strength and weight behind its claimed convention, describing it as an ancient convention. We have seen a few of those. We had written evidence from one academic accepting that convention had no place in this sort of discussion and that there was no such thing as a valid convention. How do you view conventions?

Lord Lester of Herne Hill: Could I say that many years ago I did a case in British North Borneo—Sabah, in Malaysia—which went on for four months, in which Sir William Wade was an expert. It was all about convention. There is a vast amount of completely unnecessary learning about it, and various Canadian court decisions about how you establish conventions. I think it would take this committee a very long time if it were to explore that area very much. I looked at what *Halsbury* said, and it seemed to sum it up reasonably well in a couple of paragraphs as to what kind of sources you need to establish a convention. I am quite sure that there is no ancient convention in that sense that the Treasury could rely on.

Lord Hart of Chilton: Mrs Diggle wrote to us and said, "There was also some discussion about the use of the term convention. I would like to confirm that I was using the term in the primary sense in the *Oxford English Dictionary*, i.e. to denote common practice rather than a formal agreement."

Q65 Lord Lang of Monkton: Do you think there is a gap where the Treasury is acting without proper powers, and that all its actions should be defined in statute?

Lord Lester of Herne Hill: My view, which goes to the general position about the prerogative, is that, even if we had a written constitution, which we do not, prerogative powers are necessary. They are necessary in all systems, whether they have written constitutions or not. The question really is how they should be controlled or limited. I believe, not that we should abolish prerogative but that we should place all but the personal prerogatives of the monarch under parliamentary control.

Lord Lang of Monkton: Thank you. Anything to add from the others?

Professor Sir Jeffrey Jowell: I would just say, in terms of the 1932 concordat and the Ram doctrine, that one concordat does not make a convention. Nor is it ancient. There is no convention. On the other hand, Jennings believes that continuous practice over the years can have a binding effect and can actually crystallise at some point even into a law; other constitutional theorists disagree with him about that.

The Chairman: What is your view?

Professor Sir Jeffrey Jowell: My view is that a convention can very rarely, if ever, crystallise into a law. I must be a bit careful. But he points out that the Treasury has a particularly important role in its supervisory functions over government. Without going to the extent of saying that it is the guardian of Parliament, in the sense that is asserted, he points out, for example, that the Prime Minister is also the First Lord of the Treasury and that there is a

connection between the chief whip and the Treasury; it used to be called the Ministry of Patronage and so on. There is this special position. But, as he said, it is rather by virtue of its function rather than by virtue of any particular law, and that is how you get the fist inside the velvet glove.

Sir Stephen Sedley: By definition, conventions can only exist where there is no law. They cannot have the force of law unless they acquire it by stealth, so to speak, and become part of the common law. The most striking convention that I can think of is that, for decades, the Inland Revenue has issued a volume the size of the telephone directory, entitled *Extra-Statutory Concessions*. The Crown has been forbidden, since the Bill of Rights 1689, to exercise a dispensing power in relation to parliamentary legislation and yet we have tolerated, for all these years, the Revenue doing exactly that. Recently I think it has been put on a slightly exiguous statutory footing, but for many years there was none. If anybody had had the locus to challenge this as unlawful, they might have succeeded.

One other thing, which I do not know whether the committee will be addressing, is the question of Orders in Council. They are a prerogative act which passes without any scrutiny into effective law. Neither Parliament nor the public know that an Order in Council is going to made until it is made. Lord Lester has drawn attention, in relation to the Chagos Islanders' case, to the potentially toxic effect of such a procedure. If it is within the committee's remit, then it may very well be worth comment that some form of prior publicity ought to accompany the making of Orders in Council so that both Parliament and the public know what is proposed before it happens.

The Chairman: Could I ask the others if they agree with that?

Lord Lester of Herne Hill: I agree with Sir Stephen Sedley's concurrence in respect of the Chagos Islanders' case on that point.

Professor Sir Jeffrey Jowell: So do I.

Lord Brown of Eaton-under-Heywood: I did not sit on that case. It was 3:2 majority and I have not ever formed my own view as to whether it was correctly decided. But I think there is a serious and important point about Orders in Council and conventions generally. These are, par excellence, questions for Parliament and I would suggest, Lord Chairman, questions for this committee. This is an area that it seems to me you are more than entitled to look at—it is an area where you can, and perhaps should, be examining parliamentary conventions very closely and deciding which direction they should move in, if they should move. As I say, they are not matters for the courts of law.

Lord Lang of Monkton: I think that is very interesting. I would like us to follow it further but am very grateful for the answers you have given us thus far.

Sir Stephen Sedley: I will say one thing about the Chagos Islanders' case. Although the difference of opinion that finally emerged in this House concerned the factual application of legal principle, there was no radical difference of opinion on what the legal principles were. In particular, the reviewability of the exercise of the prerogative was common ground throughout.

Lord Lang of Monkton: There are, of course, procedural conventions within this House and the House of Commons. I think they probably come under a different heading and should not be confused with what you have been talking about. They are a matter of

administration to ensure the smooth running of the House within the broad parameters of how we believe we should do business.

Lord Lester of Herne Hill: Of course, even where Parliament itself is engaged, Parliament can abuse its own powers. There is an important lesson in what happened when the House of Lords decided about the destruction of oil refineries at the time of the invasion of Burma. The Law Lords decided that compensation had to be paid, but Parliament then passed the War Damage Act 1965 to overrule the judgment of the House of Lords. Then what happened was that, when the Government were deciding whether to accept the European Convention right to go the Commission and Court of Human Rights, they deliberately postponed accepting it for six months in order that no complaint about the right to property could be made to Strasbourg. But there was clear recognition by the Government, if you look at the minutes, that they realised that in getting Parliament to overturn the Law Lords' decision, they were doing something highly questionable so far as the right to property was concerned on the international plain.

Lord Lang of Monkton: I had in mind a more recent example, but in the interests of the unity of this committee, I will not draw on it.

The Chairman: I am tempted to invite you to do so.

Sir Stephen Sedley: Preparing my Oxford lectures this week, I found a decision of the Appellate Committee of this House in 1842 in which Lord Campbell described an Act of Queen Anne as probably ultra vires of Parliament. But that is the only time I have ever come across the suggestion.

Q66 Baroness Falkner of Margravine: You have spoken to some extent about how you would define conventions and their usefulness. How would you interpret the view of the Treasury, in their evidence to us, that they are the guardians of the interests of Parliament in Whitehall? Would that concur with your views? I suspect not, although I should not lead you. Do you recognise the existence of this as having been, as Paula Diggle told us, common practice; that it is common practice that the Treasury is the guardian of Parliament's interests? Is that the way it should be constitutionally? Is it desirable, constitutionally, for the Treasury to see itself in that light?

Lord Lester of Herne Hill: I agree with what Lord Hart was saying about that. The Treasury are the guardians of Parliament to the extent that, through the accounting procedures, they keep a grip on public expenditure. Apart from parliamentary committees, only they can really do that. So, in that sense I think that they are quite right. In a broader sense, I am not sure that that would be a right way of describing it.

Baroness Falkner of Margravine: So, you think that that Jennings quote about joint trusteeship goes too far?

Lord Lester of Herne Hill: I do not know quite what it means.

Professor Sir Jeffrey Jowell: It was joint trusteeship in matters of finance. So, in terms of money questions, yes, they are. In terms of other questions—safety and security of the realm and so on—no. Other departments are charged with those functions.

Baroness Falkner of Margravine: And, specifically, when it comes to pre-legislative expenditure?

Professor Sir Jeffrey Jowell: They would be called on to assist with any expenditure, but only that; it is not necessarily for them to dictate how far the preparatory expenditure should extend. This is the issue that we are discussing: to what extent is that a broader parliamentary question or entirely in the realm of the Treasury to dictate? Taking that one step further, they do not have power to authorise expenditure that interferes with rights, duties, property interests and other significant interests, in advance of legislation or in opposition to existing legislation.

Lord Lester of Herne Hill: They have a vital role as guardians. I am thinking again of the Equality and Human Rights Commission. The role of the Treasury is vital in ensuring that that body is properly accountable for its strategy in financial terms and the way it spends money. If they are too weak, then the situation can be against the public interest. So I am very much in favour of that guardianship role being properly exercised.

Professor Sir Jeffrey Jowell: That is a guardianship role in respect of financial propriety. Or does it go further?

Lord Lester of Herne Hill: It goes to accountability because Parliament specifies what needs to be done and what its duties are but it is up to the Treasury to make sure, financially, that there is proper reporting and accounting.

Sir Stephen Sedley: It occurs to me that "guardian" is a protean word. If it is used, as I suspect it was in this context, in a paternalistic sense—in loco parentis—then the answer is no, the Treasury does not do that. If it means "watchdog", then no doubt it will do.

Baroness Falkner of Margravine: Would you be satisfied then that this role is adequately seen as a convention—in other words, common practice, in that definition—or should this role be somehow more transparently seen as a function of the Treasury?

Sir Stephen Sedley: The pre-eminence of the Treasury is partly a fact of life: if there is no money then you cannot do it. But it also goes back doctrinally, I think, to the Haldane report of 1918. Haldane was quite clear, if you look at what lay behind his report, that Parliament was a bit of a nuisance and an obstruction to efficient government. The people who really knew how to govern were in Whitehall and, at the head of Whitehall, the Treasury. Although Haldane was never formally enacted into law, his report became, in effect, the ethos of the civil service between the wars. I think that is reflected in the concept of an "ancient convention" that has been described to you.

Lord Lester of Herne Hill: Another one is parliamentary counsel. They are not under the Attorney General; they are under the Prime Minister, because he is the First Lord of the Treasury. If you do not like the way in which something is drafted, you cannot go to the Attorney General to sort it out. Under our system of government, you have to go to the Prime Minister, which means you do not go there at all, because that is hardly the function of the Prime Minister.

Professor Sir Jeffrey Jowell: May I answer your question as to whether these are conventions or whether they arise out of the function of the Treasury in our governmental system? It rather muddies the water to call them conventions. We are talking here about governmental functions which evolve over the years, as conventions may as well. It obscures the issue to call them conventions when we are talking about what the function of a department such as the Treasury is. It is a government department like any other.

Q67 Baroness Falkner of Margravine: Do you therefore think that the Treasury's reliance on Ram is about where we should be?

Sir Stephen Sedley: I would say no. 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 government can do anything that a private individual can do. The converse is the case.

The Chairman: Ram had not asserted that ministers could exercise any powers that natural persons could. What he asserted was that ministers could exercise any powers which the Crown has power to exercise.

Lord Brown of Eaton-under-Heywood: And there is nothing wrong with that, but it begs a number of questions.

The Chairman: Tell us what questions it begs.

Sir Stephen Sedley: Ram was not a law officer and not Treasury Counsel. He was a very distinguished senior parliamentary draftsman. If government ordinarily wants legal advice, it goes to the law officers. It is very handy, no doubt, to have this in a file somewhere, but to make of it what has been made of it—some kind of theological doctrine—seems to me wishful thinking.

Baroness Falkner of Margravine: But the law officers tell us that they have huge reliance on Ram.

Sir Stephen Sedley: Ram appears to have acquired a momentum of its own—largely mythological—which seems to have carried the law officers to some extent along with it, in the sense that nobody has dared to deny it. It is rather like the oracle. You do not actually get to see it. I saw it for the first time in the corridor outside this Room. One of the valuable things this committee might wish to do is debunk it; or debunk what has been made of it rather than what was actually said.

Lord Lester of Herne Hill: What I found really surprising, if we go back to paragraph 2 of my paper, was how the Cabinet Office Performance and Innovation Unit in 2002 could seriously say, "When considering what powers one has to share data"—so we are in an area about personal privacy—"one must first consider the type of public body one is dealing with. Generally speaking, a government department derives its powers from a number of different sources", including, "the 'Ram' doctrine—i.e., a department can do anything that a natural person can, provided it is not forbidden from doing so". Now that seems to me to be an extraordinary presumptuous statement and it is clearly unlawful.

The Chairman: It is a heresy.

Professor Sir Jeffrey Jowell: It 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.

Lord Brown of Eaton-under-Heywood: Can I go back to the case of Malone? I wonder whether Malone has not been too roundly attacked. Of course Malone did not survive the Human Rights Act. Indeed, it was decided in Strasbourg that the practice of telephone tapping under the fiat of the Home Secretary, which was acceptable under domestic law, was contrary to article 8 and it was condemned in Strasbourg. But I question whether, in the pre-Human Rights Act era in which it was decided, it was wrongly decided. Given that nobody's common law rights were being interfered with, why, in those days, should the

Crown have not been able to do what they thought necessary to do in the public interest and in the interest of national security?

The Chairman: If I could remind the committee, Malone was the case where the Vice-Chancellor, Sir Robert Megarry, held that telephone tapping by the police without express statutory authority was not unlawful, since telephone tapping involved no trespass. I suspect that Lord Lester does not agree with that.

Lord Lester of Herne Hill: No, for the reasons given by Lord Camden in Entick v Carrington. In that great 18th-century case, you will remember that the King's messengers ransacked the letters and documents of John Wilkes, the editor of the *North Briton*. Sir Stephen Sedley will remember this much better than me because he has a complete grasp of legal history, which I do not, but Lord Camden was then faced with precisely the argument that the King's messengers could basically do what they liked under their inherent powers. He roundly condemned that and explained that they were acting lawlessly. I have always regarded Entick v Carrington as the foundation of part of our common law principle long before we had a Human Rights Act.

The Chairman: What is your view Sir Stephen? Leaving aside the Human Rights Act, was Malone correctly decided, in your view?

Sir Stephen Sedley: I am giving a lecture next week in Oxford, partly on Malone. I am telling the students to read it because it is such a good read. Everything that Megarry wrote was wonderfully readable. I do not think there is a right or a wrong in relation to Malone in its time. The state of the law was such that Megarry, who was quite a conservative judge, was quite justified, by his lights, in deciding as he did. A braver judge would probably have pushed the boat out and taken the clue that was offered to him: that it was possible and desirable to develop the common law in harmony with the Convention, even though the Convention was not itself part of our law; in which case the decision would have gone the other way. I do not think whether it is right or wrong is necessarily the best question. The question may very well be whether it is a defensible decision—it was, but in the light of modern jurisprudence, it is plainly wrong and could not stand today.

Q68 Baroness Wheatcroft: Listening to this fascinating debate and not knowing all the intricacies of many of the cases that have been mentioned, but thinking how the common law has developed alongside statute, I just wonder whether, if Ram had never written his memorandum, would anything that goes on now be any different?

Sir Stephen Sedley: We are probably the worst people to ask about this, because as Lord Brown said, we come at this from the rather lofty stand print of legal theoreticians. It is the people who get heir hands dirty in Whitehall who could probably give you a better answer.

Lord Brown of Eaton-under-Heywood: If I may say so, I think it is an extremely good question and the answer is a categorical "no". Indeed, I spent five years defending government action in the civil courts without any notion that there was such a doctrine or feeling any need to rely on it.

Baroness Wheatcroft: That is certainly how it appears to me. The position is clear without Ram.

Lord Lester of Herne Hill: Then why was the Cabinet Office in 2002 relying on Ram if they did not regard it as a significant source of their powers?

Baroness Wheatcroft: That is an interesting question.

Sir Stephen Sedley: Having been one of Lord Brown's chief antagonists during his five years as Treasury Devil, I do not remember ever encountering, or raising, an argument that government could not do things that were not spelled out but which were nevertheless reasonably ancillary to what its admitted functions were. We all inhabited the same universe.

The Chairman: I think we have covered all the ground that we need to cover. If any of you have any specific points which we have not covered but which you think we would benefit from knowing, would you tell us? Thank you very much for your time.

Dr Kate Dommett, and Professor Matthew Flinders, University of Sheffield; and Professor Christopher Skelcher and Dr Katie Tonkiss, University of Birmingham—Written evidence

Submission to be found under Professor Christopher Skelcher

Dr Katharine Dommett, University of Sheffield, and Professor Christopher Skelcher, University of Birmingham—Oral evidence (QQ 1–22)

Transcript to be found under Professor Christopher Skelcher, Professor of Public Governance, University of Birmingham

Ms Frances Done, Chair, and Mr John Drew, Chief Executive, Youth Justice Board for England and Wales; and Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12—Oral evidence (QQ 23–37)

Transcript to be found under Sir Stephen Laws QC

Mr John Drew, Chief Executive, and Ms Frances Done, Chair, Youth Justice Board for England and Wales; and Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12—Oral evidence (QQ 23–37)

Transcript to be found under Sir Stephen Laws QC

Professor Matthew Flinders and Dr Kate Dommett, University of Sheffield, and Dr Katie Tonkiss and Professor Christopher Skelcher, University of Birmingham—Written evidence

Submission can be found under Professor Christopher Skelcher

Rt Hon Dominic Grieve QC MP, Attorney General, and Sir Paul Jenkins KCB QC, Treasury Solicitor and Head of the Government Legal Service—Oral evidence (QQ 69-83)

Evidence Session No. 5 *Heard in Public* *Questions 69 - 83*

WEDNESDAY 6 MARCH 2013

MEMBERS PRESENT

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Lang of Monkton
Lord Lexden
Lord Pannick
Baroness Wheatcroft

Examination of Witnesses

Rt Hon Dominic Grieve QC MP, Attorney General, and **Sir Paul Jenkins KCB QC**, Treasury Solicitor and Head of the Government Legal Service.

Q69 The Chairman: Good morning, Attorney General and Sir Paul. Thank you very much for coming to this meeting of the committee, which is our final oral evidence session of this inquiry. So we are especially grateful to you for being here today.

This inquiry has developed along lines that we did not necessarily think we would pursue when we embarked on it. We were concerned with some of the matters that had come before the House of Lords, and the Commons, on which we thought there had been some degree of pre-emption of the parliamentary process by governments in effecting executive change in organisations. We were thinking about the Public Bodies Bill and the Health and Social Care Bill last session, where there was not necessarily the assumption of parliamentary authority that one might have expected in constitutional practice. We have uncovered in the course of our inquiry all sorts of interesting, one might say arcane, routes, which we have gone down. We are particularly excited by the Ram doctrine, which I am sure was immediately familiar to you, but it was not to members of the committee or to some of our expert witnesses. Last week—unfortunately I was abroad—the committee took evidence from some very distinguished constitutional lawyers, in which this question was covered in great detail. This morning, particularly as this is our final session, we hope to get guidance as to what in practice the Government and their legal advisers regard as the proper way in which to pursue this matter in terms of possible pre-emption in

reorganisation, agreement on expenditure, and so on, so that when we write our report we can say that this is all working splendidly or, perhaps, offer some other thoughts about how matters might be brought more up to date, for example. One thing that the Treasury witnesses said to us was that this was all based on a 1932 concordat, which the Treasury drew up with the Public Accounts Committee. That seems in the realm of modern-day government something that might be looked at with a slightly more contemporary focus. It may or may not be relevant; it may be entirely appropriate as it stands. This morning, we are looking at what is actually happening in government and in practice, given this rather confused or complex legal position. The basic question is what is your view of the legal power—and the scope and source of that power—for ministers to act in anticipation of a bill before it comes before Parliament?

Dominic Grieve: Thank you very much for the opportunity to come before the committee. I should perhaps make a confession statement at the outset, which may surprise you, that when I was asked initially to come and talk to you about the Ram doctrine, I had not the slightest idea what you were talking about. Indeed, it was a subject of considerable anxiety to me that, in two and a half years in office, something had entirely bypassed me. I then read the evidence session with Lord Brown of Eaton-under-Heywood and noticed that, as a Treasury devil, he was unaware of the Ram doctrine as well, which provided me with some reassurance. I saw Lord Mayhew of Twysden in the corridor and mentioned the Ram doctrine to him, and he did not have any recollection of it either. That said, now that I understand what the Ram doctrine tries to encapsulate, albeit in a memorandum written in 1945—I think that this is a point that needs to be borne in mind—I have a much clearer understanding of the areas which this committee is taking an understandable interest.

I shall try to distil things, and these are generalisations. Ultimately government operates through two sources of power: statutory sources and common-law powers, as well as prerogative powers—although we can leave those to one side for the purpose of this morning's session. It has always been understood that there are common-law powers that allow government to act independently of a statutory base, although if there is a statutory base, it will supplant those common-law powers. But those common-law powers will be circumscribed by the rule of law, and now by the Human Rights Act 1998 and the European Convention on Human Rights. I make that point because, when Sir Granville Ram wrote in 1945, the scope might have been more extensive than it is today. They are circumscribed by propriety rules, which are of great importance and derive from the 1932 concordat. You heard from Paula Diggle, who has a key role within the Treasury in ensuring that the propriety rules on public expenditure are observed, which then require any expenditure that takes place, for example in anticipation of the passage of legislation but after second reading, to follow certain rules and, above all, to be fully disclosed to the Public Accounts Committee.

If you are asking me whether this area has presented me as a law officer with a great deal of difficulty, my answer would have to be that I do not think that it particularly has—although I cannot go into individual cases. There seems some perfectly well tried and tested formulae for ensuring that the Government can both exercise common-law powers, limited to those of a natural person, but which nevertheless enable them to carry out some expenditure, with money from the appropriation fund, prepare for the passage of legislation, and engage in day-to-day activities of government, including paying all civil servants—I think that that is the position—without, in fact, having express parliamentary sanction. In some cases, what the Government do at a preliminary stage of a bill may derive from statute. I was slightly struck that one issue with the Health and Social Care Bill was that most of the powers to

take preliminary steps were in the NHS Act 2006, and were not therefore common-law Ram powers, or however you might wish to describe them. There are paving bills—although paving bills have their own controversial aspects—which can sometimes provide specific powers to Governments to spend money or, indeed, powers of entry on to property and other things that may be required to lay down the preliminaries of legislation.

From my point of view—and I think that this is why you asked me to come here—jumping almost to your conclusion and asking whether there could be greater clarity or changes to the way in which the concordat operates, I have no doubt that would be a very interesting policy area to examine. But do I think that there is some huge problem here of the Government acting unconstitutionally? I very much hope not, because if they are acting unconstitutionally it is my job to stop them doing so, and I have not at the moment noticed that that is happening.

Some of the evidence that you heard from Lord Lester of Herne Hill and Sir Jeffrey Jowell highlighted an existing tension that has existed for a long time about the nature of the United Kingdom constitution. We do not have a written constitution. Some things that in other jurisdictions might be defined in statute are different, because we have a constitutional monarchy. Ultimately, the Queen's ministers are her servants, but of course are answerable and accountable to Parliament. The principles of powers, as well as prerogative and statutory powers, derive from that. I can see that some constitutional purists about Parliament may not like that arrangement, but it is the embedded arrangement under which we have operated for a very long time. I would be interested if there are examples of where this has gone in some way badly wrong—quite apart from anything else for my own instruction. The truth of the matter is that, if the Government misbehave in this area, or try to exceed their common-law powers or use them when, ultimately, the legislation does not get passed, it will be the Government who end up with egg on their face. The PAC is rather a formidable committee with Margaret Hodge as its chair, and it will be crawling all over them; that would not be a very comfortable moment for them. My general impression is that we have a system that appears to be fairly well tried and tested—albeit, I would have to acknowledge with my own ignorance of the words "Ram doctrine", probably not very well known.

Q70 The Chairman: That clarity is a very important point. As you have said, Attorney General, we are not anxious to get into the broader discussion of the prerogative, and so on. That is very helpful. Would Sir Paul like to add anything at this point?

Sir Paul Jenkins: When there is a minister and one of his senior officials before a committee, there is a temptation for the senior official to say, "I agree, and have nothing to add". But I have one difference. I had heard of the Ram doctrine, albeit a very long time ago, when I was working in the Treasury proper. I was working in the Treasury's own legal team in the 1980s on privatisations when someone asked me to advise on the Ram doctrine. Like this committee, I started to on a journey. I found a scrap of paper, and it was literally a scrap of paper, the sense of which—I would concede, having looked at it again for these purposes—does not immediately leap from the page. I barely heard of it again after that and, preparing for the committee today, I was cursing the person who decided to put the word "doctrine" at the end of it. As government lawyers, it is almost in our DNA, with the various powers of the Crown. When we are required to, we distinguish between the common-law powers of the Crown—which some academics in particular would badge up as the Ram doctrine, although it is rather more complicated than that—statutory powers and prerogative powers, which you are not going into.

I have been doing this job for nearly seven years, and like the Attorney General, I have not come across any hard-edged examples—and I have looked—where something has gone wrong. From my perspective, the approach that ministers take to the relationship between statute and common law is tried and tested. The one thing that the Attorney General did not mention, which I would add as an additional factor, which government lawyers and I would look at—a lot of my time is spent as, in effect, the Government's chief litigation lawyer—is the control that the courts exercise by way of judicial review over all those aspects, including the common-law powers of the Crown. I of all people know how often people will judicially review the Crown. Sometimes it seems that at the drop of the hat, they will judicially review the Crown; sometimes it seems that they do not have to go very far to establish that they have locus to do so. Every pressure group and every interested individual judicially reviews the Crown. I am not for one moment complaining about that.

If we were getting this wrong on a consistent basis, I would expect there to be rather more judicial review activity. One other thing that struck me when I looked at this in detail for the first time in a very long time was the comparative lack of judicial activism in this area. There are three key cases: C, Hooper and Shrewsbury. Hooper is terribly exciting, because you think that the House of Lords, as it was then, is going to go into it, and it builds up and up—and then, right at the last minute, they said, "Actually, we don't need to go into all this." In the case of C, they did go into it a little bit, and in Shrewsbury, they did a little bit. My point is that if what we both described as a tried and tested system was not working, I would have expected to see more judicial activism in this area.

Q71 Lord Goldsmith: Thank you very much indeed. I thoroughly agree with what you said, Attorney General, about it being your job to stop the Government acting unconstitutionally, and not that of the Treasury, which has been suggested in the course of this inquiry. I would like to start by understanding the legal status of different propositions. Two things have been drawn to our attention in the course of this inquiry about anticipating government legislation—one is the so-called Ram doctrine and the other is the 1932 concordat. I made the Ram doctrine public during my tenure, although it was not something, so described, that we talked about every day in my time. But the proposition behind it, which was what ministers can do without statutory authority, was something regularly referred to. So it may be that why it is described as a mythological doctrine or feature is because it did not have the label of the Ram doctrine at the time. That might be something to comment on. The second point on which I would like you to comment goes back to the Treasury's evidence and what was said about the concordat. Sir Jeffrey Jowell said that, "one concordat does not make a convention. Nor is it ancient". It would be helpful to know your views on how significant that concordat is today in determining what government may do without specific legislative authority. So there are two propositions there: what is the status in government legal thinking of the propositions in the Ram memorandum, and what is the status of the 1932 concordat?

Dominic Grieve: As I said at the outset, I was unaware of the Ram doctrine, and I had never read the Ram memorandum until I prepared to come before this committee. That may indicate that perhaps too much emphasis is being placed on the Ram doctrine. All that it is is Sir Granville Ram writing down in 1945 what he considered the position to be at that time. I emphasise that, because we have moved on in a number of areas, and the powers of the executive have become more circumscribed by the development of public law and human rights. The concordat is rather different. The question of what a constitutional convention is is difficult, and we could be here for the rest of the week having a very interesting discussion. Over time, people complain that conventions are violated, but I see

the 1932 concordat as a sort of bottom line. There were previous conventions going back to the middle of the 19th century about the way in which government expenditure was accounted for to Parliament, but 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 and that those areas of expenditure that fall outside statutory authorisation are also properly accounted and regulated.

To that extent, my feeling would be that the 1932 concordat can be described as a constitutional convention. That said, like all conventions, it may be capable of evolving. I have to be careful what I say here, because I do not think that I have the experience or expertise over time—and certainly I cannot go back over your time in office—as to whether it has been tweaked or applied differently through that period. Of course, it will respond to case law as and when it develops, although Sir Paul made the point that there has not been very much of it. I can see that the anticipation of the Hooper judgment might have taken us in a different direction but, as it turns out, it did not. So from my point of view, I repeat that on a day-to-day basis the Treasury officer of accounts may play a crucial role, and if a Government are about to do something unconstitutional it should at some point come onto my desk. I ought to be there to ensure, as I would try to do, that the principles behind the 1932 concordat are being properly observed. That leads to the next question of whether there are examples where that has not happened. I am not clear in my mind that that has occurred, certainly in my period, although I am aware that some anxieties have been expressed to the committee. One of those seems to hinge on statutory powers, not on common-law powers.

The Chairman: Is that the Health and Social Care Bill example?

Dominic Grieve: Yes.

Q72 Lord Goldsmith: What you have said about the concordat is very helpful, but it is drawing a distinction between the Ram doctrine, and the proposition that there is something different between the powers of ministers and of public bodies—and the powers of ministers and natural persons. What is the legal status of that? Sir Paul described that as being in the DNA of government law; there is a distinction, and I have to agree with that.

Dominic Grieve: I think that there is a distinction. A public body is a creature of statute; the Crown is not—it has prerogative rights and common-law rights. Although it is a public body, and a corporation, and is therefore bound by public law principles in how it should act and its propriety, its powers are not limited solely to those that it has received from a statutory source. That is a fundamental tenet of our constitution.

Sir Paul Jenkins: On that point, the interesting thing in researching of my appearance today was looking at how the powers of statutory bodies—which I would readily accept were completely in compass within the statutes setting them up—have evolved over time to deal with the very mischief that one gets, and as a bureaucrat I would say this, if one defines statutory powers quite carefully. If you look at the statutory powers of local authorities, in all those early 20th-century cases about whether a local authority could build a swimming pool, and so on, their vires and powers were very tightly controlled. Fast forward to section 1 of the Localism Act 2011, which essentially says that they can do anything. We can argue—and I am sure that we will eventually argue in court—what that means. But it is a journey that people have been driven to by an over-close drafting of statutory powers of

statutory corporations. There is a clear distinction which has to be drawn; the judgment of Mr Justice Laws in Fewings talked about a statutory public body.

I go back to the point about the concordat and conventions, to put a gloss on what the Attorney said. The 1932 concordat is a concordat—it is not mislabelled, in the sense of the doctrine; it is an agreement. Another way that I have always looked at it is that there is always, inevitably, statutory authority for spending money; you cannot spend it, as a government, unless you have it. 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 covered in the Appropriation Act.

We are all searching for examples of when something may or may not have happened. I cast my mind back to the last time I came across something that was clearly not compliant with the concordat. Many years ago, I was the first legal adviser to the Department of National Heritage, which John Major set up in 1992. In one sense, that department—now the Department for Culture, Media and Sport—is an organisation that funds a lot of non-departmental public bodies, as part of its raison d'etre. One body that it funded then and still funds is the Arts Council. When I arrived, I remember saying, "I know about the 1932 concordat, but where are the vires to fund the Arts Council?"—and there was none. The Arts Council was established under the prerogative by royal charter, and there had never been primary legislation saying that the Secretary of State could fund it. That was put right at some point after my time, but it is an example of something that had gone on for 60 years, to my knowledge, just relying on the Appropriation Acts.

Q73 The Chairman: I think that Lord Crickhowell wants to produce another example.

Lord Crickhowell: I want to raise a specific point at this stage, because of the Attorney's reference to second reading, which was frequently referred to by Treasury witnesses. I have to produce some history. The Conservative Government in 1987 committed itself to privatisation of the water industry, varied by Nick Ridley, the Secretary of State, with the announcement that it was the intention to set up a body to regulate the industry. The Government won the election and, at the end of 1987, more than a year before the second reading of the Water Bill, I was asked to set up a National Rivers Authority advisory committee. Despite some characteristic Treasury niggling delays in the interval, by the spring of 1988 we had established an office, with quite a large organisation; by the time of second reading, in December 1988, we had a quite formidable organisation and shadow board up and running, and preparing to turn a chrysalis into a butterfly when the bill was implemented in the middle of 1989. I suspect that that was all done by the Secretary of State under these ancillary, preparatory powers—and it was probably argued that we were advising the Secretary of State and the department on the legislation when it was being prepared. But we want to get it on the record that the second reading principle in at least one case has been fundamentally breached. I wonder if you have any comment. I suspect that there are other examples.

The Chairman: I add as supplementary to that, the question that has arisen about second readings of bills in the House of Lords.

Dominic Grieve: There is an interesting issue here. Clearly, the concordat allows for expenditure to take place, but without there being a second reading. Indeed, there is a formula for facilitating that, including a term that no specific legislation on the matter in question is before Parliament. So what was happening in 1987 may have been completely

acceptable. There was expenditure of a reasonable amount—I do not know how much it cost—limited to no more than two years, with statutory limits being respected and no specific legislation before Parliament. Post-second reading, there is a rather different regime, and the concordat provides for both eventualities. I can see your point that it may be that these two things are in slightly conflated, but from your description I do not necessarily think that what happened in 1987 was in any way unconstitutional, from what I understand of the concordat.

Lord Crickhowell: That is quite right, but I wanted to get on the record that there was no rigid prohibition on pre-second reading action of this kind.

The Chairman: And presumably your broader reading of the 1932 concordat covers bills that start their parliamentary life in the House of Lords.

Q74 Lord Pannick: Accepting that the system works well in practice, as it plainly does, otherwise this matter would come across both your desks far more frequently, I wonder whether you would agree that, in principle, it is nevertheless highly desirable that we move towards clarity and a bit more transparency in relation to this important constitutional issue.

Dominic Grieve: Transparency there should be, because of the system by which the Treasury is accounting. Whether there is enough public knowledge is a matter of education, I suppose, more than anything else. However, I do not think that it is a secret system as it stands. Whether there are ways in which it can be made more publicly accessible, so that there is an understanding of how government works, may be interesting to look at. I am not sure that I have a concluded view on it. However, is there something wrong in principle with what is happening here? No, I think is my reaction.

The next question is: if one is to change the principles, what does one wish to substitute for them? You certainly do not want to end up with a situation in which the Government are so circumscribed that, essentially, they are running along to get statutory authorisation for every single detail. Apart from anything else, Parliament would get very bored rather quickly if that were the position. Nor do I see great advantage in encouraging more paving legislation, or giving broader powers in statute to departmental ministers, which, as we have seen with the health service, is the other way of doing it. Is that really an advantage? If the concordat is working properly, it provides a very clear mechanism by which Parliament, specifically the Public Accounts Committee, is made aware of how the Government are spending public money using their common-law powers and in preparation for legislation going through. Then, of course, the Government become answerable to Parliament if the PAC—or the chamber of the House and backbenchers—decides that something has been done which is wasteful and improper. The obvious situation in which that might arise is if the second reading does not lead to a third reading, or leads to the bill disappearing at a later stage. Forgive my reversing the question, but if it not to be this system, in principle, what system should it be? I do not see that with our current constitutional position.

Lord Pannick: Let me develop this. The question is not whether there are adequate checks and balances, because plainly there are for the reasons that you give. What I have in mind is whether there ought to be some statement of the principles which govern the circumstances in which is permissible for government departments to take action in anticipation of legislation. I wonder whether it is really satisfactory for that to be left to Treasury guidance, relying in part on a 1945 memorandum, or whether it would be more

desirable for the Attorney General's Office to issue a statement of principle which could inform all government departments, perhaps after looking at any report that we have produced, but some authoritative, up-to-date statement of principle that should govern this area.

Sir Paul Jenkins: I am trying to distinguish between a high-level general statement of the position and anything that goes into a greater level of detail, which is where we start to get into difficulties. If you look at the history of transparency in this sector, you will see that it has been growing along with general transparency. As Lord Goldsmith said, the Ram doctrine first surfaced in the public domain during your time, when Baroness Scotland of Asthal answered various questions from Lord Lester of Herne Hill. That was the first public acknowledgement I have been able to find that it existed.

References to the common-law powers are in some basic texts that underpin the work of government, but not in others. There is a good case for taking a consistent approach to all these various documents. I noticed that one of your witnesses said that it is not in the *Cabinet Manual*. I thought it was, so I checked. It is in the *Cabinet Manual*, which refers to it as the Ram doctrine. It also talks about the common-law powers and the so-called Ram doctrine. Interestingly, in various documents which historically would not have been available to the public, it is not there. It is not in the guide to legislative procedure, which in my day was the secret manual that parliamentary counsel gave to government lawyers who were drafting a bill. Looking through it yesterday, I see that the concordat is there, but I could not find reference to the convention, or the Ram doctrine.

Dominic Grieve: Lord Pannick's point, it seems to me, raises two issues. One is whether we should have—dare I say it?—a Grieve doctrine rather than a Ram doctrine, because he seemed to have placed this on the shoulders of the law officers. I have to say that I do not think that is a very good idea. Sir Paul is nodding his head, but I did not need him to tell me that. It does not seem to me that it has anything much to do with me. For reasons I have already given, I wonder whether the Ram doctrine is not a bit of a red herring. The other issue, which might be more interesting, is whether the concordat needs updating. That might be a more interesting topic but, applying myself as a good conservative with a small "c", if the concordat needs updating, in what way? That seems to me to be the question. Is there something in the concordat that is inherently mysterious or opaque—I think that it is clear—or does it need to respond to changes that have come about in the intervening period? I would not want to pronounce on that, but it seems to me that the concordat is more interesting than Ram.

The Chairman: At the beginning of the meeting, all of us around the table agreed that it was surprising that a large number of quite experienced parliamentarians, while they may have been unaware of the titles, were to some extent unaware of the general concepts. That may be surprising to those of us who were ministers and senior law officers or legal practitioners, and we feel that that lack of clarity might be identified differently.

Q75 Lord Hart of Chilton: I hesitate to do this but, red herring or not, I want to go back to Ram. I want to understand precisely what you think it says. Sir Stephen Sedley said, "What appears to be being made out of Ram in Whitehall"—I will come back to what he means by that—"is a fabrication. Ram never said what was attributed to him because his proposition is that government can do anything reasonably ancillary to its explicit functions". He says that that is completely unobjectionable but it is nowhere near the proposition that now seems to be derived from it in Whitehall, which is that government can do anything

that a private individual can do. He says, "The converse is the case". I would like to have your comments on that.

Perhaps I may explain where he has got that from. The Treasury witnesses, in written and oral evidence, and Sir Stephen Laws stated that the Ram doctrine demonstrates that ministers may exercise the same powers as natural persons. From the other evidence that we have had, that appears as a fallacy. There is no doubt about that. The questionable proposition is that a minister can do anything that a natural person can do. That is why I want to get to the bottom of what you think Ram said, because it has been extended and expanded by Treasury officials since then.

Dominic Grieve: As I said earlier, 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 though it were a natural person. But pause a moment here because, as I also said earlier, it is circumscribed by public law; by propriety; by human rights. So, actually, we ought to be behaving differently from a private individual. I hope that a private individual would also behave in those ways, but there are clear systems in place to ensure that government behaves in conformity with those principles. It is one of the law officers' jobs to make sure that is precisely what happens.

I find myself in difficulty with Sir Stephen Sedley's distinction. I do not entirely agree with him when he says that it is just "reasonably ancillary" to its explicit functions, because I think that the powers are more extensive than that. But the powers are also circumscribed by the principles that I have just enunciated. That is how I would see it.

Lord Goldsmith: Do you mean by statute?

Dominic Grieve: Of course, by statute, I am sorry. I have made that clear at the outset. If statute law has intruded into any area, the Crown—whether its prerogative for that matter, or whether its common-law powers—cannot exercise them thereafter.

Lord Goldsmith: Your list should be complete.

Dominic Grieve: I am most grateful to Lord Goldsmith.

Lord Hart of Chilton: So the dispute is really this: the common powers, you say, give rights which are comparable to the rights of a natural person, whereas other witnesses say that is not so. I do not know that we can carry that much further forward this morning, but there is clearly a dispute.

Dominic Grieve: Is there? Forgive me: I can only look at what Sir Stephen said. The quote I have is: "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 government can do anything that a private individual can do. The converse is the case." For the reasons I have just given, I do not think that Whitehall thinks the Government can do everything that a private individual can do, because it is circumscribed by those very things that I have just listed. This may be why Sir Granville Ram's doctrine is slightly dated. It was 1945, and public law has developed quite a lot since then. What he is reflecting is about certain powers of the Crown, but those powers must be seen in the modern context.

Q76 Lord Crickhowell: Surely one way we should update the concordat is to specify clearly how information should be provided to Parliament. The evidence from Treasury

witnesses was that it was a little chancy. Perhaps it might be done by a written statement. If there is going to be a substantial commitment of expenditure, surely there should be a clearly laid down procedure for informing Parliament. We all know that written statements can appear on the last day of a session and few people note them. Do you think there should be rules clarifying how these things are announced?

Arising from that, the Treasury informed us that one project has been approved in the last five years which goes beyond the sort of expenditures we have been discussing up to now—a £76 million commitment on IT. That is understandable. It takes a long time to prepare for IT; you need it when the body comes in and it is expensive if you do not. But you are then entering into contracts which are ongoing, and you may therefore make commitments and so on that are pretty extensive. Ought we not, in the light of these changes and the growth of substantial ongoing contracts, to have some fairly clear rules about how they are announced and the circumstances in which such agreements can be made?

Dominic Grieve: I can see that that is a possibility. I am conscious that there is a whole system for making Parliament aware of government expenditure. There are written ministerial statements, which are given quite frequently on areas of this type, and there is the reporting to the PAC and the National Audit Office, all done by the Treasury on, as I understand it, a regular basis with a dedicated team led by Mrs Diggle. The question for me is: can that be done more explicitly? I am not sure I have an easy answer to it. I can see that you may, as a committee, decide that there are clearer ways in which that might be done. At the end of the day, that is an issue of communication. But I am not conscious, from what people have raised with me, that they were not kept informed. The PAC seems to be kept very well informed of what is going on in this area.

Sir Paul Jenkins: Parliamentary scrutiny, including by the PAC, is one of the other key elements of constraint in this area. Lord Goldsmith and the Attorney General were compiling this list. I think we missed out parliamentary scrutiny. As an official, almost the thing that you are more wary of than anything else is breaching the conventions or whatever and misspending money—wasting public money—and being called to account in front of the PAC. It is the true terror of every official, I would say; maybe I am exaggerating on behalf of my colleagues. Getting that right is hugely important.

Coming back to Lord Crickhowell's point about spending in advance of authority, the convention and the Appropriation Acts give you the technical ability to do that. If, as a permanent secretary or an accounting officer, you do that in a way that turns out to be wasteful or the expenditure turns out to be nugatory, unless you have sought an accounting officer direction you are the one that is going to be held to account. It is a very clear form of accountability that weighs heavily on people's minds when they are taking decisions.

Dominic Grieve: If I am picking up the concerns raised, it seems that in part this is: is parliamentary scrutiny of this area of activity good enough? Many of us in this committee room have been in the House of Commons; some of us are there at the moment. History shows that one can level considerable criticisms at the way in which the Commons carries out its scrutiny role. In fairness, I do not think it is because the Commons does not have the powers to do it. It is because the Commons is not necessarily always as good as it might be at scrutiny, which tends to be a rather laborious activity where you do not always get the soundbites.

Sir Paul Jenkins: Can I make one suggestion which goes way beyond my brief and will probably get me into trouble?

Lord Goldsmith: It has never stopped you before.

Sir Paul Jenkins: What I was going to say was—my experience is quite ancient now—that when I was involved with ministers taking bills through Parliament, one of the things we were constantly asked in committee was how we proposed to exercise the delegated powers that we were seeking. If the parliamentary pressure was enough, it would produce an answer that said, "This is what we are going to do", and that would be there on the record. Scrutiny committees can ask all sorts of questions, and they could ask, "Are you at this moment spending money? What are you doing and planning to do, whether it is investing in IT, hiring offices or something more controversial while this bill is still going through its committee stage?"

Q77 Lord Goldsmith: This discussion about how you identify the limitations is very interesting, but we seem to be talking about two things. One is: what are the absolute limitations? What are the criteria for limitations? I think that is what the Attorney was enumerating and I added—because he mentioned it before, rightly so—statute. The second question is about how those criteria are observed or how they are policed. There, I entirely agree that there is parliamentary scrutiny—actually, public scrutiny through the media is another way that those criteria are policed, but I think they are two different things. The one that crosses over is not the Ram doctrine but the concordat, because the concordat is partly a statement of what is permissible, but it is also partly a statement of how you police that. Otherwise, I think the other areas that the Attorney referred to are criteria—one could think of a better word—but absolute limitations, circumscribing what otherwise might be an unlimited power.

The Chairman: There is also, as the Attorney has said—and Sir Paul, I think—the historical development, which of course is different from the concordat. I think that is something which we may agree has to be more publicly acknowledged.

Lord Pannick: Sir Jeffrey Jowell offered us a slightly more concrete test. He said that the preparatory action in advance of parliamentary approval cannot interfere with "rights, duties or significant interests". "Rights", I would understand, would be far wider than the Human Rights Act. "Duties" and "significant interests" would themselves need interpretation, but he was looking to identify some substantive limitation that is more concrete than legislation, common law or the Human Rights Act.

Dominic Grieve: It cannot interfere with the rights of others; we have known that since Entick v Carrington in 1765, so this goes back a long way. I do not think I disagree with that, but I come back to my point: in what way has the exercise of the concordat, or the operation of the powers that the Government says it has in accordance with the concordat, interfered with that? I cannot think of examples. If somebody were to suggest to me that in fact some of the powers that were going to be exercised were going to interfere with other people's rights, I would be, as I am sure Lord Goldsmith would have been, rather swift in pointing out that no such power existed.

Q78 Baroness Wheatcroft: You have already described the Ram doctrine as a bit of a red herring. I wonder whether, for the sake of clarity, you might both tell the committee whether you think we could safely forget about the Ram doctrine and concentrate on the concordat, probably updating that, as you suggested, to get a clear view of where we should go on this.

Dominic Grieve: I will pass this question to Sir Paul because, as I have never been bothered by the Ram doctrine in two and a half years in office, I think he might be better placed to answer.

Sir Paul Jenkins: It would be terrible to say "Forget about the Ram doctrine" after the journey of discovery that you have been on, and that I have been on. I think it is important that none of us, me included, allows ourselves to be lured or attracted by the snappiness of the title "the Ram doctrine" into thinking it has some magical or mythical status. As the Attorney and I said, it is shorthand for the common-law powers of the Crown, controlled in all the ways that we have described, whatever those common-law powers are. As and when an issue comes along, one can generally apply all the tests and work out whether one thinks one has vires to do something under the common law or not. I am very wary of trying to provide a comprehensive definition of that.

If you were minded to forget the Ram doctrine—and I am not urging you to do that—one of the things that I think is really usefully emerging, even now from the deliberations and the people reading what you are doing, is avoiding the conflation that we have talked about. They link—they are very related—but it is very important not to conflate the common-law powers of the Crown and the 1932 concordat. As I say, they relate to each other, but in a lot of the material that I have read people treat them in rather a casual way, as though it is all one great lump. Teasing them out is very important for a proper analysis of the legal position.

The Chairman: Sorry to pursue this, but did I understand you to say that in the *Cabinet Manual* they are conflated?

Sir Paul Jenkins: Not conflated—no. There is a reference to the Ram doctrine and the common-law powers of the Crown.

The Chairman: I am sorry; I misunderstood you.

Sir Paul Jenkins: In a lot of the academic research and writing on this, and in some of the evidence, I think there has been a tendency to conflate the two. No, the Cabinet Office manual separates them out rather neatly.

Q79 Baroness Wheatcroft: That is very helpful. When we come to write our report it is obviously something that we will take into account. Thinking of the concordat, and the evidence we had from Mrs Diggle, I wonder whether you could get away from the legalese that has been dominating a lot of our debate and say how powerful you think the Treasury is in all this, and whether we should be concerned about that. One of the issues that came up was that when a ministerial direction was sought in, I think, a majority of cases, it was the Treasury that wanted to do the spending.

Dominic Grieve: As a departmental minister with a spending budget, I can assure you that the Treasury is very powerful. Anybody who has been a departmental spending minister knows this very well. That, I have always assumed, is precisely the reason why this safeguarding power is placed with the Treasury, because they are in the position to, first, make sure that they have the information and, secondly, disseminate it and make sure that Parliament has it. If you were to try, you could create a completely new body to do it but, whether it would be a wise use of public expenditure, the question is: is the Treasury in some way, in this particular office run by Mrs Diggle, failing to deal with its particular and special responsibility which it has taken upon itself to ensure that Parliament is kept properly informed? I have to say that my impression is, from what I have read, that that

suggestion has not been made. In that case, is there any point in having some other body, because it is going to do exactly the same role? I have no doubt, from my knowledge of how government operates after having been in office, that the Treasury's tentacles extend virtually everywhere. Therefore, it is in a very good position to know about public expenditure issues.

Sir Paul Jenkins: Mrs Diggle was working in this area when I was working in the Treasury in the 1980s; she was formidable then and is even more formidable now. The point that I would make about her role in the Treasury office of accounts is that it is very unusual in government, in that it provides a link between the Public Accounts Committee and the Treasury. It straddles that relationship in quite an interesting way. That is the key to how the Treasury office of accounts delivers the Government's responsibility to Parliament for expenditure, while at the same time controlling the rest of us in our natural desire to spend without authority.

Q80 Lord Lexden: In the report that we are preparing, it is quite likely, if not certain, that we will want to give some indication of what from a constitutional point of view might be an appropriate scope for pre-emption. A definition has been offered to us by Sir Stephen Sedley, who said that it was, "the difference 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". Could you say whether that is an appropriate statement of principle? To what extent is it observed by the Government, both in theory and practice?

Dominic Grieve: I do not think I have any reason to disagree with that as a neat, one-sentence encapsulation of what the concordat rules are designed to achieve—although it is taking it to a theoretical level, whereas the concordat is at a more practical level. I am always a bit wary of theoretical underpinnings in our constitution, as they never seem to work perfectly. For a definition of what is and is not permissible in general terms, that is a perfectly fair résumé. The provisions of the rules under the concordat are that, in certain circumstances, in anticipation of legislation going on the statute book after second reading, it is possible to spend money in a rather different way than under the rules in the common-law powers. *Managing Public Money* sets it all out. If you want some higher definition clause as well, it is a question that I do not feel very able to answer. I am fairly comfortable with the definitions that we have in the concordat and *Managing Public Money*.

Sir Paul Jenkins: Everyone acknowledges that we have an unwritten constitution. Over time, we have moved to more aspects of our constitution being written down in one form or another, whether in the Human Rights Act or a whole lot of other things. Transparency leads to greater clarity and detail. I urge a little caution about trying to write too much down in detail. You probably would expect me to say this as someone who spends quite a lot of time working in the margins of all this. Actually, the more one tries to clarify, the more one tries to put an immense amount of detail down, and the more one has to be very aware of the unintended consequences of that clarity.

Dominic Grieve: There are the five principles of *Managing Public Money*. I shall not recite them—I am sure that you are familiar with them—but they start with the statement that, "the proposed expenditure must be genuinely urgent and in the public interest … there must be wider benefits to outweigh the convention of awaiting parliamentary authority; and … the bill must have successfully passed" the second reading, and so on. Those are, I think, rather clear. As I say, you could put that into a résumé, saying that there is some higher principle encapsulated in Sir Stephen's phrase. But is that really helpful, compared to the five points which are so clearly spelt out?

Q81 Lord Lang of Monkton: Attorney General, at the outset of this encounter, you agreed with Lord Goldsmith that the responsibility for ensuring that the Government are obeying the law at all times is yours rather than that of the Treasury. Against that background, we can look at the Treasury's claims that the powers are derived from ancient convention, lost in the mists of time—those are the phrases that arose when we met the Treasury. Subsequently, Mrs Diggle downgraded her claim for the strength of the convention as no longer formal agreement but common practice. Are you comfortable as Attorney General that the Treasury has a sound legal basis for the things that it does, and is there any alternative approach that you would welcome?

Dominic Grieve: To set out the position—Lord Goldsmith would agree about this—I have a clear duty to ensure that the Government observe the rule of law and propriety. That said, I am not the grand panjandrum; I do not have a listening device in every government department. Ultimately, it is for everybody in government to observe those rules. If there is an area of difficulty, by the normal process of governmental movement, if it cannot be resolved at departmental level, properly, or if it raises complex or novel issues, it will end up on my desk. That highlights why, on a day-to-day basis, it is inevitable that it lies with the Treasury to take responsibility to ensure that these principles are observed. I would have to have a huge department, and I think I would become irksome to my colleagues, if I was a grand inquisitor into every aspect of government work. Each government department must ensure itself that it is observing those rules. I am there to keep an eye on what is going on. I have seen nothing at present in my time in office to suggest that the Treasury is misapplying or not dealing properly with the concordat.

Lord Lang of Monkton: I was not suggesting that you should become an investigative or enforcement body. I was hoping that you might be less reactive—which by implication you are being—and more proactive in suggesting a better way of doing things and a sounder legal basis.

Dominic Grieve: I am always a bit hesitant about being proactive. If I have an idea that something can be done better than it is being done at the moment, I will communicate that to my colleagues in government. But, particularly on this subject, which as you will appreciate is not one on which I have given a vast amount of focus until this committee meeting arose—although it is wrong to say that propriety issues are not something that come up in government—I have no reason to think that the Treasury in its current role and through its publications is doing this job badly. If I thought that was the case, it would be my duty to tell the committee, and to suggest that I thought that there was something better that could be done. But I am a bit hesitant about coming out with the statement that it can be better done in some other way, when I have no reason to think that it is being done badly and that, if I were to suggest another route, it would be done better.

Sir Paul Jenkins: I do not want to sound complacent at all, but unlike the Attorney I feel that I have a number of spies and listening devices in government departments, because quite a number of departmental legal advisers report directly to me. Why I hope I do not sound complacent is that, very frequently, when departmental legal advisers are troubled on professional terms by something that they are being asked to do in their department, they tell me about it. If it was a matter of major constitutional concern, I would go to the Attorney, but often it is just a question of them talking through, getting proper advice and seeing how the whole thing works. One other reason I do not think I am being complacent is that this happens quite regularly, but it has never happened in my nearly seven years in this job, in relation to this particular aspect. That leads me to conclude that this bit is working. That is the point that we keep coming back to.

Lord Lang of Monkton: The Treasury described itself to us as the guardian of Parliament's interests in Whitehall. Some of our witnesses have quarrelled with aspects of that. Sir Stephen Sedley said that if by "guardian" they meant "watchdog", he could just about live with it, but he did not like the idea of a paternalistic guardianship concept. Do you like it, or can you think of a better way of describing the role of the Treasury in parliamentary-interest terms?

Dominic Grieve: I think that Sir Stephen has a point: I think that I would prefer the word "watchdog". It is a working relationship by which there is a discrete department within the Treasury that is acting as the watchdog of the PAC and Parliament to ensure that information is fed to it. That is what it is, and of course it applies principles of government in doing that. As long as it is an effective watchdog, I do not think that the guardianship bit comes into it one way or the other.

Sir Paul Jenkins: As an accounting officer, I also feel that there is an element of policing about it. There is a sort of policeman role there. You do not want to fall foul of the Public Accounts Committee and you do not want to fall foul of Mrs Diggle and the Treasury office of accounts.

Q82 Baroness Falkner of Margravine: It seems to me, in this rather exhaustive coverage of a few basic principles, that you have come firmly to the view that the status quo is where we should be in terms of *Managing Public Money*, Ram not being a doctrine, the importance of the concordat, plus the list you enumerated. In that case, we come to the other side of the problem. Do you see a perception, when there has been pre-emption of Parliament, that the problem lies with Parliament and its functions rather than the machinery of government?

Dominic Grieve: It must probably be the case. After all, the Treasury is responsible for ensuring that the department explains clearly to Parliament what is taking place, why and by when matters should be placed on a normal footing. That is one of the things in the manual. I assume, as I have no reason to find any example that that has not happened. I come back to my point, without wanting to be overcritical of the way that the House of Commons works. The reality is that there is a huge amount of information being fed by Parliament to government in every conceivable area of activity—

Lord Crickhowell: Parliament to government; government to Parliament?

Dominic Grieve: I am sorry, by government to Parliament. Government gives a huge amount of information to Parliament and Parliament is able to obtain a huge amount of information from government if it wants it. But we all know that in some instances Parliament does not necessarily exercise its capacity to obtain and use that information if it is minded to do so. It is not unusual in the context of the House of Commons for people to say that they had no idea this was happening, when actually the suggestion that the Government have been concealing it is entirely erroneous. This may have something to do with the working practices of the House of Commons, which is a rather dangerous topic to embark on in front of a Lords committee; I think I should restrain myself before I find myself before the Bar of the House and Mr Speaker. 16 years of being in Parliament have left me with the clear impression that there are all sorts of things capable of being improved within the parliamentary context, but only if the House of Commons can regulate its own business.

Sir Paul Jenkins: Perhaps I can take us back into the slightly safer space of the House of Lords and the Health and Social Care Bill. The clarity about what was going on in terms of pre-emption and the vires—the powers—that were being used was obtained, to my

briefing, by Lord Owen writing to the Cabinet Secretary and getting a detailed response setting out what the vires were. If I might say so with respect, that is a very good example of a parliamentarian doing what parliamentarians can do well in this area.

Baroness Falkner of Margravine: In your view, is it a case of "If it ain't broke, don't fix it"?

Sir Paul Jenkins: Yes.

Q83 The Chairman: A principle on which the House of Lords is based. Thank you both very much indeed. That has been a very helpful concluding evidence session. It has been extraordinarily valuable to hear your views. Do any members of the committee still have points they want to make?

Lord Goldsmith: I wanted to make one observation, given that we are being broadcast. When Sir Paul said that, like all good civil servants he might be going beyond his brief, I made the comment, "It might not be the first time". I should have added, "And rightly so", because in my experience, Sir Paul's huge experience in government and wise guidance has always been well aimed and of great benefit to ministers.

Sir Paul Jenkins: Thank you very much, Lord Goldsmith.

The Chairman: Are there any other points that members of the committee want to raise? No? Then I am very grateful to you both and I hope that you will regard our report not necessarily as something that you will find irritating. I am sure that you will not. We will try to pursue some of the points you raised this morning because they are very valuable. Thank you both very much.

HM Treasury—Written evidence

This paper responds to the call for evidence issued by the Committee on 14 December 2012.

2. The Committee is investigating whether the government jumps the gun in implementing legislation during its passage through parliament. This note explains the controls in place to prevent such liberty. They are operated by the Treasury since any significant use of new legislation will involve public expenditure. It falls to the House of Commons to deal with these matters since it has ancient financial primacy dating back at least three centuries.

3. The paper ends with answers to the specific matters raised by the committee's call for evidence.

Context

4. As the Committee notes, it is for parliament to make laws and for the executive to implement them. Parliament makes available public expenditure for this purpose each year through annual Estimates. When approved, these become Supply and Appropriation Acts. The actual spending for each department is recorded after the year end in its annual report and accounts. The C&AG's audit process includes checking both for accuracy and also for propriety in the use of public funds

5. Hence parliament has full visibility of public spending and can call departments to account. Strictly the process set out in para 4 is sufficient authority; but parliament has always considered that these controls are not enough.

6. There is an ancient convention that the Treasury should strive to look after parliament's interests in Whitehall. So the Treasury publishes and maintains *Managing Public Money* (MPM), a guide to how public funds should be used. Its origins date back a century. The Treasury's general responsibility is older still.

7. The most recent confirmation of the Treasury's responsibility is in the Concordat of 1932, an exchange of minutes with the Public Accounts Committee. In response to the PAC's concern that departments were too inclined to rely on the authority of Appropriation Acts (as they were then called) with no other cover, the Treasury restated[2]:

> *……practice should normally accord with the view…...that, where it is desired that continuing functions should be exercised by a government department (particularly where such functions involve financial liabilities extending beyond a given year), it is proper that the powers and duties to be exercised should be defined by specific statute. The Treasury will, for their part, continue to aim at the observance of this principle.*

[2] See *Managing Public Money*, annex 2.1

8. The Treasury takes this responsibility seriously. It is an integral part of its role as the UK's economics and finance ministry, including leadership in fiscal controls.

Parliamentary authority for public expenditure

9. Thus Estimates presented to parliament usually rest on the authority of specific legislation. Recent examples include the Legal Services Act 2007, which authorises support for the Legal Services Board; and the Sovereign Grant Act 2011 which authorises payments to Her Majesty the Queen.

10. There are certain limited exceptions to this arrangement.

11. The main exception arises when departments use their inherent powers**,** relying on the fact that ministers may do anything a natural person can do, unless limited by legislation. Thus it is not necessary for legislation to provide for departments to pay rents, salaries, or acquire the goods and services they need for their administrative functions. This principle is sometimes called the Ram doctrine for it was articulated by Sir Granville Ram, then First Parliamentary Counsel, in November 1945 (who saw it as an ancient convention even then).

12. Another exception is use of prerogative powers such as international treaty obligations. Similarly, disbursements from the National Insurance Fund (such as pensions) do not require further parliamentary authority, though to give parliament a full picture the relevant Estimate notes their expected amounts.

13. The remaining exceptions arise in the interpretation of the undertaking of 1932 (para 5). MPM sets out the rules. MPM does not have the force of law. It works within the constraint of the law. And since it establishes the standards expected of accounting officers, it commands respect in Whitehall and departures from its advice always have to be carefully justified. It is designed to allow for a degree of judgement, so that accounting officers can decide on innovative approaches when faced with unusual challenges. In this way it is possible to maintain discipline over use of public funds without unnecessary restrictions.

14. MPM restricts reliance on the sole authority of the Supply and Appropriation Acts to the following circumstances:

- where spending is expected to last no more than two financial years;
- where spending may continue for longer, but is not expected to amount to more than a minimal amount annually (currently £1.5m, figure updated about every five years);
- where parliament's will is clear, but legislation is not quite complete.

15. These are often called the new services rules. It is the last of the cases in para 14 that troubles the Committee.

16. The Treasury's interpretation of this exception, following the long established practice set out in MPM chapter 2, is as follows. All the conditions must apply.

- The relevant legislation must have passed second reading in the Commons (since only the Commons can grant supply to the executive).

- There must be little doubt that the legislation will pass substantially unchanged, and in the near future.

- A minister must warn parliament of what action is intended, eg in a written ministerial statement, explaining the urgency, and setting out when matters will be normalised.

- The action proposed must be reversible or retain some use if not confirmed, ie no potentially nugatory commitment of any significance can be entered into.

- Any enacted statutory limits must be respected.

- The expenditure must be urgent and in the public interest.

- The relevant accounting officer must be convinced that the action proposed accords with his duties, eg that it offers value for public money.

- The Treasury must agree. If a loan from the Contingencies Fund is needed (as is common), the accounting officer for the Fund must also consent.

17. Together these conditions are demanding. The Treasury polices them on parliament's behalf. The Comptroller and Auditor General, as auditor of departmental accounts, reports to parliament if any of these conditions is not met.

18. It may help to illustrate how the rules in para 16 apply.

- Proposals to anticipate Royal Assent are always declined where:
    - the bill in question is sufficiently controversial that its passage cannot be assured; or
    - the proposed expenditure is more than trivial and would be nugatory if the bill does not achieve Royal Assent; or
    - the case for action rests wholly on ministerial preference as this alone does not make the case for urgency or public interest..
- Proposals to anticipate Royal Assent may be accepted where:
    - they would allow modest, time limited, pilot testing; or
    - they would allow the recruitment of a shadow board whose members could be stood down if the bill does not achieve Royal Assent; or
    - there is an urgent need for action.

19. Every case for anticipating royal assent must be assessed on its merits. The judgement of the relevant accounting officer(s) is of course crucial.

The Committee's questions

Q1 *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?*

The government believes that the authoritative advice described in para 11, on which previous governments have relied, provides ample justification – provided that adequate protections are in place.

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

The government believes that the present controls are adequate and appropriate. They blend transparency with sufficient judgement to provide flexibility. Public spending never goes entirely without parliamentary authorisation for inclusion in a Supply and Appropriation Act is always essential.

3. 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?
The second reading convention dates back some forty years and probably more. During the passage of the Contingencies Fund Bill in 1974, the then Financial Secretary said: "*The Contingencies Fund cannot be drawn upon for any purpose for which the statutory authority of parliament is required until legislation seeking authority has been given a second reading*." This safeguard is not however enough alone. A number of other controls are needed to make sure that no irresponsible anticipation of enactment takes place – see para 16.

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

With the help of the C&AG, the Treasury polices this convention and believes that it is respected.

5. 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?

If some such flexibility were not available, parliament would be asked to pass many more bills as many measures would require authority for paving activity to enable preparation of the primary step. And approval in principle at second reading is never enough alone (see para 16).

The second question is a matter for parliament.

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

The rules in para 16 apply, however legislation proceeds through parliament.

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

No.

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

9. 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?

Some changes can be accomplished using the government's inherent powers. For example an existing organisation could change its board; or its internal structure, provided the changes are within the limits of existing legislation. Similarly a government department might establish an agency (which is formally part of a department) or a wholly owned company; or, with an appropriate Transfer of Functions Order, a non-ministerial department.

But some changes are impossible without legislation. A classic example is establishing a non-departmental public body. That requires either an Order in Council (using the Royal Prerogative) or, more usually, specific enabling legislation.

Each case must be assessed on its merits. And the safeguards in para 16 apply.

The Committee's specific concerns

20. The Committee's call for evidence draws attention to activity associated with several named bills. Notes on these are below. It is important to bear in mind that many changes can begin using ministers' existing or inherent powers (para 11), leaving completion for after Royal Assent.

Health and Social Care Act 2012: this is one such case**.** The Secretary of State for Health has broad duties and wide powers under existing legislation, including the NHS Act 2006, which confers a duty to promote a comprehensive health service and allows public expenditure to do so. This enabled DH to put in place the Transition Programme, including beginning to set up clinical commissioning groups, to close down primary care trusts and strategic health authorities, and so on. Many of the savings the programme is designed to deliver would have been wanted irrespective of the organisation of the NHS to meet the requirements of the spending review..

Financial Services Act 2012: again the change process could make an early start under the inherent powers of the FSA or the Bank of England. These are both special purpose statutory corporations with broad functions defined by their statutes[3]. They are financed by industry levies and do not receive government support for their core functions. The bill received second reading in the Commons in February 2012 and achieved Royal Assent in December 2012, allowing the new regulatory system to begin formally in February 2013. The government has been very open about the direction of travel of the reforms

[3] the Financial Services and Markets Act 2000 and the Bank of England Acts 1946 and 1988.

throughout, and has consulted extensively on details of the intended twin peaks structure. Shadow operation is proving useful in helping develop the new arrangements.

Public Bodies Act 2010: this provides for the closure or merger of a number of arm's length bodies established in statute. Each of these has (or had) a bespoke set of duties and responsibilities appropriate to its functions. These powers all left considerable discretion about exactly how the functions are to be discharged. It was therefore lawful to begin to make the changes planned in the bill using the existing powers. For example Defra ensured that the Commission for Rural Communities retained its statutory officers with their immediate support staff, while operational work was moved into Defra itself.

The arrangements for transforming each of the organisations covered by the Act are a matter for the accounting officers of the sponsor departments concerned.

Enterprise and Regulatory Reform Bill 2012: the bill achieved second reading with cross party support in June 2012. In order to allow the Competition and Markets Authority to begin work with little delay after Royal Assent (expected by July 2013), BIS was granted access to the Contingencies Fund. This is sufficient to permit the recruitment of a CEO for the CMA (its intended chairman was already an adviser to BIS). The CMA is to operate in shadow form from October 2013, taking up its full powers in April 2014. The Contingencies Fund advance passed the urgency and pubic interest tests because it was judged important to start making decisions about resource allocation and restructuring, so that strengthened enforcement powers could be used quickly.

January 2013

Sajid Javid MP, Economic Secretary, and Paula Diggle, Officer of Accounts, HM Treasury—Oral evidence (QQ 38–53)

Evidence Session No. 3 *Heard in Public* *Questions 38 - 53*

WEDNESDAY 6 FEBRUARY 2013

Members present

Baroness Jay of Paddington (Chairman)
Baroness Falkner of Margravine
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Pannick
Lord Powell of Bayswater
Baroness Wheatcroft

Examination of Witnesses

Sajid Javid MP, Economic Secretary to the Treasury, and **Paula Diggle**, HM Treasury Officer of Accounts.

Q38 The Chairman: Good morning, and thank you both for coming to speak to the Committee. We have about an hour in which to talk about this issue, and I hope that that accords with your own timetables. We are conducting this inquiry because over the course of looking at various Bills which have come to the House of Lords, or indeed which in some cases have started in the House of Lords, we have the impression that sometimes there is pre-emption in terms of changes being made, particularly in administration but also in public expenditure, before Parliament has finished and Royal Assent has been given. What the Constitution Committee is trying to pursue is what guidelines, conventions or other activities of Government and of the Executive are in force to deal with this, and how we can see most appropriately the relationships between parliamentary responsibility, ministerial accountability and the role of the Executive in creating these important changes.

Obviously we understand that neither of you are constitutional experts, and that is not the basis on which we are seeking to ask you some questions this morning. We are concerned with the role the Treasury plays in pursuing some of these lines of policy with Ministers—I think that they are lines of policy—and the conventions which apply to the Treasury position. Perhaps we can start with the historical position. One of the things of interest to us is that, at the moment, the whole system still seems to be based on the concordat which was agreed between the Treasury and the Public Accounts Committee in 1932, and the broader conventions—if we can call them that; we shall probably return to the question of whether we should call them conventions—that are dependent on what is known colloquially as the Ram doctrine, the memorandum written by Sir Granville Ram in 1945. I realise that there are other elements like the *Managing Public Money* document and the conventions that apply to new services and so forth, but one of the questions the

Sajid Javid MP, Economic Secretary, and Paula Diggle, Officer of Accounts, HM Treasury—Oral evidence (QQ 38–53)

Committee has been asking other witnesses is how can we, in such a changing world of wider and more complicated government, work exclusively on the basis of rules and regulations which are so long distance in terms of the history—public expenditure was very much less complex and certainly much less substantial—in 2013, when Government is so much more complicated than before. How is it that historically the Treasury has, as it were, gained supremacy in this particular field of rather complicated relations between the legislature and the Executive? As I say, we do not expect you to talk about this from the constitutionally legal point of view, but more in terms of the role of the Treasury. We are very grateful for the note you have sent us. It is most helpful.

This evidence session is being broadcast, so please be kind enough to identify yourselves when you begin. Perhaps I could ask the Minister to speak first.

Sajid Javid MP: Thank you. I am Sajid Javid, the Economic Secretary to the Treasury. First, let me say that it is a great pleasure to appear before your Committee. It is a good opportunity to have this important discussion. You said quite rightly that neither of us are constitutional experts. I have served for around two and a half years in Parliament and six months as a Minister, so I will not be able to draw on experience too much. However, I will try my best to answer your questions.

I thought it might be useful to start by making a few general points that will help to set the context, especially with the key question that you put to us in your introduction. It goes without saying that it is for Parliament to make law and for Government to implement Parliament's will. Any policy that the Government implement clearly requires the authority of Parliament specifically to authorise any related expenditure. A Government Minister is considered a natural person, so he can make commitments on behalf of the Government, but even then those commitments need to be authorised by Parliament for the expenditure actually to be made. There are very limited exceptions to this, and my understanding is that those are the key focus of the Committee today. Perhaps I may broadly outline them.

The first is a Minister's inherent power. The Ram doctrine authority has already been referred to. A Minister has the authority to take action that would potentially incur expenditure, but only in the ordinary running of that Minister's department. The expenditure might be for paying staff, ordering new computers or for reorganising the department, perhaps by creating an internal agency to carry out functions that are already the responsibility of that particular department. A second exception is what we refer to in the Treasury as the new services rules where a very small amount of expenditure, up to £1.5 million a year, may be allowed, or on the basis that it is of a temporary nature; that is, a maximum of two years. Ministers have discretion around that. As the Chairman has said, these exceptions fall under the concordat of 1932 between HM Treasury and the Public Accounts Committee which tried to put in place some guidelines in this area—they are guidelines, not legislation. The main relevant document is *Managing Public Money*, which has been referred to. In essence, it talks clearly about the responsibility of the accounting officer in every department to be involved in all spending decisions, including those where a Minister might believe that, in anticipation of a Bill going through Parliament, it might be necessary to incur some expenditure early on in preparation.

I think it is fair to say that the *Managing Public Money* document sets out two big ideas. One is that there must be very high standards of integrity and public administration when spending public money. The Treasury sees itself as the guardian of the public purse in that regard. It also pays due respect to the role of Parliament, so even in cases where money is being spent in anticipation of legislation going through, Parliament is made aware of uses

being made of the Contingencies Fund through written ministerial statements or other methods so that there is as much transparency as possible. I will leave it to Mrs Diggle to expand on some of the things I have said.

Paula Diggle: I am Paula Diggle, the Treasury Officer of Accounts. I should explain how I came to this position. I have worked at the Treasury for a long time in a number of different positions, and I have been in this present job for around seven years. The Minister has explained in an excellent and clear exposition the general shape of what we do. I am now happy to explain anything you need to know about exactly how we make it work in the Treasury, and in particular how we handle relationships between the Treasury and the departments. Many of the issues that we need to touch on this morning involve areas where Treasury consent is essential because any pre-emption of Parliament is always what we call novel or potentially contentious. The department needs explicit Treasury consent before it happens and it will always come to the Treasury so as to understand what can be done, and there follows a process of engagement and discussion. Sometimes that takes place with Ministers and sometimes not, although very often it does. I am usually part of that engagement, so perhaps I can help the Committee on it.

The Chairman: That is very important. You have both demonstrated that the Treasury does see its role in this as pre-eminent.

Q39 Lord Pannick: Paragraph 6 of your helpful note states that, "There is an ancient convention that the Treasury should strive to look after Parliament's interests in Whitehall". Can you give us some assistance on the origin of the convention and on how the Treasury performs this function, given that there might appear to be some conceptual difficulty in the Treasury protecting a body Parliament with which it may, on particular issues, come into conflict?

Paula Diggle: I will see if I can help you. We think that the convention dates back a long way. We have traced something that may be of help. It is from a fat book that is very ancient and yellow, and calls itself the *Public Accounts Committee Epitome of Reports*. It consists of extracts made by the PAC of the things that they thought were important. Running through the whole book is the thread, "The Treasury must do this and must do that to make sure that every department does what it should". Let me read one short passage that dates back to 1884. I should say that this is the PAC quoting the Treasury, but doing so with "consent and approbation"; "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". That is a statement made in 1884 of what the authority for the predecessor of *Managing Public Money* was.

Lord Irvine of Lairg: A statement made by whom?

Paula Diggle: It was the PAC quoting the Treasury, but doing so with approbation.

Lord Pannick: Is there evidence that any of this has ever been debated or considered by Parliament itself? Have you found anything to that effect?

Paula Diggle: We have not found anything, but we have not looked for it, and I would be surprised if there was. It runs through the essence of the relationship between the Treasury and the PAC today. The PAC often says that the Treasury should make sure that departments do whatever is required. That is the beginning of the first answer to your question.

Lord Pannick: The second part of my question concerns how the Treasury goes about the process of protecting the interests of Parliament, a body with which it may, unhappily, sometimes come into conflict. Do you consult Parliament or its officers? Do you have particular people in the Treasury whose job it is to act as, I do not know, devil's advocate? How do you go about the process of protecting the interests of Parliament?

The Chairman: Mrs Diggle, before you reply, I wonder if you would be able to move slightly closer to the microphone. It is simply that the sound recording is proving to be a little difficult.

Paula Diggle: Also, my voice is a bit soft. The beginning of the story is that we have set the rules in *Managing Public* Money, but we have always had something like this. Before *Managing Public Money* there was a document called *Government Accounting*. The earliest copy we have of it dates back to 1900-and-something. It is very primitive, but it was successively updated many times. It is a guide to departments about what they need to do and it always contains a provision that states that if a department wants to do something outside the normal rules, which would include the pre-emption of Parliament, it needs to seek the explicit consent of the Treasury, as I said earlier. The spending department must go to its Treasury spending team and ask for guidance. That team would automatically come to my team or to me and we would go through exactly what can be allowed under the rules. Sometimes it is a matter of nice judgment in the old-fashioned sense of the term. It is always a decision for the accounting officer talking to the Secretary of State, and it can lead, in extremis although very rarely, to the Secretary of State directing the accounting officer. We can give examples of that if the Committee wishes. It does not happen often because this is usually the beginning of a conversation about how we can make the Government's will happen. Governments often say, "We want to make this new policy work. Tell us how we can do it expeditiously". As good civil servants, we want to ensure that it happens, but we do not want to offend Parliament.

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 would tell us very quickly if it was not. That is how we work the relationship. There are many meaningful conversations about what can be done and what cannot be done under the rules.

Q40 Lord Irvine of Lairg: Your note refers to "an ancient convention", which causes me to think that there must be within the Treasury a paper trail of documents that justify the assertion that there is an ancient convention. Is there such a paper trail and could we be shown it?

Paula Diggle: I wish I could be sure that there was one, my Lord. I have not yet been able to find it.

Lord Irvine of Lairg: Have you looked for it?

Paula Diggle: Yes, we have looked for it. I think it is so ancient that it has been lost in the mists of time.

Lord Irvine of Lairg: What is your basis for saying that?

Paula Diggle: It has always been the understanding in our relationship with Parliament. When the PAC was established in 1860, it was live even then. It was not something that had to be explained or documented. I think it is probably not documented because it is so much a part of what the Treasury is and does. The Treasury is the Government's economics and

finance ministry and it runs so much with the essence of getting that right, which includes getting the administration right and getting the handling of public money right.

Lord Irvine of Lairg: Does it really just come down to the fact that this is a long-standing practice of the Treasury that does not qualify as a convention of the constitution?

Paula Diggle: Perhaps I am using the word "convention" in the wrong sense, and if so, I apologise. I believe that it is a long-standing arrangement that the PAC has understood and accepted.

Q41 Lord Lang of Monkton: Even if it is the wrong word, it is quite an important thing to say. Perhaps I may ask for a ministerial view. Mr Javid, I understand that you had a distinguished banking career in the City before coming here. I am sure you based all your decisions and actions on a very sound, carefully checked and double-checked basis to make sure that what you were doing was proper and appropriate. When you went to the Treasury and someone told you that action was based on ancient conventions, how did you react to that?

Sajid Javid MP: First, no one told me about them at the beginning, but I learnt about them before I arrived at the Treasury through a better understanding of the parliamentary process. When I first heard about them, I actually looked at this book, which does not look too ancient to me.

Lord Lang of Monkton: It is 40 years old, so it is not ancient, but it is getting on.

The Chairman: I think that the latest edition is 10 years old.

Sajid Javid MP: My point is that I look for the most recent guidance on these issues, and this is something, as Mrs Diggle says, that is based on ancient conventions or understandings, not least the concordat from 1932. Also, the practice of various Governments in modern times at least has been consistent with the description given by Mrs Diggle, and I have had no need to question it. The practicalities of the process work by involving the accounting officer of each relevant department. Under the framework, if a department wants to spend money that the accounting officer does not agree with because he does not feel it meets the guidelines, it is of course possible for the relevant Minister to give a direction, but even in that case the Treasury must approve the spending. The Comptroller & Auditor General is involved as well as the Treasury Officer of Accounts. Although Mrs Diggle will know better, my understanding is that it is quite rare for a situation to arise where a Minister has to give a direction as these issues are often resolved. It is talked about more often than it actually happens.

Lord Lang of Monkton: The mechanism that you have set out in your paper to us as to what the document allows for is very sound and one does not quarrel with it. What we are trying to establish is the constitutional base—just how deep in the mud is it? Perhaps Mrs Diggle could answer the next question. In your answer to Question 2 of our call for evidence: "Are conventions a suitable mechanism for regulating government action … ?", the four-line response does not address the question at all, and yet this is one of the things that goes virtually to the core of our inquiry as far as the Treasury is concerned.

Paula Diggle: I understanding your yearning for some sort of written convention, but I think that this is the magic of the UK constitution—it is something that is not written down.

Lord Lang of Monkton: It is Merlin magic, I think.

Paula Diggle: You may be right.

Q42 Lord Powell of Bayswater: I suppose that "Ancient" may be a relative term in this Committee. I want to get an idea of the scale of the issue. On average, over the course of a year, how many requests would you receive for pre-emption or something resembling pre-emption that raise issues for you?

Paula Diggle: That is an interesting question. I do not keep a log, but it is probably a dozen or something like that. However, the number will vary a lot.

Lord Powell of Bayswater: A dozen is quite a lot, actually.

Paula Diggle: Some of them come to nothing, of course. Some people ask, "Can we do this?". They find that it is not possible and they go away, or they find another way around it.

Lord Powell of Bayswater: Is it not possible on the grounds of the convention or non convention and the Treasury guidelines?

Paula Diggle: Usually it will not fit with the new services rules.

Lord Powell of Bayswater: In that case, do you turn away quite a lot of disappointed Ministers and officials?

Paula Diggle: It varies. We do our very best to help if we can because public servants exist to serve the Government and we try to get done what they want done. We try to find a way through, if that is possible.

The Chairman: Can we look a little more closely at the new services rules?

Q43 Baroness Wheatcroft: I am struggling with this slightly because in the scale of public spending, £1.5 million sounds like rather a small drop in the ocean. How often do you think that Ministers actually commit £1.5 million or more without even thinking about pre-emption?

Paula Diggle: Let me try to give some insight into that. As you say, £1.5 million is not a great sum of money in the scheme of public spending, and as it happens, it does not arise very often. It tends to be something like a subscription to a worthy international body which is not exactly provided for in legislation, or it might be a very low-level grant scheme to a worthy set of people. What is more common is the second leg of the new services rules: a department wanting to provide a one-off service that will last for a short time, but not being able to find space in the parliamentary timetable to do it through legislation. That is reasonably common. However, we have to be very careful about how we police that. The rule is not how much, but how long; the rule is two financial years, which is not all that long.

Baroness Wheatcroft: If a Minister brazenly went ahead or did not realise that several million pounds were being committed, do you have a police force in the Treasury which looks out for that sort of thing, or might it go unnoticed?

Paula Diggle: It certainly would not go unnoticed. Let me take the Committee through what would happen. The first thing is that we would probably know about it because whatever the expenditure might be, it would be novel and contentious, so explicit Treasury approval would be sought. If the department has not got it, it would be improper to go ahead. The NAO, which checks every bit of spending as it happens, would spot that the expenditure did not have the full measure of approvals and it would probably stop it. If for some reason that did not happen, when the NAO came to do the audit, it certainly would spot that it was improper spending and it would criticise the department, which would probably lead to a PAC hearing. It would not go undetected. I can assure the Committee that the NAO is quite stringent about this.

Baroness Wheatcroft: Thank you. Minister, you have been Minister for only a relatively short time, but have you been aware of any of your Government colleagues being turned down in a request to spend money in advance of legislation?

Sajid Javid MP: Not in that time. What I have seen is that a Minister will float an idea and have an open discussion with the Treasury, asking, "Could we possibly do this? Do you think it will be allowed?". That discussion would be held with the accounting officer. However, the idea does not come to more than that. Even in my own experience with the policies that I am responsible for—that is, those not coming from other departments—I have seen initial ideas for future legislation go to the accounting officer, the Permanent Secretary to the Treasury. He has come back with very good reasons as to why they might not fit exactly with the guidelines. That is usually what will happen, at which point we go back to the table and look at different ideas. From what I have seen so far, certainly at the Treasury, the accounting officer takes the role very seriously and will not be pushed around by Ministers, and I am sure that that is the case for all departments.

Q44 The Chairman: I think that Lord Powell and Lord Pannick would both like to come in on this.

Lord Powell of Bayswater: I am still puzzled about one point. What you have described does not sound like pre-emption. Every now and again, a Minister will wake up, have a good breakfast and come up with a great idea for spending a little money on something. It is not very much money and probably does not need legislation. To my mind, that is not pre-emption. Pre-emption is actually seeking approval to pre-empt Parliament concluding its debate on the piece of legislation that would authorise that spending. Does that happen very often? I can quite see how the other situation might arise—the wizard idea—but it is more serious when you are talking about legislation.

Paula Diggle: What you are talking about is the circumstance when a Bill is going through Parliament and the Minister wants to make an early start. Yes, that does happen. Typically, the legislation prescribes the setting up of a new agency or body of some sort, and the Minister wants to get it going. The convention we normally apply is that if the Second Reading of the Bill has been passed in the Commons and if it looks like a racing certainty that the Bill will be passed without substantial change—those are two important ifs—we then consider whether modest spending can be permitted. It has to be modest, it has to be in the public interest, and it has to be good value for money. Typically, it might consist of hiring the leaders for a new organisation on terms stipulating that they may have to stand down if the Bill does not get through, and on planning but not actually buying or executing IT strategies. These are both modest spending streams and do not usually offend Parliament.

Lord Powell of Bayswater: I understand that and indeed it is clearly explained in your memorandum. What I am trying to do is separate that form of expenditure from what sounds to me to be the majority of the requests you get which have nothing to do with legislation. How often are you presented with a request for real pre-emption as opposed to some eccentric spending?

Paula Diggle: The second area that I have just been talking about will obviously depend on the number of Bills going through, but the issue can arise several times a year. Quite often we can help because we can allow some drain on the Contingencies Fund which can be repaid out of a subsequent Estimate. However, we are very careful about that and we always advertise it to Parliament once it has been done.

The Chairman: The Committee would be very interested in examples where this has not been possible for the Treasury. You mentioned non-contentious Bills, but those are political decisions rather than financial or economic ones.

Paula Diggle: I am struggling to remember one. I am sorry. Perhaps I could come back to you on it.

Q45 Lord Pannick: I was going to ask a similar question. It would be very helpful if the Treasury could send the Committee a list of examples of where true pre-emption as identified by Lord Powell has occurred.

Perhaps I may also put a question to Mr Javid. Given that the Treasury's role in the true pre-emption context is to protect the interests of Parliament as you describe them in your helpful note, do you think that there is a case for more transparency in this area so that Parliament is actually told that the Treasury has approved the payment of moneys in areas of true pre-emption?

Sajid Javid MP: There may well be improvements to be made to the process and I would be interested in any suggestions from the Committee, but as I understand it, in the examples you are talking about—what you call the true pre-emption of particular legislation—first, we follow what is known as the Second Reading convention. The Bill will have been debated in Parliament and passed through its Second Reading. That is part of the transparency process to reveal the costs of the legislation. For example, as the legislation is considered at Second Reading, there will be discussions about the costs involved. It would not be unusual for Ministers to refer to the schedule of costs if they are asked questions about it. Also—perhaps Mrs Diggle knows better—an investigation will be undertaken if, say, an agency needs to be set up and the recruitment process for it needs to begin. Today, we have strong but correct rules about recruitment to public bodies that probably did not exist decades ago, and that may be a reason for more requests for pre-emption than historically might have been the case. Another example of why pre-emption may be more frequent now is that a lot of Government policy requires investment in IT. Again, that would not have been the case many years ago. It might require some preliminary spending as well. There may be circumstances where Ministers can issue written ministerial statements saying, "In anticipation of this legislation, we are looking at incurring these costs". Also, eventually those costs will need to go through the Estimates process, which becomes the Supply and Appropriations Act, so Parliament will have a say on them. However, I take the point that there may be a more transparent way of doing this, and I would be happy to look at any suggestions.

Lord Pannick: I understand that the substance of the decision may well be entirely justified, and of course I understand that if there has been a Second Reading debate, the Bill will have been fully debated. However, we are talking about a different question. We are talking about the fact that before the Bill is enacted, expenditure is being incurred in expectation of the Bill being passed by Parliament. All I am suggesting is that perhaps there ought to be a process by which the fact of payment in true pre-emption cases is publicised so that, as the Treasury sees it, Parliament is protected because it knows what is being done. That is what I am suggesting to you.

Sajid Javid MP: First, there is a degree of transparency. Your suggestion is whether it can be taken further. For example, should it be standard practice that a written ministerial statement is always produced. The suggestion is worth looking at.

Paula Diggle: Perhaps I may add that it is very rare for there not to be a written ministerial statement. If I were aware that something like this was being planned, I would always advise that such a statement is issued so that Parliament knows about it. The very essence of my job is respecting Parliament, so I would always want that.

Q46 Lord Hart of Chilton: Before I ask a similar question to the one that has just been put, do we have a copy of the piece of paper that you read from earlier?

Paula Diggle: You are very welcome to have it.

Lord Hart of Chilton: We would like to see it. Also, you said that from time to time there would be directions and you appeared to indicate that you have a record of those directions. I would find it helpful if we could see a list of the directions that have been issued in recent times.

My question is on *Managing Public Money*, which states that, "in order for expenditure to be authorised prior to Royal Assent, 'the planned legislation must be certain, or virtually certain, to pass into law in the near future'". In your note at paragraph 16 you state that: "There must be little doubt that the legislation will pass substantially unchanged, and in the near future", and in answer to an earlier question you talked about a "racing certainty". How does the Treasury assess that certainty? Does it relate to the whole Bill or just to certain provisions in it? In terms of Ladbrokes, how is the racing certainty calculated in the Treasury? Who does the calculations and how are the conclusions reached?

Paula Diggle: Perhaps I may take the second question first. It is a matter of judgment 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. That is how the certainty is calculated.

Lord Hart of Chilton: What happens before Second Reading?

Paula Diggle: We do not normally allow expenditure before Second Reading unless it is within the powers of the Minister to do anything he likes, to which the Minister referred earlier.

Can I take the Committee on to the directions now? I can think of three where we have caused Ministers to give directions in order for spending to take place without proper parliamentary authorisation. All of them are different, of course. One was Icesave in, I believe, 2008. The Committee will remember that it was a branch of Landesbanki which was operating in the UK. The then Government had no legal liability to compensate the holders of savings accounts in that bank when it foundered, but nevertheless they were very concerned about it because the retail savings market was in disarray. Because we had no legal authority to make payments in compensation, the Treasury accounting officer sought a direction and was given one by Alistair Darling, who thought that it was in the wider public interest that the savings market should be reassured. The compensation was paid and there was no subsequent legislation. The giving of the direction was sufficient authority.

I can give two further examples from the previous Government, but they are a bit obscure and the Committee may not have heard of them before. One concerned something known as pleural plaques. Some former coal miners were medically examined and found to have pleural plaques on their lungs. They were worried about them and there was a court case. The case found that the Government had no liability, but Ministers were nonetheless very

sympathetic. The Ministry of Justice accounting officer, Sir Suma Chakrabarti, faced a problem because he had no authority to pay compensation to these people; indeed, the courts had told him that. It was a form of double jeopardy, if you like. He sought a direction from Jack Straw and was given one to proceed.

Slightly further back in, I think, 2007, but I am not 100% certain of the date, there was a case that we always to refer to as that of the Icelandic fishermen. It concerned compensation for trawlermen on the east coast of the UK who were unable to fish in what became Icelandic waters. There had been a number of compensation schemes. After a series of cases, the ombudsman ruled that those schemes were not quite right. There was no legal authority to pay compensation in the way the ombudsman wanted, and we could see that the payments would take more than two years. The then Secretary of State for BIS gave a direction to Sir Brian Bender, who was the accounting officer, to proceed and make those payments.

Those are three examples that led to directions and they stick in my mind because they are so rare. They were carefully thought through first and we tried every which way not to do it, but it was clear that they had to be done.

Sajid Javid MP: Perhaps I may add to that. As Mrs Diggle has said, in the case of a Bill it is rare for money to leave the Treasury in advance of Second Reading, but there is a significant relatively recent example that I can give where not only did that happen, but it took place without even the essence of a Bill; there was no draft Bill. It was the state intervention in RBS. In 2008 when RBS was suddenly in serious trouble, the then Chancellor decided in less than 24 hours that the Government would intervene with over £40 billion of public money. That decision was literally taken overnight and the money was made available by the Treasury. The Bill did not actually come until the following year. It became the Banking Act 2009 and it was retrospective. That is an example of what I am sure the Committee will understand was a very time-sensitive situation. However, you have asked for examples of where the Second Reading convention was not kept to, and I think that this is a significant one.

Lord Hart of Chilton: Going back for a moment to Ladbrokes and racing certainties, are there any examples of the Treasury looking hard and long at a Bill and thinking, "This is not actually going to happen because there are serious disadvantages. We now think that this horse is not going to win the race and therefore we are not going to authorise". Are there any examples of that?

Paula Diggle: I can quote the Companies Act 2010. It was a long Act and there was no certainty that it would be passed before the election was called. Included in it were some clauses about the governance of the NAO, which I knew about because I happened to be sponsoring them. There was great uncertainty about whether those clauses would be included in the final Bill, and indeed over whether the Bill itself would fall. No action was taken to implement the Bill ahead of Royal Assent, and we were right to be cautious because when it came to the brief period before the election, large chunks of it were taken out, including the clauses on the NAO. It was very wise to be cautious then.

Lord Hart of Chilton: Can you think of any others?

Paula Diggle: There must be others.

Lord Hart of Chilton: You do not have to answer now, but perhaps you could cast your mind back and then let us have a note. This subject is very interesting.

Paula Diggle: As I say, there must be others, but I am struggling to think of them. The chances are that because something did not happen, I would not have been conscious of it.

The Chairman: Can we pursue the question about the Second Reading convention?

Q47 Baroness Falkner of Margravine: The examples given by the Minister and Mrs Diggle are very interesting. They appear to be relatively straightforward, but when contentious legislation comes to the House of Lords first, how do you arrive at a judgment as to the racing certainty then? We do not have a convention of voting at Second Reading.

Paula Diggle: The litmus test is always Second Reading in the Commons. If a Bill has been hotly argued in the Lords and there is some doubt about whether it will proceed, we will take that into account.

The Chairman: For example, last week we heard evidence from representatives of the Youth Justice Board. A particularly contentious Act which started in the Lords and involved expenditure was the Public Bodies Act 2011. Do you have any reflections on that?

Paula Diggle: I cannot recall examples of every body that was reorganised under the Public Bodies Act. All I can say in general terms is that the accounting officer of that particular organisation must have taken decisions about what was right in the context. I am not aware of that particular issue.

Baroness Falkner of Margravine: Where does the convention come from and how far back does it go? An increasing number of Bills are originating in the House of Lords; I think that it is now around a third of them. Again, as you know, we do not vote at Second Reading.

Paula Diggle: I am afraid that you are not going to like this answer, my Lady, because it is also lost in the mists of time. It is a convention in the same way as the Treasury acts as the guardian of Parliament—in my loose sense of the term, and I am sorry if it is not the right sense. It was very live in the predecessor to *Managing Public Money* when the legislation to set up the Contingencies Fund was enacted in the early 1970s, but it was not new even then. **Baroness Falkner of Margravine:** Essentially, what you are saying is that if there is doubt about how contentious a Bill is, it is entirely possible, in terms of tactics, to decide to do that because the House of Lords does not vote at Second Reading. It may be a way to circumvent the convention.

Paula Diggle: I would not dream of commenting on the tactics of the parliamentary authorities in choosing how Bills are dealt with. I am not aware that that happens.

Baroness Falkner of Margravine: You really do not think so at all.

Paula Diggle: I simply do not know.

Baroness Falkner of Margravine: I think that you used the Public Bodies Bill as an example. In the example you give on the final page of your note, you say that: "Each of these has (or had) a bespoke set of duties and responsibilities appropriate to its functions"—those are the arm's-length bodies that were established—"These powers all left considerable discretion about exactly how the functions were to be discharged. It was therefore lawful to begin to make the changes". In other words, the convention of Second Reading was not really relevant to the decisions that were taken.

Paula Diggle: In many cases, the powers of the bodies concerned were derived from the Minister's authority as a natural person to do anything he wanted, which the Minister

explained at the beginning of this session. It would therefore be possible for considerable reorganisation to take place using those powers. I imagine that that is probably what it tracks back to.

Q48 The Chairman: I think that Lord Pannick and Lord Lang want to comment on this.

Lord Pannick: Given that the Second Reading convention as you have described it is part of the way the Treasury protects the interests of Parliament in, as you describe it, a non-partisan manner in these true pre-emption cases, I wonder whether the Treasury discusses or seeks to ensure that there are discussions with Opposition politicians as well as Government Ministers in order to identify whether your assessment of how controversial a provision is is accurate.

Paula Diggle: Cases like that would normally have to go to a Treasury Minister to secure agreement. He would decide whether that was necessary.

Lord Pannick: Let us ask the Minister. Can you envisage discussing the fact that expenditure is being incurred in a true pre-emption case only on the basis that it is not going to be contentious in Parliament in that it is almost inevitable that the Bill is going to go through? Would you discuss that with the Opposition, just as on many occasions Ministers do discuss potentially controversial issues, such as when a general election is imminent?

Sajid Javid MP: The judgment the Minister would make would be based on whether there were controversial issues in the Bill. If the Second Reading goes through Parliament with the Opposition typically voting against it but there is a decent majority for the Government—it is not controversial among the Government's own Back Benchers—there would be little reason to discuss it with the Opposition unless they raised the issue. If the Opposition have already approached Ministers and said that they want to discuss any expenditure that might be incurred prior to Royal Assent, there would be little reason for the Government to approach the Opposition.

Lord Pannick: Would the Opposition know that the expenditure is being incurred before it is incurred?

Sajid Javid MP: Yes. Going back to the point on transparency, in many cases, such as setting up a new agency, I would expect the Government to issue a written ministerial statement. The Opposition would most certainly be aware of that, and if it prompted them to approach the Government to discuss it either privately or on the Floor of the House, that is their right.

Paula Diggle: Perhaps I can add to that. The Minister quoted the example of the rescue of RBS. In his biography, Alistair Darling makes it very clear that he talked to both of the Opposition Members leading for the financial side to make sure that they were aware of the position. They did not say that they could not possibly accept it; they assented without arguing, and he took that as sufficient.

Q49 Lord Lang of Monkton: I want to go back to the mechanism for notifying Parliament that expenditure is being authorised. *Managing Public Money* states that, "Parliament must have been aware of the intended steps and appropriate detail when relevant previous legislative steps were taken". Your note to us states, "A minister must warn parliament of what action is intended, eg in a written ministerial statement". Mrs Diggle mentioned that in reply to an earlier question from Lord Pannick. However, to say "for example" in a ministerial statement implies that it is still rather loose. Is that something which is used automatically and on every occasion, or are there other ways in which this

could be regularised? For example, should it be included in the explanatory notes to a Bill? Should the express approval of Parliament be sought at an early stage in a Bill's passage, or is there some other mechanism that could be used to make this clearer cut and automatic?

Sajid Javid MP: I can respond to that in part. First, the written ministerial statement is the usual channel, but another could be the Minister making an oral statement or some kind of statement to Parliament itself. You have suggested that it could be included in the explanatory notes or there could be a prior parliamentary vote. Those are possible, and if the Committee has any suggestions to make, we will look at them. However, an immediate thought is that the more steps that are in the way—for example, if it was always the practice to have an explanatory note or to produce, as some people have said, some kind of paving Bill—the more they would make the process less flexible. It has to be balanced by a common-sense approach where one asks whether it is in the public interest to put more hurdles in the way. Are they actually necessary?

Lord Lang of Monkton: A paving Bill is a different situation and there are arguments both for and against. One just feels that it is all a bit haphazard at the moment. If a ministerial statement is the best way of doing it, perhaps it should be rationalised in some kind of protocol or written convention, or else these other methods should be considered, debated and perhaps decided upon so that Parliament knows exactly where it stands on what really is a very important matter.

Paula Diggle: Perhaps I can add to that, Lord Lang. You are right to say that there is no general convention, and the Minister is right to say that there is usually a written ministerial statement. However, it could be done through an oral statement made by the Minister during the Second Reading debate, or what is probably more likely, an oral statement made during the debate on a particular clause. That is quite common too.

Q50 Baroness Falkner of Margravine: I come back to the point of contentious Bills that are introduced in Parliament and your role in the Treasury of striving to look after Parliament's interests in Whitehall. In response to my earlier question about tactics, you said that you could not possibly comment, but in protecting Parliament's interests in Whitehall, if a contentious piece of legislation was first introduced in the Lords where Second Reading would not be subject to a vote, would you consider that it was your responsibility, in protecting those interests, to point out to the Minister through *Hansard* and so on that a lot of doubts had been expressed in the Lords and that the Government should therefore not proceed down that particular route?

Paula Diggle: Indeed we would do that. It is likely that the Minister and the department concerned would be very cautious about considering pre-emption in those circumstances.

Baroness Falkner of Margravine: Would you issue your advice to the Minister in writing?

Paula Diggle: I do not ever do that. My advice goes to my Ministers. However, there are many circumstances where my Minister has had correspondence with other Ministers about such things.

Baroness Falkner of Margravine: It is therefore not just a casual aside. The advice is taken seriously.

Paula Diggle: I should say that it does not happen very often, and you are right to say that it is not taken lightly.

Q51 The Chairman: A piece of legislation which this Committee was particularly concerned about during the last Session was the Health and Social Care Act, or at least many aspects of the Bill as it was. It was paused in an unusual action by the Government at a certain stage of its passage through Parliament. It was obviously contentious at a very high level. People in this House who were trying to table amendments to it were told that it was in a sense too late because the expenditure had been agreed and changes to administration had taken place that would make life more difficult—not for the Government, but for the NHS—if the Bill did not proceed. At some stage along the line, that must have been the subject not just of a financial decision by the Treasury but of a political judgment by Treasury Ministers. How does that kind of situation interact?

Paula Diggle: I am not an expert on that very long Bill, but my understanding is that there was some previous legislation which gave the Secretary of State powers to reorganise the structure of the NHS to quite a considerable degree. It was on that basis that the Secretary of State and the relevant accounting officers took the judgment that it was proper to go ahead with certain kinds or reorganisation. If the Committee wants more, I would ask it to have a word with the accounting officer and/or the Secretary of State.

Sajid Javid MP: I can add a little to that. My understanding is that under Section 1 of the National Health Service Act 2006, the Secretary of State has a broad duty to promote a comprehensive health service.

The Chairman: We had a Bill last year that was designed to remove that responsibility, although it was then amended in the Lords to reinstate part of it.

Sajid Javid MP: Nevertheless, under that Act the power exists for the time period you are referring to. Again, my understanding is that it explicitly allows the Secretary of State to incur expenditure and to undertake forward planning in anticipation of proposed NHS legislation. But as Mrs Diggle has said, it is a very long and technical Act.

The Chairman: I do not think we are concerned with the detail of the legislation. The Committee is concerned about the interaction between the political and the financial judgment which led to public expenditure before Royal Assent.

Q52 Lord Lang of Monkton: I hope that this is not too frivolous a question, but the Parliamentary Voting System and Constituencies Bill went through both Houses of Parliament. At what stage did you give consideration to allowing any advance expenditure prior to Royal Assent?

Paula Diggle: I was never asked about it.

Lord Lang of Monkton: You were never asked. There was no anticipated public expenditure.

Paula Diggle: I would not say that with certainty because I was never engaged with it. **Lord Lang of Monkton:** The point of the question is that the Act is still not in force, yet it has been through all its stages in Parliament. Therefore if it had incurred the kind of expenditure that you would have had to authorise, there might have been a problem.

Paula Diggle: It sounds to me as if this was a case where the department concerned thought that it was too contentious even to contemplate pre-emption. Whitehall polices itself to a certain extent.

Lord Lang of Monkton: I will not press the point.

Paula Diggle: It did not seem contentious at the time.

The Chairman: You have both been extremely helpful. I would like to thank Mrs Diggle in particular for agreeing to provide us with additional information, which I hope will not be a burden to her. However, it is important that the Committee should see all the relevant papers. I do not know if any Member of the Committee has a further question that they would like to put to the Minister or to Mrs Diggle.

Q53 Baroness Wheatcroft: Perhaps I may ask one more question. It goes back to the role of the Treasury as the guardian of Parliament's interests in government. I wonder whether that is particularly difficult when the department wishing to pre-empt is in fact the Treasury.

Paula Diggle: Ah.

Sajid Javid MP: You have saved the best question until last.

Paula Diggle: It is a very good question. The Treasury has a rigorous method of evaluating this. We go through the different criteria that have to be satisfied in order that the accounting officer can be sure that there is no need to seek a direction. We draw up a memorandum for the accounting officer about whether the proposal is in accord with the standards or not. A lot of us think about it very carefully and in the end the accounting officer makes a judgment; he does not do that lightly. Let me give a live example. We are supporting Ireland with a loan that is being paid in instalments. The accounting officer, Sir Nicholas Macpherson, said that that was fine and that each disbursement of the loan would have to be evaluated carefully. He will look at each subsequent disbursement separately and evaluate it in the light of the circumstances at the time—the political, economic and financial circumstances. We are not saying that we have simply ticked the box; we are taking it very carefully, line by line, because we know that it is not straightforward.

Baroness Wheatcroft: If we look back over time, would there be more directions from Treasury Ministers than from other departments?

Paula Diggle: We have had two directions in the Treasury, one of which was IceSave and Landesbanki and the other subsequent one was when the Asset Protection Scheme was set up to insure RBS's assets. We had worries about the quality of the assets.

Baroness Wheatcroft: I wonder whether I could ask the Minister if he thinks that there is a potential conflict.

Sajid Javid MP: I can answer that by referring to my own experience so far. Among my responsibilities as a departmental Minister are those for certain areas of the financial sector. In one particular area, which I cannot mention, we are looking at potential new legislation. It is early days, but I was pleasantly surprised when officials came up with their first thoughts about the legislation and how it might work. There are a number of ways to approach the particular problem, but when our first idea went up the chain to the accounting officer, he immediately dismissed it on what were very good grounds. He killed the idea and said that there would be no further discussion about it because he would not be able to sign off on it. When I thought about it further, I realised that it would not be something on which we would want to issue a direction in any case. That rather sent us back to the drawing board in order to think of a new approach. The example backs up Mrs Diggle's point that the accounting officer takes his responsibilities very seriously indeed and understands how they need to be discharged.

The Chairman: Thank you. Does any other Member of the Committee have a point that they want to put? Minister, do you have anything that you want to add in conclusion?

Sajid Javid MP: No. I look forward to seeing any suggestions that the Committee may make in due course.

The Chairman: Thank you. Mrs Diggle, we look forward to hearing from you with the additional information. I most grateful to you both for your time. You have been very generous and helpful.

HM Treasury—Supplementary evidence

Thank you for inviting the Treasury to give evidence to the Constitution Committee on 6 February. I am writing to offer the additional material for which the committee asked.

2. At the evidence session I quoted the PAC on the role of the Treasury in 1885. This came from the *Epitome of the Reports from the Committees of Public Accounts 1857 to 1937* (page 157). A scanned copy of the page was sent across to you last week.

3. The Committee asked for examples of cases where the executive pre-empted a bill during its passage through parliament, or did not do so. Annex 1 (attached) lists all the examples from the past 5 years where a contingency fund advance was given to allow spend ahead of Royal Assent for specific bills. There are also a few examples of where an advance might have been thought useful but was not given.

4. The Committee wanted a list of all the ministerial directions issued in recent times. Please see annex 2.

5. The Committee was interested in whether the Treasury's traditional role in looking after Parliament's interests had been debated in Parliament. The best insight I can offer is Nick Macpherson's recent lecture on the origins of Treasury control which has been placed on the Treasury public website. In case you think that the committee will be interested the link is:

http://www.hm-treasury.gov.uk/speech_permsec_160113.htm.

To bring the subject up to date, the committee might also be interested to read the transcript of the PAC's session on accountability of 13 February, at which the current relationship was discussed.

6. The committee explored whether there was a clearly identified requirement to notify parliament about pre-emptions. I can confirm that the guidance on the Contingency Fund clearly states that parliament must, whenever practicable, be given advance notice of the intention to use the Fund. This is usually done by way of a written Ministerial Statement unless by the time of the advance the Estimate repaying the advance has already been footnoted. If advance notice is not possible, retrospective notification is of course essential.

7. There was also some discussion about the use of the term convention. I would like to confirm that I was using the term in the primary sense in the OED, ie to denote common practice rather than a formal agreement.

8. I hope that this provides the information the committee wanted. Please let me know if there is anything further I can do to help the committee's deliberations.

Annex 1
Examples of cases that pre-empted bills in passage

1. The table below includes information of all the Contingency fund advances from the past five years where specific legislation had passed 2nd reading but prior to Royal Assent.

Year	Bill or Act	Case details	Amount
2012-13	Small Charitable Donations Act (Dec 2012)	HMRC - Development of IT systems for online claims for Gift Aid (Sept 2012) as delay would result in increased costs.	£159,000
	Enterprise and Regulatory Reform Bill	BIS - to recruit a chief executive officer for the proposed Competition and Markets Authority (Oct 2012) as delay would result in increased costs.	£220,000
2011-12	Welfare Reform Act (March 2012)	DWP – several advances for IT development costs for different benefits covered by the Act as delays in starting would result in increased costs.	£77,300,000
	Localism Act (Nov 2011)	CLG – Early recruitment of the Chair (July 2011) and Committee members (October 2011) of the Homes and Communities Agency Regulatory Committee as delay would result in increased costs.	£34,000
2010-11	None		
2009-10	Marine and Coastal Access Act (Nov 2009)	DEFRA – To start the recruitment process for a chair and board members for the Marine Management Organisation (Sept 2009) as delay would result in increased costs.	£50,000
	Apprenticeships, Skills, Children and Learners Act (Nov 2009)	DfE – To start the recruitment process in advance of setting up the Young Peoples Learning Agency (April 2009); as delay would result in extra cost; and the Office of Qualifications and Examinations Regulations (Oct 2009).	£150,000
2008-09	Children and Young People Bill (Nov 2009)	DfE – Extending a Sure Start contract that was resting solely on the Appropriation Act (less than 2 years). Delay would have resulted in extra cost.	£1,500,000
	Child Maintenance and Other Payments Act (June 2008)	DWP - IT development, recruitment and resource management in setting up the Child Maintenance and Enforcement Commission. (April 2008). Delay would have resulted in extra cost.	£2,400,000

2. Departments often explore with the Treasury whether they may have a Contingencies Fund advance when legislation is still going through. Such enquiries are not normally recorded. Some of them arise when specific legislation has received Royal Assent, but the relevant Supply and Appropriation Act has not yet passed. Others take place when the specific legislation is still in discussion in parliament. Proposals in the latter group of cases often fail to develop into a formal application, when all the criteria are fully explained. Here are some instances where it might have been useful to receive an advance of funds, but none was given.

3. **Apprenticeships, Skills, Children and Learning Act 2009**: it might have been useful to the Commission for Local Administration to receive an advance, but none was made as the case was not justified as urgent and in the public interest.

4. **Parliamentary Voting System and Constituencies Act [date]:** on 13 October 2010 the Speaker's Committee considered the Electoral Commission's request to commit £2.0755 million between October and December 2010 for preparations of the proposed UK-wide referendum in advance of the Parliamentary Voting and Constituencies Bill. The Committee sought the view of the Treasury. The Commission did not proceed with the application once it appreciated that the expenditure had to be urgent and in the public interest.

5. **Equality Act 2005**: the Commission for Equality and Human Rights might have found an advance ahead of Royal Assent of the Equality Bill 200, useful to meet the timetable for the establishment of the new body. There was no advance as the case could not be justified as urgent and in the public interest.

6. **Postal Services Act 2011: a** Contingencies Fund advance ahead of Royal Assent might have been useful for the OFCOM and POSTCOM merger but because OFCOM operated outside of the normal supply procedure it was not possible to make one.

Annex 2
Ministerial directions from the recent past

1. In the last 16 years there have been 37 ministerial directions (although none since 2010). The majority were issued where the accounting officer had concerns that the approach being taken did not offer good value for money. The full list is reproduced below with the four where there was no appropriate legislation highlighted in bold text.

Year	Department	Direction	Category
1997	Department of Environment, Transport and the Regions	Millennium exhibition	vfm
1997	Department of Environment, Transport and the Regions	Channel tunnel rail link	vfm
1998	Department of Social Security (twice)	Post Office automation project to pay benefits	vfm
1998	Northern Ireland Court Service	An individual's personnel records	regularity and propriety
1998	Ministry of Defence	Sale of cadet property in Moffat	regularity and propriety
1998 and 1999	Department of Social Security (three directions)	Benefits integrity project	regularity and propriety
1999	Export Credit Guarantee Department	Cashmere exporters	vfm
1999	Export Credit Guarantee Department	ECGD cover – Indonesia	vfm
2000	Export Credit Guarantee Department	ECGD cover – Romania	vfm
2000	**Ministry of Defence**	**Financial assistance to fly a parent to Croatia to attend trial of those accused of murder of his son, a British Serviceman**	**regularity and propriety**
2001	Ministry of Defence	Roll-on, roll-off ferries	vfm
2001 and 2003	Department of Trade and Industry (twice)	Regional selective assistance	vfm
2002	Department of Environment, Transport and the Regions	A43 Silverstone bypass	vfm
2003	Ministry of Defence	Acquisition of BAE Hawk trainer aircraft	vfm
2005	Department of Trade and Industry	Bombardier C-series launch investment	vfm
2006	Ministry of Defence	The armed forces memorial	propriety
2008	Department for Business, Enterprise and Regulatory Reform	Launch investment	vfm

Year	Department	Direction	Category
2008	Ministry of Defence	Remploy procurement	vfm
2008	**HM Treasury**	**Landsbanki**	**regularity and vfm**
2009	**Department for Business, Enterprise and Regulatory Reform**	**Icelandic water trawlermen scheme**	**regularity and vfm**
2009	Department for Business, Enterprise and Regulatory Reform	Advantage West Midlands loan	vfm
2009	Ministry of Defence (twice)	Repatriation flights for UK hostages in Iraq	propriety
2009	Department for Environment, Food and Rural Affairs	Dairy farmers of Britain	vfm
2009	Department for Business, Enterprise and Regulatory Reform	Leeds arena project	vfm
2009	Department for Business, Enterprise and Regulatory Reform (twice)	Car scrappage scheme	vfm
2009	HM Treasury	Asset protection scheme	propriety
2010	Department for Communities and Local Government	Proposals for new unitary local government structures for Devon, Norfolk and Suffolk	vfm
2010	**Ministry of Justice**	**Pleural plaques**	**regularity and vfm**
2010	Ministry of Defence	Basra memorial wall dedication ceremony	vfm
2010	Department for Business, Innovation and Skills and Department for Communities and Local Government (two directions)	North West Development Agency's funding for Blackpool Leisure Assets	vfm

Sir Paul Jenkins KCB QC, Treasury Solicitor and Head of the Government Legal Service, and Rt Hon Dominic Grieve QC MP, Attorney General—Oral evidence (QQ 69-83)

Transcript to be found under Rt Hon Dominic Grieve QC MP, Attorney General

Professor Sir Jeffrey Jowell KCMG QC, Rt Hon Lord Brown of Eaton-under-Heywood, Lord Lester of Herne Hill QC and Rt Hon Sir Stephen Sedley—Oral evidence (QQ 54-68)

Transcript to be found under Rt Hon Lord Brown of Eaton-under-Heywood

Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12; Mr John Drew, Chief Executive, and Ms Frances Done, Chair, Youth Justice Board for England and Wales—Oral evidence (QQ 23–37)

Evidence Session No. 2 *Heard in Public* *Questions 23 - 37*

Wednesday 23 January 2013

Members present

Baroness Jay of Paddington (Chairman)
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Lexden
Lord Pannick
Lord Powell of Bayswater
Baroness Wheatcroft

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Examination of Witnesses

Sir Stephen Laws QC, First Parliamentary Counsel, 2006–12, **Mr John Drew**, chief executive, Youth Justice Board for England and Wales, and **Ms Frances Done**, chair, Youth Justice Board for England and Wales.

Q23 The Chairman: Good morning, and thank you all for attending and helping us with our inquiry, which, as you know, is into the pre-emption of Parliament. You may think, looking at the different bases of interest from which you come, that it is slightly odd that we have invited you all to take part together. That is because we have found, in our initial conversations and the evidence we have taken—and thank you very much, Sir Stephen, for your informal note—that it is quite difficult to distinguish what one might broadly call administrative questions about the way in which organisational change takes place before Acts have passed Parliament, and some of the almost theoretical issues about how those decisions should be taken. I invite you all to intervene in what you may think is not necessarily a question specifically addressed to your area of interest because our understanding is that it is quite difficult to draw boundaries between the different areas of concern.

This morning, we are not being televised but we are broadcasting by audio, so if you would be kind enough when you first speak to give your name and your particular function, that will help the identification on the recording. Thank you very much.

Do you think that there is a case, given that it seems that this is an area in which there is not complete clarity, for allowing wide discretion to the Government on the nature of pre-legislative action, as we understand it, or do you think this is something that should be more

precisely drawn? Do you think the present balance is the right one? Perhaps, Sir Stephen, I could begin with you on that.

Sir Stephen Laws: Yes. My name is Sir Stephen Laws. I was a civil servant from 1975 until 2012, and from 2006 to 2012 was the First Parliamentary Counsel.

I think there are some relatively clear principles at the moment about how this operates. There are two areas that apply. There is the law. The law says that you cannot exercise powers until you have them, and you cannot stop performing duties until they are taken away from you; and there are more complex rules about the extent to which, when you are carrying out your functions before legislation, you can take into account the fact that there is the possibility of change ahead.

The other area where there are legal rules is in relation to what the powers of various people are. Ministers have a general power to do anything that a natural person may do, and one of my predecessors, Granville Ram, wrote a memorandum that is still regarded as the authority on this. Ministers have powers unless you can show that there is some reason they do not; whereas statutory bodies have powers if you can find a source for those powers.

Ministers have a very wide power to do things, and that includes taking steps in preparation for legislation. Statutory bodies may sometimes be in a more difficult position. Those are the legal principles.

There are also rules of propriety that are enforced by the Treasury and have their origin in what is known as the 1932 concordat. That was an agreement between the Treasury and the Public Accounts Committee, that the Government would not rely exclusively on the Appropriation Act for regular expenditure or for large amounts of expenditure. Those rules are applied to activities of ministers preparing for legislation, and the Treasury has a series of rules of thumb that it applies to when action may be taken—But the overriding principle is that government should not waste money doing things that may prove to be abortive because of legislation. Those principles also apply in a different way to the notion that government should not carry on its existing functions in a way that would be wasteful, having regard to the fact there is change on the horizon.

I think those are the clear principles. There are issues about their application in practice in individual cases, but I think the principles are probably the ones that need to apply.

Q24 The Chairman: You can derive, as you have very clearly, some guidance from the things that are in circulation in Whitehall—although the Ram doctrine, I understand, was not made public until 2003, although it was written in 1945. If the Government continue to rely on a doctrine which was pronounced in 1945 and on the Treasury concordat from 1932, do you think that there are many different pressures and understandings of the nature of legislation in government today that they should be looked at again?

Sir Stephen Laws: I am afraid I think they do the job. I think there is an issue about there being a cliff edge between preparatory actions that satisfy the Treasury's test and things that you might want to do that you could only do if you introduced a paving bill. I think there is room for a middle position where you would get more authority to do things than is provided by the Treasury's rules of thumb, but not have to go through the process of putting a bill through both Houses of Parliament.

Q25 Lord Lang of Monkton: I wish to question the propriety of having paving bills, given that some of the evidence that we have had—written evidence from an academic—insists that there is no justification for any of this pre-emptive activity. We might come to this later on, but perhaps you would like to comment on it now, since you have mentioned it.

Sir Stephen Laws: I think, if Parliament is prepared to authorise it, there must be justification for it.

Lord Lang of Monkton: Do you mean a paving bill that enables money to be spent in anticipation of legislation that has not yet passed through Parliament?

Sir Stephen Laws: Yes. There have been examples of that. I can think of only one example where the bill was confined exclusively to spending money, and that was the Planning-gain Supplement (Preparations) Bill 2006–07, which was passed to allow expenditure on preparations for that tax.

There are quite often bills whose justification is the concordat. They are introduced to create statutory authority for doing things that the Government could do on a day-to-day basis, in theory, on the authority of the Appropriation Act alone. There were probably one or two bills like that each year, or at least provisions each year, where the main purpose of the provision is to give a permanent statutory authority for a new service that requires expenditure.

The other examples of paving bills, and I worked on two of them, are where a statutory body is involved. There was one for the privatisation of the water industry and the electricity industry, where there was anxiety about whether the functions of the statutory bodies included collaborating in their own destruction, so to speak, and whether they could operate in a way that would be in the interests of their ultimate successors. There was another one—where I think there were also other reasons for legislating—when Ofcom was set up. The Office of Communications Bill set up Ofcom, and included some obligations on the then regulators to co-operate with the Government in bringing about the proposals that then conferred functions on Ofcom.

The Chairman: That was prior to the Communications Act 2003, which put the broad principles in. Is that right?

Sir Stephen Laws: Yes. Ofcom was set up by an Act of 2002, and then the 2003 Act conferred its main functions on Ofcom.

Lord Lang of Monkton: Would you support the further use of paving bills?

Sir Stephen Laws: I think there is room, if we were only concerned with expenditure, for some different procedure to fall between the Treasury and paving bills. As First Parliamentary Counsel I was always somewhat opposed to paving bills, partly because of their business management implications. They end up being a rather inefficient form of pre-legislative scrutiny, because the debate is all on the main issue, which is then debated again when the real bill comes along. Some procedure that concentrated more closely on expenditure I think would be preferable.

Q26 Lord Powell of Bayswater: Sir Stephen, do you think one could say that, as it has been applied, pre-emption is a sensible, practical way of proceeding and that objections to it stem from those who dislike the particular policy issues to which it has been applied?

Sir Stephen Laws: I think that can often be the case. I do not want to generalise. One factor is about the legislation that you are pre-empting. Legislation serves many functions. I think it is often seen as being parliamentary authority for a policy initiative. Very often that is not what it is doing. It is doing a bit, it is adding bits. It may be integrating it into something else. Its sole purpose may be to ratchet a change that is required. And—this is not my specialist area of expertise—there are very good reasons, when you have decided to make a change, to get on with it. I know, from making organisational change in the department where I worked, that if you start a change and are held up, and there is uncertainty for ages until you can implement it, that is much more disruptive and it can make the transition to a new system much more difficult.

Lord Lang of Monkton: So, you are saying life cannot always proceed at the pace of the parliamentary diary, provided the parliamentary process has gone a certain distance?

Sir Stephen Laws: It has to be respected. You have to take account of the fact that Parliament is not a rubber stamp and may change things. You do not want to waste activity.

Lord Lang of Monkton: Provided it has reached a certain stage though; the second reading seems to be a generally observed milestone.

Sir Stephen Laws: Yes.

Lord Lang of Monkton: Thank you.

The Chairman: One of the examples you used of ratcheting—as a verb—of legislation was the Health and Social Care Bill, where it was often argued that some of the organisational changes could have been made without primary legislation. In ratcheting it, it created a situation where some people said—and some parliamentarians challenged this—that the difficulties of stopping it, although it was paused, were greater than those of carrying on at the pace that was desired.

Sir Stephen Laws: I do not want to go into too much detail on the Health and Social Care Bill because I was quite closely involved in at least a bit of it. I think how these things work in practice is different from the principle because, inevitably, in the nature of authorising things before Parliament has reached a final decision, there is an element of risk. The question is: what is the sensible risk to take? I do not think one should have a system where you have to act only when there is no risk, because that is inefficient so far as change is concerned.

The Chairman: Perhaps we can turn to the particular experiences of Frances Done and John Drew, where perhaps the risk was inappropriate.

Q27 Baroness Falkner of Margravine: Given what we have heard from Sir Stephen, and the particular experience that you had during the Public Bodies Bill's passage, where you were listed for demise and then resurrected, would you like to comment on the extent to which the Government made it clear to you that the abolition of the Youth Justice Board was subject to parliamentary approval—in other words, that your planning was contingent on parliamentary approval—whether there were any limits placed, and what you were doing to wind down, pending that approval? In other words, what were you told as to where the parameters were and how you should proceed?

Ms Done: I am Frances Done. I am chair of the Youth Justice Board. It might be worth giving a short introduction to this to explain how it happened for the Youth Justice Board. Following the election we knew that there was some uncertainty about our future because

of the policy of the Government about arm's-length bodies, but it was October 2010 before the Secretary of State told me that he was going to put forward abolition as part of the Public Bodies Bill—a Cabinet Office bill. What you might be quite interested in is our attitude at that point.

As you might expect, the Youth Justice Board did not think that that was the right thing to do, but as a board we discussed the position and how we should behave. We took the view very clearly that the Government has a perfect right to decide it wants to do something different. Bear in mind it was not proposed that our functions should be abolished; it was a question of a straight transfer of everything we did into the Ministry of Justice.

The approach we took was this: that we would co-operate, but equally we would not expect anything to happen in terms of our ability to carry out our statutory functions in such a way that, if the decision was reversed or if, for any other reason, the legislation did not pass, we could not just carry on. We carried on a business-as-usual operation because it is really important work we do and we did not want to lose any momentum.

At the same time, we co-operated with the transition planning, and—this is in relation to your question—nobody said to me, "This is all subject to parliamentary approval", but obviously I knew it was. I also felt personally that there was a real possibility it would not go through because those interested in youth justice in Parliament are very expert and feel very strongly about these issues, so I always knew there was a possibility of reversal.

What then happened was—and I think John could comment here—we entered into transition planning with the Ministry of Justice and we tried to twin-track it with them, although I do not think we did it openly, particularly with MoJ about this, but we did from our side want to spend time doing useful preparation because clearly you should prepare. At the same time we did not want to put ourselves in a position where, if the decision was reversed, we could not carry on—so it was full steam ahead while co-operating with the transition planning.

Mr Drew: I am John Drew. I am the chief executive of the Youth Justice Board. I think my chair has described the process fully. It was never put to us that anything would happen in advance of decisions by Parliament. The processes that we followed in preparing for being abolished—there would be a two-stage legislative process, with the Public Bodies Bill the first of those—were perfectly appropriately phased to take account of the potential for Parliament to change its view or to disagree with the Government.

These processes always have other things that drive them. In this instance we were also in the early phases of planning our spending reductions for the spending review 2010 to 2015, so much of our work was anyway driven by that, and, therefore, was not lost when the proposition that we be abolished was changed.

Q28 Baroness Falkner of Margravine: Operationally, in terms of the impact on numbers and expenditure and everything else, that would have happened in any event because of the change in your budget. I do not want to lead you, but my question is: did you feel, operationally, that there was a significant impact of this time lag and the uncertainty that it caused?

Mr Drew: There were consequences of the time lag. A body that is probably going to be abolished for a period of time which lasted 13 months—there are consequences to it. There were consequences for us in terms of our authority to exercise our statutory role; not our authority in a legal sense but the degree to which people with whom we work were

prepared to comply. We lost authority in that more common-sense way. But you are absolutely right: the central component of planning would have happened anyway.

There is one other thing which I do not think is particularly central to your inquiry but is probably worth putting on the record. In the early phase of our planning for these changes—between November 2010, the second reading in the House of Lords, and January 2011—there were questions in the Ministry of Justice's mind about the dismemberment of the YJB, and it was only after January that the Ministry of Justice settled on a proposition that our functions would be transferred complete into the Ministry. It probably is a consequence of that that there were things in that phase that were different to them, the nature of the planning, but I do not think that that cuts to the heart of your concern. I emphasise that ministers, in particular, were very scrupulous in their dealings with us about the constitutional position, and at no stage did we feel that we were being, in that sense, railroaded under an assumption of what would happen.

Q29 Lord Hart of Chilton: You were obviously, from your description of what happened, a rather special case. But one of the things we are interested in is the organisational impact that this sort of thing has on bodies. While all this went on, while the parliamentary process went on, what impact did that have on staff morale and personnel issues in the organisation? Was there a drift away? Did people become angry or irritated by what was going on? What happened inside the organisation?

Mr Drew: Perhaps I can answer that in two ways, because there were two processes affecting us. There was the proposed abolition and there were the spending review cuts, which were very substantial: we reduced in this window from being an organisation of 400 people to being an organisation of 220. You cannot, in a sense, suffer like we did.

I will deal with morale first. We measure morale annually in October every year, so it does not work completely precisely for your purposes, but when we measured morale in October/November 2010, just as the announcement of our proposed abolition was at the forefront of people's minds, morale had risen significantly. There were probably other reasons for that, but I think the period before the announcement was a more difficult period for staff. Would we be scheduled for abolition or would we not? That was a long period. From the election of the Government it was clear that they wished to bring forward the Public Bodies Bill and there would be a long list of public bodies in it, and it was easy to see that the YJB might be one of those, so that was a more difficult period, strangely, than the next period.

Then there was the fact that, quite quickly, we reached agreement with the Ministry of Justice and ministers that the organisation would be lifted more or less intact and placed within the Ministry. That certainly impacted on people's morale; in other words, it improved.

Our morale remained very high, and is always very high because we are a small organisation with a very clear mission, and so on—all the preconditions for high morale. But staff undoubtedly felt angry about the proposal—I do not think "angry" is overstating it—and that was simply because from our perspective and the perspective of staff in the organisation, the real question was not being asked by government. The real question about whether it should be abolished was surely one about: were we efficient and effective and what were the end results of our work? We felt there was a compelling case for our continued operation in the way in which we had operated around those propositions.

The Chairman: Lord Hart, do you want to continue on that particular—

Lord Hart of Chilton: No, because I think this is a very special case.

The Chairman: I was going to say that. Perhaps I could ask Sir Stephen this. This is a special case, and John Drew and Frances Done have explained clearly the implications that there were as regards the financial situation of the organisation and so forth. What are the implications, from your perspective, of matters like the Treasury concordat when a bill of this nature is introduced in the House of Lords? We have no control over public expenditure.

Sir Stephen Laws: The way the Treasury apply the rules, they do not authorise expenditure until a bill has received its second reading in the House of Commons. From a business management point of view, that is inconvenient because it becomes an argument for lots of bills that require pre-emptive preparation to be introduced into the Commons and not into the Lords.

The Chairman: The Public Bodies Bill was introduced in the Lords. That is one of the reasons why this is an interesting case from both angles.

Sir Stephen Laws: I think the Treasury operates its rules by not allowing preparatory expenditure until the bill has received its second reading in the Commons. There are categories of expenditure that you can engage in before that. The preparation of a bill itself is wasted expenditure if the bill does not pass, but you can do that in advance, and some of the things that you have heard about may fall into that category of developing the policy for the bill itself. The Treasury strictly apply this rule that, before they will allow you to do things that are contingent on the bill's passage, they require at least a second reading in the House of Commons.

Q30 Lord Lexden: Going back to the representatives from the Youth Justice Board, I think it might be helpful for our inquiry if you could summarise the general lessons that emerge from your experience that we ought to bear in mind.

Ms Done: Looking at it from my perspective—obviously it is not something the Youth Justice Board itself has spent much time thinking about because we have just got on with it—I must say I feel very strongly. The whole process by which a decision was made to propose legislation, including our abolition, was not satisfactory. If the consultation—which took place with all those involved in youth justice across the system, which was as a result of the House of Lords' intervention and insisting that there should be a consultation—had taken place before a decision was finally made by the Government, I think there is more than a chance, for example in the case of the Youth Justice Board, that the Government might have changed their mind at that point because there was an overwhelming view among all those who know about youth justice that this was not the right thing to do. It was not about saving money or anything like that. The Government have always agreed there was never an issue about saving money. It was a matter of principle almost. That I feel very strongly about.

The other thing is that even if we subsequently, as a board, were abolished—I think this is relevant to what we have seen in terms of health service reorganisation, Audit Commission reorganisation and so on, which is happening—I think it would inform the discussions and preparations between the relevant department and the relevant body in a way that would much improve what took place. If those preparations were taking place in the context of having had the views of the whole health world, or the Audit Commission world, or whatever, I think that would make it much more acceptable that there will be some commitment of time, effort and energy to prepare for legislation being enacted. That makes

sense. It is doing that in the absence of a chance for everyone to contribute which I think is concerning, as an observer—because I have no role in health, of what happened in the Health Service, and the youth justice system is, like many other parts of the system experiencing uncertainty around what the new structures will be in health and how they will affect youth justice.

It was not at all clear how those changes were going to be made, on what basis they were being made and so on. One would have thought there ought to be some discussion and an open, transparent set of arrangements for those pre-legislative decision-taking processes.

There should be consultation from the outset, genuine consultation. In the end the Government can always decide what they want to do. Any preparatory processes should be based on at least listening to those people who are most interested in the services and being very transparent about what is happening, how it is happening and why it is happening. Possibly select committees should have a role in looking at that, where a significant amount of pre-planning is needed.

The Chairman: I think that is useful, and that is something that we have looked at in relation to various bills. The question was raised earlier with Sir Stephen about pre-legislative scrutiny and paving bills and so on. Lady Wheatcroft, did you want to come in on this?

Q31 Baroness Wheatcroft: Yes, if I may. As you say, the Youth Justice Board was in an unusual situation in that you were going to be picked up and moved wholesale into the Ministry. It is a hypothetical question, but can you imagine how things might have worked, were your functions to be abolished?

Ms Done: Basically, some of our functions could not be abolished because one of our key functions is to commission the secure safety for children in custody, so we are the commissioners of the units that hold young people in custody. Clearly that could not be abolished. It would have to be done by somebody else.

Baroness Wheatcroft: It is a hypothetical question. If you were a different organisation, doing something that government suddenly decided, "We do not need that to be done" in advance of the legislation being enacted, can you imagine what would have happened to the organisation?

Mr Drew: I will try to answer that because, in a sense, that was potentially the situation we faced in those first three months before the decision to lift us and place us intact into the Ministry of Justice. I think that would have been calamitous for the authority to carry out any functions that were not going to be placed in the Ministry of Justice. This is probably a subsidiary issue to your inquiry, but to illustrate: there was serious consideration given to one of our smaller functions—the responsibility for placing children, deciding where to place children who have been sentenced or remanded to custody, which prisons or other establishments they should go to—being given an alternative location. Had staff known that was going to happen, even though the legislation was still going through Parliament, that decision could have been made 12 months or more before the abolition. I think it would have been very difficult to sustain that function in terms of retaining staff, retaining expertise and having credibility with the people with whom you need credibility in order to deliver it.

There were a number of special factors about our position, but a key one was that decision by the Ministry of Justice, and that did not stem from the constitutional position. It stemmed

from a policy decision. I think I understand what underlies your question and I think you are absolutely right. It could have been very different.

Baroness Wheatcroft: That is very helpful, thank you. I wonder if I could ask, Sir Stephen, whether you think there becomes an air of inevitability often with legislation; once the Government announce that they are going to do something, then it will happen in many cases, because opposition, unlike in the case of the Youth Justice Board, fades away.

Sir Stephen Laws: I do not think pre-emption dictates what Parliament will do. I have never witnessed Parliament saying we cannot change the proposal that Government have brought forward because they have done enough of it now that it does not matter. I do not think that is the case.

I think the rules say that you look at what is likely and you take a realistic view of that. If a bill has received the second reading in the House of Commons, it is very likely that something along those lines will pass, but the rules require you to say Parliament is not a rubber stamp - because Parliament is not a rubber stamp.

Baroness Wheatcroft: With the latest reforms of the health service, for instance, Lord Owen remarked that he felt that it was almost getting a momentum of its own because too much would be done to row back.

Sir Stephen Laws: I think this gets back to the point I made before, which is that legislation serves different purposes. It is true that if government can achieve a lot of what they intend without legislation, then that will happen whatever Parliament does to the legislation that supplements it. If, on the other hand, the legislation is a necessary part of carrying on the whole initiative, then I do not think Parliament will be stopped by what is happening from taking a view on the legislation.

Q32 Lord Lexden: Sir Stephen, could you help us by putting the issue of pre-legislative action in broader historical context. One has the general impression that it has developed and increased perhaps notably in recent years. Is that true? Should one think in terms of the venerable words that it has increased, is increasing and ought to be diminished?

Sir Stephen Laws: It is largely an impression that I have. I share your impression that it is a more frequent issue. I think the factors may be the same factors that affect the development of legislation as a whole. I think there is more detail in legislation. There is more detail put into legislation because of increasing involvement of the courts in administrative matters. I think that we are in a part of the political cycle where more things have been moved out of government and put at arm's length from government. The consequence is that you have legislation that deals with the relationship between government and what is at arm's length. That means that if you want to change the administration of those things you need legislation and, therefore, there is the opportunity for deciding whether you need pre-emption.

When everything is in government, all these reorganisations can happen. They happen between departments of state without the need for legislation, and no question of pre-emption arises. Those are two historical factors. One other historical factor is that I think the Treasury's administration of the new services rules, and everybody's perception of what is needed in that regard has tightened up over the years. The new services rules deal with pre-emption. They also deal with setting up new services with just the authority of the Appropriation Act. I cannot conceive at the moment that a Government would decide to set up a criminal injuries compensation scheme on the authority only of the Appropriation Act, although that for many years was how the criminal injuries compensation scheme was run.

There are legal reasons why that might not be adopted; but there is also a wholly different attitude to the way government actions are authorised.

Q33 Lord Lang of Monkton: Sir Stephen, I have been listening to what you have been saying and trying to work out on what you base your approach to these issues. You mentioned the Ram doctrine, but you seem to be founding more on the Treasury concordat than anything else, and that is a convention, I think your own phrase was "Treasury rule of thumb". I do not know how confident you feel using that as a base for action.

In response to the question, "Is the Government correct to assert the existence of a second reading convention?", one of our witnesses gave us a one-word answer: "No." You seem to accept it. What do you see as the benefits? Are they simply practical administrative benefits or is there more to it? Is it certainty? Is it shortening the implementation gap, or is it something else?

Sir Stephen Laws: If I may address the "rule of thumb" question first. I think the position is that the Treasury is asserting a principle, which is that departments must be responsible and act with propriety in using public money. That means that they should not waste public money on doing things that are going to be aborted by Parliament. Equally, they should not waste public money on carrying on doing what they are doing at the moment in the knowledge that there is a very strong likelihood that things will change. That is the principle. It is the proper use of public money.

Whether or not the second reading rule is a convention, I would say it is a rule of thumb. It is a rule of thumb applied by the Treasury in deciding what it will authorise, and I think there is a degree of flexibility in the Treasury's approach to this. In some ways I think that is inevitable because of the variables in these cases.

There is the variable about what the legislation will do. There is the variable about how likely the change is. There is the variable about how much of the change is capable of being implemented whether or not Parliament approves the legislation that has been put before it. There are all these judgments, but it seems to me that the principle ought to be—from a practical point of view—"Is what the Government are doing the best use of public money?" I cannot see any other principle because, if there were another principle, it would have to be that there is a circumstance when it is justifiable to waste public money. Having operated under the control of the Treasury for over 30 years, I cannot see how any other principle would be accepted.

Lord Lang of Monkton: I think the Treasury iron has entered your soul. But how certain is the second reading convention in the present circumstances where we have coalition Government, where majorities are variable according to the piece of legislation? We have seen the example of the Youth Justice Board and the uncertainty that arose over that. We even have a piece of legislation that has been enacted but, at the will of the Deputy Prime Minister, part of it has not been implemented. I do not think there are any particularly large financial implications there, but it does imply that the second reading convention is somewhat ephemeral.

Sir Stephen Laws: I agree, but I think it is a hurdle you have to cross. It is not a green light to do whatever you want. You will not get permission before second reading in the House of Commons. You may not get permission then. There are other principles that apply and the overriding principle is: is this the most sensible use of the public money you want to spend?

The Chairman: This is a particularly tricky judgment when you are dealing with a second reading in the House of Lords on something like the Youth Justice Board.

Sir Stephen Laws: The rule is the second reading in the House of Commons.

Q34 Lord Goldsmith: This is an enormously interesting debate and the evidence that you have all given is very helpful. I want to focus, if I may, on the principles that are applied. Sir Stephen, I think what you have been saying essentially is that in the context of pre-emption—it would apply to other things, as I understand it—there are two constraints. The constraint is the law, but the law is not much of a constraint in the sense that you cannot do things that you do not have power to do, and you cannot stop doing things that you have a duty to do until Parliament has said so. Subject to that, the executive can spend money and can do a lot of things otherwise. That takes us back to the Ram doctrine, the details of which we could debate if need be.

The other constraint is Treasury permission. While we have been discussing second reading as if it were a constitutional convention, it is, it seems to me, nothing of the sort. It is a rule of the Treasury as to when it will give assent to money being spent.

In your very helpful note, you suggest that we may think there is a third question: is it constitutionally appropriate to do something? You doubt that there is space for that question. You have probably thought more about legislation than anyone else in Whitehall because you have had this problem arising from time to time. During my time in government, I do not recall, on the whole, the question: is it constitutionally appropriate to do something? Is it lawful to do something? Then there is this test of propriety, the full content of which I never understood.

What I want to ask you, therefore, is: is there a space? Have we moved to a position, for all sorts of reasons—the Human Rights Act 1998, the focus on rule of law, the Lord Chancellor's role, all these things—where we need to start thinking more about whether there is space for a constitutional constraint, not just a constraint as to the narrow area of the law, as you have described it, and whether the Treasury is prepared to give its permission, because the Treasury giving its permission still is the executive deciding? Fundamentally, I think that what this debate is about is the balance between Parliament and the executive. I welcome your views.

Sir Stephen Laws: My short answer is that I do not think there is room for this. I think that the rule is a rule for the Treasury, but it is a rule where the Treasury accounts to the Public Accounts Committee in the House of Commons and is supervised by the National Audit Office in its implementation. It reflects—admittedly, going back to 1932—an agreement with the bit of Parliament that is concerned most with money.

I think its operation has to take account of constitutional considerations but Parliament is not a rubber stamp. The rules the Treasury applies take account of the fact that Parliament is not a rubber stamp, and the Treasury is usually very reluctant to give people authority to spend money unless it thinks there is a good reason for doing it.

Lord Goldsmith: Can I raise two points? For reasons which Lord Lang referred to, things have moved on quite a lot since the 1930s in terms of how government runs and in people's perception of the respective powers of the executive and Parliament and the way that this House operates. The first question is: does that make a difference?

The second question is: you have rightly referred us to the supervision of the PAC. Can you recall any cases where the PAC has said, "This was inappropriate expenditure because it was not right, even though it went through the rules and the Treasury gave its consent, to be spending this money at this stage before Parliament had had its say"?

Sir Stephen Laws: I am afraid I do not know and I have not researched it.

Lord Goldsmith: What about the first point? Do you think there is any scope for saying things have moved on in a number of different respects so it is worth looking at whether "propriety" should become "constitutional appropriateness"?

Sir Stephen Laws: As I suggested earlier, I think there is room for some form of authority between, "Have you satisfied the Treasury's rules?" and, "Shall we introduce a paving bill that has to go through both Houses—admittedly probably as a money bill in the House of Lords—authorising the expenditure?" I think the new services rules, as a whole, would benefit if you could sometimes go to Parliament and say, "Here is a reason why we want to spend money we have power to spend. It falls outside the Treasury's normal rules. Can we have authority to do it?" I think there ought to be a way of doing that without having to pass a bill through both Houses. That is the extent to which I think it has moved on, because people expect that more now.

Q35 Lord Pannick: I wonder whether you agree that there seems to be enormous discretionary powers conferred on the Treasury in this area, with very little legal control in terms of what ministers can do if and to the extent the Treasury gives them the money to do it.

Sir Stephen Laws: The question is whether I agree that they are enormous. I think ministers have wide powers. I think there are considerable legal constraints on what ministers can do. Certainly with statutory powers, the example which I referred to was the attempt to revoke the regional strategies in advance of the bill that was going to abolish them. There the court said you could not do that because although you have power to revoke regional strategies, that was a power that was conferred for limited purposes, and one of the purposes was not in order to abolish them without parliamentary approval. So there are constraints on what government can do, certainly with its statutory powers.

Lord Pannick: That is a special case, is it not, because the statute either imposes a duty or it contains some other provision, which means that the conduct of the minister would simply be inconsistent with the statutory provision?

Sir Stephen Laws: I think the decision was based on the notion that the power could only be used for the purposes for which it was conferred. I think there are very few statutory powers that you can say are conferred for the purpose of preparing for legislation. You are driven back to the Ram powers, which are powers to enter into contracts, to incur expenditure within government; I think that is appropriate. There has to be a balance between ensuring that you can make progress with change in a way that does not give rise to all the difficulties that you are likely to run into if you take two years over it, but on the other hand that ensures that Parliament has an opportunity to interfere with proposals that need its approval.

Lord Pannick: Much of your concern I think is pragmatic: that this type of arrangement is the only arrangement that can work effectively to deal with the day-to-day problems that Whitehall faces. My concern is whether it is compatible with the rule of law for such an

arrangement, which may or may not be desirable, not to be contained in any hard law—it is not contained in any statute or any other principle that one can point to. One of the problems is a limited understanding and debate of these principles even in the legal community, let alone in the wider community generally.

Sir Stephen Laws: I wonder if I can convince you that there is an equivalence between the principles that the Treasury applies and the principles that the courts appear to have come to, on the extent to which you can take into account the possibility of a change in legislation. The other part of the regional strategies case was whether or not the Secretary of State could say to people, "You must take into account the fact that I intend to abolish regional strategies in reaching your decision." As I understand what the Court of Appeal decided, they said it goes to weight and not to materiality. You have to look at the individual case and see how you balance the prospect of change coming from legislation and its likelihood against the fact that it is not certain yet.

Lord Goldsmith: I have one question. There is a danger in asking this question because we can both find things that are unhelpful and widen our inquiry. Do you know, from the discussions you have had with fellow parliamentary draftsmen, whether other countries with a similar democratic background adopt the same sort of approach, or whether they look for a higher level of legislative approval, or indeed less legislative approval for this sort of preparatory activity?

Sir Stephen Laws: I am afraid I do not know.

Q36 The Chairman: I think it would be worth asking all of you, if I may, because it comes out of this in practical as well as legal terms: what kinds of organisational change? Perhaps, Mr Drew and Ms Done, you would refer to this in a broader context, which I know your own careers allow. Do you think it would be inappropriate ever for a government to try to undertake change within an organisation before there had been legislative approval for it?

Ms Done: It boils down to the question of the statutory responsibilities of the organisation. That is quite difficult to define—whether you can undertake your statutory functions at this level or that level. Clearly there would be debate about that, but I feel strongly that if Parliament has given consideration to legislation, and passed legislation specifically to set up a body with particular functions, then, while it is understandable that another government might not want that, you have to take the changes around that just as seriously as setting it up. I think that is important.

The most important aspect is, because governments can always in the end do what they want, they should be prepared to listen to all those involved who have a view so that they can find out the most appropriate and the most successful way of making the change, and then not take the changes any faster or in a very directed, rapid fashion, which causes uncertainty and huge risk to some very big services. I think there should be an expectation that that would happen.

I do not think governments would not be able to deliver what they wanted, but on the way there would be better administration of public affairs and less risk to the services that are affected. I think, in our case, if that had been done in a measured way, we could have saved ourselves an awful lot of effort, time, money and uncertainty. We have come out the other end of it, and hopefully the youth justice system will still do well, but it was not necessary, in my view, and I think if these sorts of changes were approached in that way there would be a much better outcome overall.

The Chairman: That is very interesting, and I know Lady Falkner wants to come in on this, but, Sir Stephen, do you feel that the ability to fulfil statutory functions is the only bottom line in terms of acceptable change before legislation?

Sir Stephen Laws: Predictably, I am going to take a legalistic view, which is that either Parliament has put in place law that requires you to go back to Parliament before you change something or it has not. If it has not, then it seems to me it is legitimate to try to change it.

Q37 Baroness Falkner of Margravine: This question is to Frances Done. While I accept that you are coming from the perspective of what has happened to the Youth Justice Board, the question is more general. I wonder whether the process that you would like to see in an ideal world is not somewhat unrealistic, given that governments are elected for five-year cycles and elected on the basis of an election manifesto; that they command a majority in Parliament to do what they said they might do in their manifesto; and that in order to achieve, particularly early in their term, the changes that they have promised the public they would achieve, there may be circumstances where they would not be able to go through this very deliberative, slow consultation period, particularly not with the emphasis that you gave on transparency. In my experience, transparency is sometimes not possible at the peak of very difficult negotiations. In fact, transparency makes different sides take positions that they would not normally take. Certainly in international politics, which is my area of expertise, that is the case. When you are negotiating a treaty, you tend to keep relatively quiet until you have got to the point where you can express your positions publicly. Would you accept that what you have described as something desirable would be a scenario that would be difficult to deliver, given the exigencies of a political timetable?

Ms Done: My comments really are based on the arm's-length bodies established, which then may not have a future. I do not accept that it needs to take a long time. I think you can have a genuine, open consultation process which brings in everybody's views, and of course there will be different views, and then the Government decide. If that process is done in a calm, organised way, you will get a much better outcome.

To give an example—and I am obviously not speaking on behalf of the Audit Commission, although I was the managing director there in my previous life—the bill to abolish the Audit Commission is still in draft. There has not been any speed anyway. But the process of involving all those involved in audit and inspection and so on from the outset into what should be done if there is to be no Audit Commission would have been far better conducted in that rational, organised way, and the Government, in the end, would still be able to take the decisions they want to take.

I do not see any benefit at all to services or the public or public administration in rushing into decisions, announcing that changes will be made, and then having to manage the process from there until the legislation is finally enacted. That is my view. I have a very clear view that Government have a perfect right to change the arrangements, but there are good ways to do it and not very good ways to do it, and this is something that causes me great concern, even though I do not understand all the legal niceties. I think it is a matter of public policy that these things should be done in a calm, organised way. It does not in any way stop the Government getting decisions that they think are sensible in the long run, but I am sure the process on the way will be much better and the risks and uncertainties will be much less than they have been in the recent cases.

The Chairman: That is precisely the point at which we began, about whether the risks of the balance between pre-emption, as we describe it, and swift action to fulfil policy aims is

now right or should be rebalanced. Thank you all very much. We have enormously valued your time, and it was very useful to us to see both sides of the spectrum together, so I am grateful to you all. Thank you very much.

Sir Stephen Laws QC, First Parliamentary Counsel 2006–12—Written evidence

1. There are essentially two questions for anyone who wants to act in anticipation of legislation.

    - Is it legal to do so? Normally this means "Do I have the power to do what I want to do?"
    - Is it consistent with financial propriety to do so? "Do the rules of financial propriety imposed by the Treasury ("HMT"), the National Audit Office ("the NAO") and the Commons Public Accounts Committee ("the PAC") in relation to supply etc. inhibit the exercise of the legal powers I do have?

2. The inquiry seems to be looking at whether there is a third question "Is it constitutionally appropriate to do so?" 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. Can there be a difference between a project that needs some additional powers to implement and one that is capable of being implemented wholly without legislation? Beyond financial prudence (see below), is there any constitutional reason for restricting the use of statutory powers, even when their exercise would be nugatory if Parliament failed to pass legislation that has been or may be introduced?

Is it legal?

3. Although parliamentarians, understandably, often see the legislation that accompanies a major policy initiative as the means by which they approve the whole initiative, that is not usually what is really happening, at least from a technical point of view.

4. Most major policy initiatives are implemented using a mixture of existing powers and new powers. A Bill is very often introduced for the purpose only of supplementing existing powers with the provisions that are needed to fill the gaps in the current legislative scheme. I described this phenomenon in my article in the Statute Law Review "Giving effect to policy in legislation: How to avoid missing the point" *(2011) 32 SLR 1 at p 6*. Sometimes statutory powers are taken because the Government wants to implement in one way rather than another, even though it would be possible to implement in the other way without legislation. Sometimes the main purpose of the Bill is to ratchet the change, in the sense that the policy initiative, as such, does not necessarily need new powers but may be more effective if those whom it affects are persuaded that it will be difficult or impossible to reverse. (Circumstances suggest that could have been the case for parts of the Health and Social Care Bill.)

5. Change can sometimes work better once it has been accepted that the opportunity to prevent it or to revert to the old system has expired. Those who seek to implement changes to electronic ways of working normally suggest that the benefits of the change are only likely to accrue after facilities to work in other ways are withdrawn. Similar considerations may sometimes apply to legislative changes.

6. A complication is that often Bills are not drafted with the ruthless logic which would confine them to only what is legally impossible without them. I referred in my article to why Bills in practice need to draw a line between ruthless legal logic and the desire, for political purposes, to make them relevant to the wider policy.

7. So, it is often convenient to reproduce existing powers in a form that better fits the context of the new scheme and of the new powers that go with it. Sometimes this may be partly out of legal caution—because it might be only if confirmed in the new context that a proposed use of old powers in new ways would be comprehensible or might avoid being criticised as "unusual and unexpected". Sometimes though, the Bill may go beyond what is legally necessary just for ease of understanding, or to put all the relevant law in one place. That might be done to make the law more effective, by making it more accessible to those who wish to comply with it. Similarly, provisions may be added to a Bill to make it easier to understand why new powers are needed, and therefore how they should be exercised

8. At other times, also, one of the considerations may be to avoid provoking Parliament into thinking that it is being asked to approve only the trivial aspects of a scheme, and is being denied the opportunity to consider and amend the powers on which the core of the new scheme depends. Bills need to attract support in Parliament and both political and practical considerations might cause a Bill to be framed to avoid any suspicion that procedure or legalistic arguments had been used to avoid discussion of the most controversial aspects of its context, or to forego democratic endorsement for the main change. However, although these non legal factors may affect how legislation is drafted, I can think of no example (financial propriety apart) of when a Bill was introduced for the sole purpose of making provision with no practical legal effect. Had such a suggestion been made, it would have been my duty, as First Parliamentary Counsel, to advise against it.

9. In this context the width of existing powers has to be understood in the context of the "Ram doctrine" under which Ministers have the power to do anything a natural person may do provided they have the funds to do it. See http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/30122wa1.pdf. This is still regarded within Government as an accurate statement of the law and has been accepted by the courts, although aspects of its scope have been questioned (see *Shrewsbury & Atcham Borough Council and another v Secretary of State for Communities and Local Government [2008] ECWA Civ 148*).

10. That case also dealt with other questions about anticipatory action pending legislation. A request was made for proposals to be submitted to the Secretary of State in connection with local government re-organisation and other preliminary steps were taken before the Act providing for re-organisations had passed; but they were found to have satisfied requirements in the Act for taking of those preliminary steps (principally on the ground that they were retrospectively adopted or validated by the Act itself).

11. The case is also of interest because it discussed an argument that the procedure adopted was inconsistent with an obligation undertaken by the Government, under the European Charter of Local Self-Government, that local government powers

should not be "undermined or limited" by another authority except "as provided for by the law" (article 4.4). The court did not find this concept relevant and the judge in the administrative court thought the concept of "undermining" was "too vague to be justiciable".

12. Other relevant cases about the legal position of anticipatory action are those relating to the abolition of regional strategies, where issues arose, firstly, about the use of a power of revocation to remove regional strategies from consideration in advance of the passing of legislation to remove the need for them. Then, in a later case, the court considered a direction from the Secretary of State to planning authorities to take into account the legislative proposal to abolish the need for regional strategies when deciding what weight to give them in planning decisions. (See *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government [2010] EWHC 2866 (Admin)* and *R (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government and another [2011] EWCA Civ 639*.)

Is it consistent with financial propriety?

13. What the Ram memorandum says about financial propriety is also the basis for the current practice, although the memorandum needs to be read in the light of the latest guidance on the rules of financial propriety.

14. The starting point is the 1932 concordat mentioned in that memorandum. But the most relevant document now is "Managing Public Money", the HMT document that replaced "Public Accounting" and sets out the rules of financial propriety governing Government spending and accounting, including how the concordat is to be applied in practice. http://www.hm-treasury.gov.uk/d/mpm_whole.pdf

15. Managing Public Money is issued with the authority of HMT, but of course reflects rules which the NAO and the PAC would expect to be obeyed. The concordat is discussed in Annex 2.1 of that guidance. (There is of course a foundation in law for those rules: the Government can only lawfully spend money that has been voted under supply procedure or is otherwise authorised by law eg by charges on the Consolidated Fund.)

16. On the other hand, things have changed in one important respect, since Ram's day, when it was believed that the Appropriation Act was capable, not only of authorising expenditure on doing things within existing powers, but also, in the process of authorising expenditure, of providing implied statutory authority for something to be done that was otherwise outside the capacity of Government. That is a logical view; but it would not be relied on today. In any event, the more general form in which ambits are expressed in modern supply legislation would make that impracticable to do so.

17. Managing Public Money and its predecessors are, I believe, where the so-called "second reading convention" comes from: see para A2.5.17.

18. Generally speaking, as a matter of financial propriety, HMT will not allow an existing authorisation in response to a request for resources, or a supplementary, to cover expenditure on using existing powers (including Ram powers) where the value of

expenditure is contingent on legislation which has not yet been passed. I believe this principle is also taken into account by HMT in determining how existing ambits in the estimates and supply and appropriation legislation are to be construed. Although those ambits are often construed as allowing departments to incur expenditure within their departmental allocations on the preparation of new policy or of legislation to implement it, they are not taken to allow expenditure on anticipatory implementation of proposed legislation.

19. There may, of course, be cases where a department could say that they would spend the money on implementing the scheme in a non-statutory way, even if the Act did not pass. It is difficult to see how that could be said to fall outside an existing ambit that would otherwise cover it. Nevertheless, the proposed legislation might still be a relevant consideration (on normal financial propriety and "value for money" grounds) if it were likely that the Government would abandon a non-legislative implementation in the face of a defeat for the legislative route in Parliament.

20. What Managing Public Money says is that money can, with the required authority, be issued out of the Contingencies Fund for expenditure that is contingent on the passage of legislation; but the conditions set out in the guidance must be met in accordance with the principle that Government money should not be wasted. There is room for considerable flexibility and some indulgence in the application of the conditions and the rules relating to the concordat, but my experience is that the rules are usually applied quite strictly—although I believe that the financial year requirement must have been relaxed more often when the parliamentary session and the financial year overlapped by more than they do under current practice.

21. These rules of financial propriety also engage the personal responsibilities of departmental accounting officers. If a Minister wanted to spend money in contravention of the guidance in Managing Public Money, the department's Permanent Secretary, as its chief accounting officer, would feel obliged to object and not to authorise the spending without a written direction from the Minister, about which the NAO and PAC would be informed, and which the latter may decide to investigate further.

22. At one time, I wondered whether the specification of the Commons second reading in what is now para A.2.5.17 of Managing Public Money had anything to do with the taking of the Commons money resolution for a Bill at that stage. The money resolution usually takes a form that provides House of Commons endorsement for expenditure arising from the Bill. However, I now believe that HMT think the only reason for the rule of thumb is that, if a Bill gets a second reading in the Commons, that is a good indication that the principle contained in the Bill will eventually reach the statute book in some form or other. Neither the money resolution nor its contents are regarded as significant factors in practice.

23. I have wondered why a department (instead of seeking to draw on the Contingencies Fund) could not make an original or supplementary request for resources to cover expenditure, in anticipation of legislation, on the exercise of powers that it already has. I know of no example of that happening, even where the timetable for supply procedure would have allowed it; and I think the reason is because HMT would not allow it to happen.

24. It is worth pointing out that financial propriety can pull in different directions when legislation is in prospect. A person who is subject to statutory duties must continue to perform them until the duties are removed by Parliament. However, the questions of whether and how to exercise a discretion need to take account of the possibility that money would be wasted if legislation before Parliament is enacted in the near future (e.g. money spent in the meantime might be wasted if waiting for the legislation would result in lower expenditure).

Paving Bills

25. There have been examples of paving Bills. I have worked on a number. There are two main reasons for these Bills. These reflect the matters discussed above.

26. First there are Bills involving statutory corporations. They are unable to take advantage of the Ram doctrine, which (as Ram's memorandum makes clear) only applies to Minsters. There was a paving Bill for the privatisation of the water and electricity industries, where the problem was that it was thought the functions of the nationalised corporations did not include devoting resources to facilitating the project to dispose of their undertakings. A Bill was passed to enable them to work with the Government and generally to prepare for privatisation—and to do so, in effect, in the interests of their as yet non-existent successors (see section 1 of the Public Utility Transfers and Water Charges Act 1988).

27. The other category is where the Contingencies Fund arrangements and expenditure under the concordat will not do the trick for other reasons—e.g. because of how much needs to be spent. (See, for example, the Planning-gain Supplement (Preparations) Act 2007.)

Policy

28. This is not my main area of expertise, but as the leader of the Office of Parliamentary Counsel, I did have a certain amount of experience of "change management". Legislation is about change. Pace is very often extremely important in the process of change. A balance has to be struck between, on the one side, consulting properly on a proposal for change and allowing time for proper consideration to be given to it before it goes ahead and, on the other, getting on with it before anxiety about it undermines morale and weakens the chances of an effective and successful transition to new arrangements.

29. Timetables for efficient change, as well as political timetables for landing results, are usually much shorter than those for legislation. The existing arrangements seem to me, on the whole, to contribute an inevitable and necessary compromise, which balances competing considerations in a way that is consistent with legal principle and the rules of financial propriety.

January 2013

Lord Lester of Herne Hill QC—Written evidence

> "For centuries the executive has, in certain areas, been able to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted. This is no longer appropriate in a modern democracy. The Government believes that the executive should draw its powers from the people through Parliament."
> *The Governance of Britain*, July 2007, CM 7170, paragraph 14.

1. This memorandum seeks to assist the Constitution Committee in answered the important questions it has posed.

2. The existence of the Ram doctrine was revealed in a Report on Privacy and Data Sharing issued by the Performance and Innovation Unit of the Cabinet Office in 2002. The PIU Report stated (paragraph 3.46) that:

   "When considering what powers one has to share data, one must first consider the type of public body one is dealing with. Generally speaking, a government department derives its powers from a number of different sources – Specific statutory powers – known as information gateways – to share information with others – Implied powers – the power to do anything that is necessarily incidental to express powers, and – the 'Ram' doctrine – ie., a department can do anything that a natural person can, provided it is not forbidden from doing so."

3. A footnote reference inn the PIU Report explained that:

   "This derives from advice by Sir Granville Ram, First Parliamentary Counsel 1937-1947. It continued: (paragraph 3.47) "By contrast, statutory bodies derive their power to act from their creating statute, and have no *vires* to act outwith their statutory powers."

4. The PIU Report suggested that data could be freely shared among Government Departments on the basis of the Ram Doctrine. The Report was discussed at a seminar convened by JUSTICE and Sweet and Maxwell in December 2002 when Ms. Jay, a solicitor at Masons, observed in her paper that she had been told that all civil servants know of the Ram Doctrine but she could not find it on the LCD website and did not know how one could find a publicly available copy.

5. It was this that prompted me to table Parliamentary Questions on the subject, and to write an article (with Dr Matthew Weait who had attended the seminar on my behalf as my Parliamentary Legal Officer) published in *Public Law*, in 2003 (pages 415-28).[4]

6. It also prompted me to draft Private Member's Bills to place Ministers and Civil Servants under Parliament rather than the Crown, and setting limits to their powers: the Executive Powers and Civil Service Bill 2003; and the Constitutional Reform (Prerogative Powers and Civil Service) Bill 2006 (second reading 3rd March 2006).

7. The Written Answers to my Parliamentary Questions given by Baroness Scotland of Asthal in 2003 are reproduced in our *Public Law*, article, at pages 416-18. The Government explained that it relied on common law powers as well as prerogative powers.to authorise government actions.

8. I also gave evidence to the House of Commons Select Committee on Public Administration, on 8th May 2003. Their Report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Fourth Report of Session 2003-04), HC 422, 16th March 2004, and the draft Ministers of the Crown (Executive Powers) Bill, cover much of the ground being examined by the Constitution Committee.

9. Reliance on common law powers is controversial. The division of opinion within the Court of Appeal, in *Shrewsbury & Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, illustrates the controversial nature of the assertion that government departments have powers derived from the common law in addition to those conferred by statute or under the Royal Prerogative. Like Lord Justice Carnwath (as he then was) [paragraphs 45 and 47], and Lord Justice Waller [paragraph 81] I sympathise with the accepted wisdom that Ministers have only two sources of power, statute or prerogative.

10. If the Crown has common law as well as statutory and 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

[4] Dr. Weait is now Professor of Law and Policy and Pro-Vice-Master (Academic Partnerships) at Birkbeck College, London University..

far as to enable the Government to pre-empt Parliament's legislative process, and to contend otherwise would be contrary to the doctrine of Parliamentary supremacy.

11. A concept of public powers derived more broadly from the common law would also lack legal certainty and be incompatible with modern principles of democratic government under the rule of law. In *Entinck v Carrington* (1765) 19 State Tr 1029, Lord Camden CJ held that the exercise of governmental authority directly affecting individual interests must rest on legal foundations. I agree with Laws J (as he then was) in *R v Somerset CC, ex p. Fewings* [1995] 1All ER 513, that, while private persons may do anything they choose which the law does not prohibit, a public body is in a different position and may take action only if it is justified by positive law. It follows that the decision by Sir Robert Megarry V-C, in *Malone v Metropolitan Police Commissioner* [1979] Ch 244 was wrongly decided. There must be adequate protection in domestic law against arbitrary interference by public authorities: see the judgment of the European Court of Human Rights in *Malone v United Kingdom* (1984) 7 EHRR 14, paragraph 67; *R (Gillan) v Metropolitan Police Commissioner* [2006] 2 AC 307, paragraph 34, *per* Lord Bingham of Cornhill.

12. The constitutional principle of legality essential to the rule of law requires the exercise of Ministers' powers to be authorised by prior law. Judicial review provides common law safeguards against the misuse of public powers in accordance with the principles of legality, fairness, and rationality.

13. Where the rights and freedoms protected by the European Convention on Human Rights are implicated, Section 6 of the Human Rights Act 1998 expressly requires Ministers to act compatibly with those rights. But constitutional rights are more extensive than those protected by the Convention. For example,, the common law rights to a fair trial and to equality without discrimination are broader that the protection given by Article 6 and 14 of the Convention.

14. In terms of the Convention, and the Human Rights Act, Ministers of the Crown are in the same position as statutory authorities in being bound to act compatibly with the Convention rights. But in terms of British constitutional principles, Ministers are also directly accountable to Parliament for the way in which they exercise their powers.

15. Constitutional conventions differ from rules of law. They are not enforceable by judicial process but are sanctioned by settled practice and political convenience. There can be no authoritative source to which reference can be made to ascertain whether a convention exists or what it is. One can only refer to works on constitutional law or on constitutional or political history or the biographies of public figures: Halsbury's Laws of England: 4th ed. (1996), title, Constitutional Law and Human Rights, paragraph 20.[5]

16. I am not aware of the existence of a convention that HM Treasury is the Guardian of Parliament's interests in Whitehall and have been unable to locate the source of such a convention in independent works. It is not included in the principal conventions listed in Halsbury's Laws, Vol. 8(2), above, paragraph 21.

17. In my opinion, a convention on pre-legislative expenditure would be inconsistent with the two constitutional doctrines upon which our Parliamentary system of government is based: Parliamentary sovereignty or supremacy and the rule of law.

18. A notorious example of the abuse of prerogative powers occurred in relation to the Chagos islanders case, where they were used by the Secretary of State to overturn a judgment of the Court of Appeal in favour of the dispossessed: see the judgment of the Court of Appeal *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (N0. 2)* [2007] 3WLR 768.

19. The Chagossians had been forcibly removed from their homes, and the central island of Diego Garcia had been leased to the United States for use as a military outpost. Mr. Olivier Bancoult brought a successful judicial review claim on the ground that the Order in Council by which this was done was beyond the powers of the Secretary of State. In response, the Rt Hon Robin Cook, the Foreign Secretary, repealed the Order and announced that he would not appeal against the decision, so allowing the Chagossian's to return home. However, in 2004 a second Order in Council made by the Rt Hon Jack Straw QC MP reinstated the off-limits nature of the Chagos Islands. The new Order was struck down by the Divisional Court and the Court of Appeal. However, the House of Lords decided, by three to two, that the Order had been

[5] I should declare an interest as a contributor to this work.

validly made and that national security and foreign relations considerations barred them from examining the matter further.

Some Proposals for Reform

20. In June 2007, I agreed to become unpaid independent adviser to the Rt Hon Jack Straw QC, MP, at the Ministry of Justice on aspects of constitutional reform, including human rights and prerogative powers. I did so for some fifteen months. I was optimistic that the Government would introduce much needed constitutional reform because of his published commitment to reform, and encouragement from the new Prime Minister, the Rt. Hon. Gordon Brown MP.

21. Mr Straw had written an essay entitled "Abolish the Prerogative" in A. Barnett, ed., *Power and the Throne: The Monarchy Debate* (1994) declaring that

"The royal prerogative has no place in a western democracy … Accountability of the executive is fundamental to any democracy. Where power is based not upon statute but upon the Royal Prerogative it is this accountability which suffers… Much of the discussion about the Royal Prerogative centres on the way it has been used as a smoke-screen by ministers to obfuscate the use of power for which they are insufficiently accountable. That is entirely right."

22. In July 2007, the Government published a Green Paper, *The Governance of Britain*, which discussed prerogative powers (pages 15-23). It stated (paragraph 24) the Government's belief that "in general the prerogative powers should be put on a statutory basis and put under stronger parliamentary scrutiny and control. This will ensure that government is more clearly subject to the mandate of the people's representatives. Proposals in relation to certain specific powers are set out below and can be addressed now. The Government also intends to undertake a wider review of the remaining prerogative executive powers and will consider whether, in the longer term, all of these powers should be codified or put on a statutory basis."

23. When it became apparent that the approach suggested in my Private Member's Bill was too radical, I advised (on 19th September 2008) that one option would be to mirror the approach taken in clause 4 of my 2003 Bill by establishing an Executive Powers Review Committee to review and report to Parliament annually on the exercise of executive powers. The Committee would report on any circumstances in which it considered that the exercise of executive powers ought to be considered by

Parliament and authorized by primary and secondary legislation. If the report was approved by both Houses of Parliament, the responsible Minister would be bound, within 18 months, either to introduce legislation, explain to Parliament the reasons for not doing so, or make an order authorising the action which would have to be approved by both Houses. The Government would retain ultimate authority to reject Parliament's proposals, but Parliament would be able to hold Ministers to account for doing so and would be able to do so in an informed manner.

24. I advised that an alternative would be to adopt the approach suggested by the Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* by placing a duty on government to provide details of Ministers' executive powers to Parliament. A specially established Joint Select Committee would then report to Parliament suggesting reform of those executive powers and would produce draft legislation which, if enacted, would put their proposals into effect. In drafting their report, the Committee would be obliged to have regard to certain principles, including the necessity for Ministers to act quickly without prior Parliamentary authority or approval. This approach would provide a democratic safeguard to the use of executive powers. Parliament would have the power to subject the exercise of the Prerogative to procedural requirements, but should not do so where this would inappropriately encumber Government activity.

25. In the event, the Government rejected both options. The Constitutional Reform and Governance Act 2010 failed to meet the expectations created by *The Governance of Britain.*

February 2013

Lord Lester of Herne Hill QC, Professor Sir Jeffrey Jowell KCMG QC, Rt Hon Lord Brown of Eaton-under-Heywood and Rt Hon Sir Stephen Sedley—Oral evidence (QQ 54-68)

Transcript to be found under Rt Hon Lord Brown of Eaton-under-Heywood

Rt Hon Sir Stephen Sedley, Lord Lester of Herne Hill QC, Professor Sir Jeffrey Jowell KCMG QC and Rt Hon Lord Brown of Eaton-under-Heywood—Oral evidence (QQ 54-68)

Transcript to be found under Rt Hon Lord Brown of Eaton-under-Heywood

Professor Christopher Skelcher, University of Birmingham, and Dr Katharine Dommett, University of Sheffield—Oral evidence (QQ 1–22)

Evidence Session No. 1. *Heard in Public* *Questions 1 - 22*

WEDNESDAY 16 JANUARY 2013

Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lexden
Lord Pannick
Baroness Wheatcroft

Examination of Witnesses

Professor Christopher Skelcher, Professor of Public Governance, University of Birmingham, and **Dr Katharine Dommett**, Research Fellow, University of Sheffield

Q1 The Chairman: Good morning, and thank you very much for coming on this cold, miserable morning. It is very good to see you both. Thank you also for your written evidence, which I know the Committee has found very useful. We are just embarking on this inquiry; you are our first witnesses to give oral evidence. We are focusing on three areas: the constitutional implications of pre-emption of Parliament, in so far as it can be described; the financial questions that arise from that; and then the area in which I know you two are most interested, which is organisational issues which result from changes that are made by legislation to large bodies and the impact that that has if the legislation is not complete. I wonder if you would like to a make a brief opening statement.

Professor Skelcher: Thank you very much. It is important to distinguish between any intention to pre-empt Parliament and action that may in effect have that consequence. Certainly, from the research we have been doing, it is very clear that departments are conscious of the authority of Parliament and the legislative frameworks within which they work. However, that legislation is open to a considerable amount of discretion. The legislation may be framed in quite a broad way; there may be considerable discretion to Ministers, and so judgment is particularly important when departments decide whether to take action to start reforming bodies prior to legislation. We would recommend that there should be more transparency in how those decisions are made and how that judgment is exercised.

In terms of actions that have some effect, here we are dealing with what we have called the climate of inevitability. Our sense is that once organisations begin to be reformed—albeit that that is within the legislative competence of ministers—there begins to develop a sense that reform will happen, and that begins to shape the way that people think and talk about the future of those bodies. That is a much more difficult area to control or regulate. That is probably the main area in which these issues about pre-emption arise. Our key concern is to increase the level of transparency about the basis on which decisions are made to change bodies prior to legislative approval.

The Chairman: Do you have anything to add, Dr Dommett?

Dr Dommett: No, thank you.

Q2 The Chairman: That was very helpful, Professor Skelcher, because it leads directly to our first area of interest, which is whether there should be general principles guiding this kind of activity by governments. If so, are they identifiable, for example in government publications? We had a short inquiry into the Cabinet Manual, which is intended as a guide to executive action, but there is no reference to this type of activity there.

Professor Skelcher: There are three principles that I would argue should underlie this. The first is that action should be within the legislative authority of the minister or the department. That has to be the primary principle. Secondly, related to the other area of your interest, expenditure in advance of legislation reforming bodies needs to be within the accepted public expenditure rules. Thirdly, and this comes back to the point I made earlier, there needs to be sufficient transparency, and transparency should be proportionate to the scale of the change and the significance or controversy regarding that particular body. I can amplify that a little bit with reference to your second question, which is the existing guidance on these issues. There are two or three documents that spell out these issues in more detail. I can provide a brief supplementary note that outlines these subsequent to this evidence session.

The Chairman: Yes, that would be helpful.

Professor Skelcher: The first is the Cabinet Office document, "Public Bodies: A Guide for Departments". That has a chapter that is concerned with dissolving a public body. That chapter starts by making clear that a public body continues to exist as long as its founding instrument is in force and that, where ministers decide to begin to wind up its affairs in advance of legislation, this should be done in such a way that it does not conflict with the legal duties of that body. I think that is a very clear statement of expectation in relation to the legal standing of the body and the discretion available to Ministers. The second document relates to public expenditure: the HM Treasury document, "Managing Public Money", which is, in a sense, the bible for the Treasury and for the Government in managing public money. In chapter 2 of that document, there is a statement that relates to the issues with which you are concerned. It explicitly recognises that sometimes ministers may be anxious to start a new activity where there is not explicit parliamentary authority. It says that limited steps can be taken there to spend money on those activities, subject to Treasury consent, and there is an annexe that provides further details on those consents.

In the documentation both the questions of legal authority and expenditure in advance of legislative approval for reform of a body are spelt out. What is not clear—it is an issue that we have not researched and as far as we can tell no one else has researched—is how those

guidelines are applied and what kinds of judgments and discretion are used in applying those guidelines. The guidelines that relate to managing public money are much more specific because they talk in the annexe about any significant expenditure in advance of legislative authority having to be reported to Parliament and going through particular procedures. So that seems to be tied down more tightly than the general question about the amount of reform that ministers could make to a public body in advance of legislation.

Q3 Lord Hart of Chilton: What is the date of those documents?

Professor Skelcher: "Managing Public Money" was updated in May 2012.

Lord Hart of Chilton: What about the original?

Professor Skelcher: I do not know the date of the original but I think it is early 2000s. As for "Public Bodies: A Guide for Departments", the latest version is June 2006, so that is slightly dated.

Lord Hart of Chilton: They seem to be assertions of power, rather than illustrating all the principles from which they derive. There is a question of vires of ministers. I am puzzled as to—apart from assertions they can do things—where they think they got the power to do it.

Professor Skelcher: That is the key question. In the bodies that we have looked at, where there have been considerable changes in advance of legislation—for instance the regional development agencies—there have been a lot of statements to Parliament about the changes that are taking place. What is not evident is the basis on which those judgments are made and the legal authority. I imagine that that is part of the submissions that go to ministers, but clearly those are confidential and we do not know what is in them.

Lord Hart of Chilton: There is still in my mind a puzzle as to where it comes from.

Q4 The Chairman: I think the difficulty perhaps arises with the phrase that you quoted in your opening remarks about the capacity to carry out their statutory duties or responsibilities, because that is a pretty all-embracing phrase, is it not?

Professor Skelcher: It is. Constitutional lawyers will have a better view than me about the way in which legislation is framed, but it does seem to me that there is a lot of discretion in legislation; quite a lot of it may be permissive and there may be considerable discretion to ministers to give guidance or to vary resources. I think that question is central.

Q5 Lord Lexden: The guidelines and codes to which you have referred have only come in the last few years, so what happened before that? Was there complete discretion?

Professor Skelcher: It is difficult to say. This is an area which, as far as we know, has not really been researched. There are some examples in the past of changes to public bodies in advance of legislation. One is the creation of the Strategic Rail Authority towards the end of the 1990s. Some of the functions of the British Railways Board and the Office of Passenger Rail Franchising were brought together in a shadow Strategic Rail Authority, but legislation to create the body was not forthcoming for another year or two. It seemed to us that, in that case, the body was effectively exercising the functions of its predecessors. The legislation then formalised that and gave it additional functions. However, the historical picture is unclear.

Q6 Lord Crickhowell: I can give an early example. I noted that the examples that you gave in your paper were all about running bodies down, not about creating them. In 1987, after the privatisation of the water industry, the Government announced the setting up of the National Rivers Authority. I was asked to chair and set up not the National Rivers Authority initially but the National Rivers Authority Advisory Committee. That was a mechanism designed to deal with exactly this problem. We were given limited scope, we took offices across the river, and we recruited initial staff. I cannot recall exactly the legal authority that lay behind that preliminary step. We were in existence for quite a long time before the actual National Rivers Authority received statutory backing and came into existence and we changed into it. Have you knowledge of the background to that particular situation?

Professor Skelcher: Not to that particular situation, but there is some information on an analogous situation, which was the creation of the Committee on Climate Change. This committee was created de novo but the legislation had not yet passed Parliament. The creation of the advisory body—and perhaps this was the same in your case—was done as an administrative act because it does not necessarily require legislation if it is an advisory non-departmental public body. Once the legislation is passed it can be formalised into an executive body which has additional functions.

Q7 Lord Goldsmith: This is really the heart of it: whether there is a new practice that has been developing recently of anticipating changes that Parliament is going to approve or whether it goes back a long way, and what the constraints are. Obviously a body cannot exercise any function that has not yet been conferred, but there is a lot that can be done otherwise if the only constraint is financial. When I was in government I am sure I appointed advisers from time to time and Parliament did not approve that. That is a very common thing to do, as are general powers to spend money as long as it is within your budget. I understand historically it is difficult, but can you say anything about how extensive the practice is of anticipating legislation, both now and whether it is a recent phenomenon? We have Lord Crickhowell's example; his may be exceptional or it may indicate a generality that was taking place at that time.

Professor Skelcher: Unfortunately that is not what I am able to provide, because these are all very individual cases. It is an area that, at least, scholars in the public administration and government field have not really looked at. It may be that legal scholars have considered this in some detail but I do not know. As for the extent to which it is a new practice or not, my suspicion is that it is not a new practice but that perhaps governments in the last decade or two have been more eager to realise their manifesto promises because their manifestos have tended to be more specific than they were 20, 30 or 40 years ago. It may be—I speculate here—that there is now a greater desire to begin to change bodies prior to legislative approval whereas in the past we may have had a white paper, then the legislation, then the shadow body, and then the actual body would come into existence at a future date. You would have a bigger gap between Royal Assent and commencement and creating that body. But that is an impression and it may be that your other witnesses are able to cast more light on that than we are able to.

Q8 Lord Goldsmith: Regarding the three case studies you give in your written evidence, the first two are undoubtedly in relation to abolition and running down of bodies, the third not entirely, and that seems to depend on other powers in order to finance what is going on. Have you any sense of how many of these examples of anticipating legislation are

anticipating something that is to come into existence, rather than anticipating the rundown or abolition of a body?

Professor Skelcher: It depends on the historical period. Currently, most of the reforms are about running down or merging them because of the Public Bodies Act 2011 and because of the philosophy and approach of the current Government. That is the current position. In relation to these bodies—for instance the regional development agencies—there has been lot of information provided—for instance in the Local Growth White Paper—about what would happen to the functions. There have been a lot of ministerial statements to Parliament about progress in reforming those functions. That seems to me very positive and to be encouraged. What would help would be a little more in terms of that question of legal basis.

Lord Goldsmith: And transparency.

Professor Skelcher: And transparency.

Q9 Lord Pannick: In the examples that you have looked at, is there any evidence that those involved either in running down or in helping to create something that has not yet got parliamentary approval, are aware of this constitutional issue. Is there any evidence that they are asking questions of the Treasury or the Government as to where their authority comes from and what the limits are on what they can do? Is this a matter of discussion?

Professor Skelcher: The civil servants that we have talked to in this research are very conscious of the authority of Parliament. From the informal discussions we have had with them we get the sense that legal advisers are intimately involved in these discussions and that the parliamentary liaison functions of departments are involved. Judgments are made about the level of contention of particular proposals, and that will influence the extent to which there is a willingness to make changes in advance of legislation or to hold back longer and to wait for clear parliamentary approval. I think the civil servants are very aware of these legal issues, not least the possibility of judicial review, which they are keen to avoid.

Q10 The Chairman: There are other risks. The question that arises is whether these things are done for political purposes and the risks, which as you say may be identified by civil servants, fail to be acknowledged. How do you mitigate such risk? It is not about moving pieces on a chessboard; it is about very large organisations with huge manpower and other organisational questions. One of the issues we are going to look at next week, is the troubled history of the Youth Justice Board, first about to be abolished then not being abolished. Do you have any feeling about what could be done to mitigate those potential risks?

Professor Skelcher: In terms of bodies where there is contention or where the changes are deemed to be significant, the idea of setting out in some arena the steps that are intended to be taken in advance of legislation would be helpful. It might be in the explanatory notes to the bill or it might be in the impact assessment that accompanies proposals to change bodies and that sets out the various options, costs and consequences. That would be a helpful mechanism to assure Parliament of the steps that are intended to be taken and the justification for those.

The Chairman: I have been rather emphasising the negative. Lord Lexden, did you want to talk about the benefits?

Q11 Lord Lexden: Your written evidence very usefully refers to the existence of benefits for management and employees, but I do not think it sets out in detail what those benefits are. Perhaps you could say a few words about that. As far as the Government are concerned, one can see clearly what the benefits are of getting on with implementing election manifesto commitments, something that governments always like to draw to public attention, and of reducing the amount of time between passing legislation and bringing it into effect. Of course, there a great deal of danger lies. Could you comment on those aspects of the benefits?

Professor Skelcher: The benefits for managers and employees in public bodies are to do with certainty. The major issue when any kind of organisation, public or private, faces some challenge or threat to its existence is that skilled employees leave, staff are not replaced and board members leave. The fact that there is a path mapped out for that body, at least to some degree, is helpful in enabling it to maintain its services and functions, because individuals know what the position is and are able to make informed judgments. There are difficulties—one of the issues may be appointments to public bodies' boards in positions where there is change, and whether departments are able to recruit individuals into those boards. Those are important benefits of this ability to make some kind of change in advance of legislation.

Q12 Baroness Falkner of Margravine: It is very interesting to hear you say that, because my recollection of the formation of the Equality and Human Rights Commission was precisely the opposite. There were five different bodies that were going to be merged. There were clearly going to be winners and losers among the different bodies and, long before the legislation was passed, people started jockeying for position as to who would get what jobs, including on the board, but especially in the executive roles. If I remember correctly, there were significant payouts made to certain staff and certain bodies because it had not been done the way it should have been and there was potential for legal action. It would be very interesting to know—in terms of not just bodies winding down but bodies that then morph into something different—what the tensions are. Do you think there would be greater risks in that regard? That was an instructive case for me because it was not creation or abolition. It was quite different.

Dr Dommett: The cases that we have been looking at have shown real diversity about how these situations are handled. It comes back to the need for transparency. There is a wealth of different examples that could be given to show the difficulties that happen behind the scenes through the creation or the process of merger or abolition. The difficulty arises when there is not clarity about what is happening in these situations. You can quite often see that when these issues are not addressed then progress is not made. When an indication of abolition or creation is happening then it throws the organisation or the potential organisation into greater confusion. It stores up problems for down the line. I take your point. There really is no one answer here. We have seen a wealth of different experiences and it is potentially because there is so little clarity around what should happen in these situations that there is no clear way to resolve these issues.

The Chairman: This seems to be the problem: there is no rubric which covers all or any of these things.

Lord Crickhowell: A comparable example that might be worth looking at is the creation of the Environment Agency, where a number of powerful and important bodies were

brought together and where those competitive and employment issues were writ large and had to be resolved. It would be interesting to look at how that was handled.

Q13 Lord Goldsmith: I am sure that those who are making these arrangements will say the benefit is that we can do the preparatory work so that when Parliament has given its approval, the body, whatever it is, can hit the ground running. Does your evidence show any examples where they hit the ground running in the wrong direction?

Professor Skelcher: No. We do not have any evidence on that at the moment. We can work on that.

The Chairman: The more we get into this the more obvious it becomes that this is an area that you have done an enormous amount of interesting work on but there are vast areas which are simply under-examined.

Q14 Baroness Wheatcroft: I was fascinated to read your written evidence. One of the areas you highlighted is the changes to the NHS. I think it was Lord Owen who referred to the advance work creating a sense of inevitability. I would be interested to hear how extensive you think the risk is that, because of what the Government do in advance of legislation, Parliament is effectively pre-empted.

Professor Skelcher: I think the adversarial nature of the legislative process and the two Houses of Parliament provide some assurance that there will be a challenge to proposals as they go through Parliament. The effect is probably more on people working in those organisations, perhaps, than in Parliament.

Baroness Wheatcroft: So people drift off, for instance.

Professor Skelcher: People drift off or they do things on the assumption that this is how things will be in the future. The health case is interesting because it was argued by some that the reforms to the health service, in terms of commissioning at a local level, could have been effected without legislation. What has happened over the last couple of years through the creation of these embryonic clinical commissioning groups illustrates that that may be a valid interpretation. We have effectively shadow organisations, which can take up the reins and in fact are taking up the reins in the near future.

One other example, which I noted in the evidence, was the pre-appointment hearing of the Audit Commission chairman. I am not in any way trying to impugn the integrity of those involved in that process, but what it did was to require a select committee to consider an appointment of a chair to a body on the basis that the appointment would be about skills in running down that body. That seems to be quite a complex problem in this issue of pre-emption, because in a sense the committee is being asked to approve somebody on an agenda where the bill is only in draft form. So there is a tension there between the role of the committee in pre-appointment approval and the role of Parliament in the legislative process. I do not know how one squares that circle or whether there is an alternative mechanism that could be used but, standing back from it and without any reflection on the individuals involved, it seemed to me that that offers some degree of legitimacy to the proposal, because that individual has been appointed on the basis that they are the best person to do that particular job. That running-down was the policy decision of the Government, which is to run down the Audit Commission—here you have a tension

between government policy and the legislative act of abolishing a particular body. That is an example that illustrates some of the complexity in this area.

Q15 Baroness Wheatcroft: That is a very clear example. There has to be a rather muddy middle ground too, of course, where restructuring can go on without needing the authority of Parliament. Are you clear where the line would be? For instance, you pointed to the commissioning bodies within the NHS. What could be done without needing parliamentary authority?

Professor Skelcher: I think it is a case-by-case judgment, because so much depends on what the legislation is, what the functions of those bodies are and how those functions are expressed—whether they are mandatory or discretionary, and how much discretion there is to ministers. It is an area that requires somebody with a legal background to comment, rather than ourselves as political scientists.

Q16 Baroness Wheatcroft: When it comes to expenditure, you pointed out that the legal position is very clear. I am less clear about the number of occasions on which the request for authority has come before Parliament. Are you aware of many instances?

Professor Skelcher: From our very rapid work over the last couple of weeks to put the evidence together, I have not been able to track down any information on this. "Managing Public Money" explicitly talks about procedures and reporting to Parliament, but this is an area that we do not have any data on. It may be an issue that requires greater transparency.

Baroness Wheatcroft: It sounds as if it might be.

The Chairman: Yes. In the example of the NHS the phrase that was constantly used was destabilising the service. That is a different concern from the one about people drifting in and out of particular jobs or whether clinical commissioning groups are in fact simply a replica of primary care trusts under a different name. The difficulty is destabilising the service, particularly when it relates to patients—or customers, as they would be called nowadays in the NHS. Lord Pannick, did you want to pursue that about the nature of change you could make?

Q17 Lord Pannick: It is this fundamental question of what the limits are. I am interested in whether, in practice, your evidence suggests a recognition of where the limit lies. Plainly, if you announce a bill, it is going to create beliefs and expectations. Any expenditure of money is going to be irrecoverable if the proposal does not go ahead, but there must come a point at which the action in advance of parliamentary approval impedes the ability of Parliament to decide on whether the proposal is a good or a bad one. I am interested in whether, in practice—as that is what you are talking about—these limits are recognised and how they are articulated.

Professor Skelcher: I have to say we do not have clear evidence on that. It may be something you are doing in the committee—looking at one or two examples and talking to the people involved in those would help to clarify that. I afraid I am not really able to respond to that question.

The Chairman: There are not any identifiable objective criteria.

Professor Skelcher: As far as the documentation we have been able to identify, there are not.

Lord Pannick: This is a leading question, but would you agree that it is highly desirable that there should be?

Professor Skelcher: It is highly desirable that there should be some clear principles. However, inevitably there is a need for some discretion in this process.

The Chairman: Lady Falkner, you wanted to ask something that emerges from that.

Q18 Baroness Falkner of Margravine: Yes. It is in the context of what you said about those two documents, particularly HM Treasury's "Managing Public Money". You referred to chapter 2. At the moment, we have a convention whereby pre-legislative expenditure may be incurred once a bill has received its second reading in the House of Commons. So if a bill starts its passage in the House of Commons, and if there is going to be expenditure incurred, it can take place once the bill has had its second reading. What is slightly more controversial is when a bill starts in the House of Lords, where we do not have that convention.

The Chairman: The Public Bodies Bill, for example.

Baroness Falkner of Margravine: Quite. It had significant Henry VIII powers. In your view, should we have similar conventions for all legislation in both Houses? Do you think that would be sensible?

Professor Skelcher: It seems to be sensible to have a consistent approach, regardless of where the legislation starts its passage.

Baroness Falkner of Margravine: Do you think the Government should be required to explain in explanatory notes or, in the case of the House of Commons, the second reading debate, what action they have taken or anticipate taking and how much it is going to cost?

Professor Skelcher: I think it would be helpful to have that explained in some forum. That may be in the explanatory notes to the bill, in the impact assessment or in a ministerial statement. That would help to increase the level of transparency regarding the intentions to act prior to legislative approval.

Q19 Baroness Falkner of Margravine: Would you go so far as to say that that sort of thing ought to be incorporated into the Cabinet Manual and into the public documents that you referred to?

Professor Skelcher: If one is thinking about the development of clearer principles, then that would be something that could be considered within either the "Public Bodies" document or "Managing Public Money", or some other single source.

Baroness Falkner of Margravine: What would be the implications of that when you discover things subsequently, particularly where there has been a change of Government? For example, there were the two aircraft carriers that were commissioned, where it subsequently emerged that the contracts for those carriers had been structured in such a way that breaking the contract was going to cost more than the entire cost of the carriers.

While I can see your emphasis on having these principles and this guidance, it could result in misinformation being laid before Parliament. That is why, I imagine, it would be quite hard to do, and successive governments, irrespective of their colour, would resist that.

Professor Skelcher: There are a number of processes occurring at the same time, and part of the task is to join those processes up. There is clearly a process around money. There is a process around vires. There is a process around informing Parliament. Trying to join those processes up in a more systematic way would help to resolve some of these issues.

Q20 Lord Crickhowell: Going back to the difference between the conventions in the two Houses, and the usefulness of having some kind of similar convention in the Lords, is that not a real difficulty? The fact is that the convention arises because the House of Commons can give authority for expenditure. The implication is that a second reading in the House of Commons has given at least a limited authority for expenditure. I do not see how you could have a similar convention in the House of Lords, without breaching that fundamental constitutional convention.

Professor Skelcher: You are correct. I accept that point completely.

Q21 Lord Goldsmith: I started this session with a very clear view of what the answer was. I am now very unsure because you have very helpfully pointed out the many different factors that there are. To some extent, some of the things you have talked about are inherent in any change; any proposal for change then results in risks, the greatest of which is people moving on. We have seen that for example in the Serious Fraud Office over the last three or four years; without there being a concrete proposal people have left because they are worried about their futures. You have talked about the need for clear principles, or we have led you into asserting the need for clear principles; I am not sure which. I wondered if we could lead you at some point, either now or hereafter, if you would be prepared to think about it, to consider the sort of principles that would be appropriate. I think that might help us very much with what we have to do, if that is not an imposition.

Professor Skelcher: We would certainly accept the invitation to offer a short supplementary note that might begin to help to spell some of those out.

Q22 The Chairman: That would be enormously helpful. Like Lord Goldsmith, I feel this is something that if we can only say, "It depends on individual examples", we will not be very helpful. It would be useful to have something that we could at least consider. The point that seems to emerge to me historically, and perhaps you can correct me if I have derived the wrong conclusion, is that the greater determination and explicitness about manifesto commitments and the drive to have real change, particularly in public services, which has occurred over the last decade or so, lead to the kind of confusion that you have described very well in the examples you have given, without there being any framework within which these can be considered by officials or ministers.

Professor Skelcher: Yes, I am sympathetic to that conclusion. I think that is where we are going.

The Chairman: So our role as a committee that tries to draw attention to these matters is to identify that, and then with your help develop some principles, which, as Lord Crickhowell pointed out, in terms of the conventions that now exist, cannot be applied when you have a bill that is relevant to this discussion, like the Public Bodies Bill, introduced

in the House of Lords. We are most grateful to you. Dr Dommett, you were very discreet in your comments; is there anything further you would like to say?

Dr Dommett: Your summing-up captures our experience. We have done a lot of interviews with individuals in public bodies who were trying to implement these changes with very little guidance and very little understanding of how far they can go. There is a real need for greater transparency in this area to aid the individual's ability when tasked with establishing or abolishing these bodies to make sure they are discharging their functions properly.

The Chairman: You have underlined the point again, which I think was made by Lord Goldsmith, that we are talking not simply about dismantling, although that has been a current problem, but about building; Lord Crickhowell's example about the National Rivers Authority and Strategic Rail Authority and other bodies that you mentioned are relevant. It is about creation as well as dismantling. Professor Skelcher, was there anything you wanted to add?

Professor Skelcher: No. Thank you very much for inviting us.

The Chairman: Thank you both very much for coming. It has been very helpful and has certainly put us on the road to further questions and further evidence sessions. Thank you very much indeed.

Professor Christopher Skelcher and Dr Katie Tonkiss, University of Birmingham, and Professor Matthew Flinders and Dr Kate Dommett, University of Sheffield—Written evidence

ORGANISATIONAL CHANGE IN ADVANCE OF LEGISLATION: THE REFORM OF PUBLIC BODIES AND THE NHS

Statement of evidence

Our evidence concentrates on the organisational rather than the financial aspects of the Committee's inquiry, drawing on our analysis of the Coalition government's public bodies and NHS reform process.[6] We focus on pre-legislative action by government in relation to the proposed closure of the Audit Commission and the Regional Development Agencies (RDAs), and proposed reform of NHS commissioning from Primary Care Trusts (PCTs) to GP-led Clinical Commissioning Groups (CCGs). These cases have been selected because (a) they have high political salience for the Coalition government, (b) the proposed reforms have far-reaching implications on the bodies' existence, and (c) they exhibit significant pre-legislative reform activity.

The legislative centre-piece of the Government's reform of public bodies[7] is the Public Bodies Act 2011. It is enabling legislation giving ministers powers by order to abolish, merge or otherwise reform most of those public bodies created through statute. A small number of statutory public bodies were excluded from the Act, as the intention was to reform these using existing powers or by introducing new departmental legislation. There are also a large number of non-statutory public bodies that can be reformed through executive decision. NHS bodies are reformed under the Health and Social Care Act 2012.

Qu. 8. 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 public bodies are created by statute, the legislation tends to concentrate on the duties, functions and powers of a public body and its accountability relationships, rather than on its organisation. Any legislation on organisational matters is generally about governance (e.g. appointment of chair, size of board) rather than its internal structure or staff complement.

As a result, individual public bodies are subject to frequent changes in their organisational structure as a result of decisions by their management, or in response to external events (e.g. changes in policy, legislation, resources, technology, demands from citizens, etc.). The Audit Commission, for example, grew its inspection function considerably in the light of the

[6] The 'Shrinking the State' project is a 3 year study ending in May 2015, also involving Prof Anthony M. Bertelli, University of Southern California. We acknowledge the financial support of the ESRC (Grant Ref. ES/J010553/1) and the extensive cooperation of politicians, civil servants, public body board members, the Public Chairs Forum and the Institute for Government. The views expressed are our own, and do not necessarily reflect those of our interviewees. www.shrinkingthestate.org

[7] This reform covers non-departmental public bodies, as well as a number of non-ministerial departments and public corporations. It does not cover executive agencies.

Labour government's Best Value policy. And one of the most substantial reforms of Whitehall, the creation of executive agencies, took place without the need for legislation.

Consequently, it is not unexpected that the case studies reveal that the Coalition government has been able to make considerable organisational change. Post-May 2010 alterations in departmental policy and budgets have led to downsizing of the Audit Commission and RDAs, including termination of particular activities (e.g. inspections and new investment respectively), and there have also been some transfers of activities to other bodies. These could have occurred regardless of the intention to abolish or reform. But in addition there has been explicit planning for closure, with associated actions such as the extensive transfers of RDA staff. In the NHS case, the agenda has been about facilitating the development of the GP consortia so that they have the capacity to take on their intended statutory responsibilities once PCTs are abolished.

The ability to make major organisational changes in advance of legislation is advantageous from the perspective of a government wanting to realise its electoral commitments. It helps resolve the 'implementation gap' between policy decision and realisation by preparing the ground for a swift change once legislation is enacted. There are also benefits for management and employees.

The danger of planning for change in advance of legislation is that it creates an environment of inevitability. For example, discussion of the Audit Commission is often phrased in terms of 'the abolition of...' rather than, more correctly, 'the proposed abolition of...'. Similarly, the pre-appointment hearing for the new chairman of the Audit Commission was framed by the Government's requirement that the individual should be able to manage the closure of the organisation, even though the legislation authorising abolition was only in draft form.

Qu. 9. 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?

The fundamental constraint on organisational change in advance of legislation should be that the body is still viable – i.e. able to undertake its statutory responsibilities. If Parliament has passed legislation in the expectation that certain duties, functions and powers will be exercised by the body, then it should continue to be able to exercise these until Parliament deems otherwise.

Viability can be assessed in two ways:

1. Resource allocation: Does the extent of pre-legislative change reduce the level of resource available to the body such that it is no longer able to undertake any or all of its duties, functions or powers?
2. Policy direction: Does a change in government policy fatally undermine the body's ability to undertake its statutory responsibilities?

In the case of the Audit Commission, reduced resource allocation has resulted in the body stopping or downsizing its work programmes where its statutory powers are discretionary.[8] On the policy criteria, the Audit Commission's inspection role is a discretionary power that

[8] Audit Commission (2012) *Annual Report and Accounts 2011/12*, HC 249, London: The Stationary Office, page 14 http://www.official-documents.gov.uk/document/hc1213/hc02/0249/0249.pdf

is subject to Secretary of State's guidance.[9] In the NHS local commissioning case, PCTs retain statutory responsibility for commissioning. The RDAs' statutory purposes are broadly defined, and open to interpretation.

To establish pre-emption of Parliament requires an ability to establish whether (a) the intentions and (b) the effects of governmental actions are such that a public body is unable to meet its statutory obligations. In terms of government statements and documentation, our case studies show that the intention does not seem to have been to pre-empt Parliament; departments were well aware of the need for legislative authority prior to closing the Audit Commission and RDAs, or releasing CCGs from PCT delegations.

The question of effects is more complex, and rests on a judgement about whether the Audit Commission and RDAs were so reduced in scale and capacity that they were unable to meet their statutory obligations, or whether the effect of delegations to CCGs effectively negated the PCTs' statutory responsibilities. This judgement is complex because of the lack of specific performance standards in the primary legislation for public bodies of all types. For example, RDAs had broad statutory purposes (e.g. 'to further the economic development and the regeneration of its area') and power to 'do anything which it considers expedient for its purposes'.[10]

To ensure that Parliament was not pre-empted by government reforms, legislation creating public bodies would need to contain specific safeguards such that the body had the resources and capacity to undertake its statutory responsibilities at a minimum level. These safeguards might be specified in terms of minimum budget allocations or staffing levels. Such standards might be applied selectively, for example to regulatory bodies where independence and continuity was at a premium. This would reduce the executive's influence on such bodies, and safeguard Parliament's intentions.

The wider constitutional issue concerns the degree of flexibility available to ministers, local authorities and others public sector decision-makers in relation to the organisation of public functions.

Supporting case studies

Case study 1: Preparing to abolish the Audit Commission

The Coalition Agreement contained the commitments to 'cut local government inspection and abolish the Comprehensive Area Agreement'.[11] On 25 June 2010, the Rt. Hon. Eric Pickles MP, Secretary of State for Communities and Local Government, formally instructed the Audit Commission to cease work on the CAA (Comprehensive Area Assessment) and associated inspection work. As a result, the Audit Commission started a process to reduce its inspectorial workforce.

[9] Local Government Act 1999, as amended, s10 http://www.legislation.gov.uk/ukpga/1999/27/part/I
[10] *Regional Development Agencies Act 1998*
[11] HM Government (2010) *The Coalition: Our Programme for Government*, May, page 11
http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf

On 13 August 2010, the Secretary of State announced his intention to 'disband' the Audit Commission.[12] Following the announcement, DCLG started to develop a closure plan. A DCLG-led project team was established, and in November 2010 disbanding the Audit Commission became an item in the DCLG Structural Reform Plan.[13]

On 18 April 2011, FTI Consulting Ltd. were appointed to provide advice on the most cost effective options for transferring the balance of its audit work into the private sector (30% was already outsourced), as part of disbanding the Audit Commission.[14] On 28 July DCLG announced the Audit Commission would outsource all its in-house local public audit work from 2012/13.

On 9 May 2012 the Queen's Speech announced a Bill to close the Audit Commission and on 6 July 2012 the draft Local Audit Bill was published for pre-legislative scrutiny.

Throughout, the DCLG project team - in liaison with other stakeholders, including the Audit Commission - had been continuing the planning for downsizing and eventual closure. This included considering options for the Audit Commission pension scheme, transfer of assets, and other related matters.

A significant development in mid-2012 was the recruitment of a new chairman and new commissioners, in the light of the then chairman and some commissioners coming to the end of their terms of office. These posts were advertised with a specific brief related to winding-down the body. On 19 September 2012, a new Chairman was appointed to lead the Commission 'to an effective and efficient closedown, and oversee the delivery of its reduced functions in the run up to closure.'[15] The appointment followed a formal recruitment process and approval from the Communities and Local Government Select Committee following their pre-appointment hearing on 3 September 2012.[16]

The result of ending inspection, closing the audit practice, ending the Commission's research functions, and a general tightening of resources in the light of the June 2010 Budget has been to leave a much smaller organisation. It is anticipated the Audit Commission will continue into existence until at least 2015, subject to passage of the Local Audit Bill. This plan for closure is reflected in the Audit Commission's Annual Report 2011/12.[17]

Case study 2: Preparing to close the Regional Development Agencies

In June 2010, the Emergency Budget contained the announcement that 'Regional Development Agencies will be abolished'.[18] This reflected commitments in the Coalition

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[12] DCLG Press Release 'Eric Pickles to disband Audit Commission in new era of town hall transparency', 13 August 2010 https://www.gov.uk/government/news/eric-pickles-to-disband-audit-commission-in-new-era-of-town-hall-transparency

[13] DCLG *Structural Reform Plan*, implementation update, November 2010, https://www.gov.uk/government/publications/dclg-structural-reform-plan

[14] DCLG (2011) *Future of local public audits: Summary of report prepared by FTI Consulting Limited*, October https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6276/2005112.pdf

[15] DCLG Press Release 'New chairman appointed to close down the Audit Commission', 19 September 2012 https://www.gov.uk/government/news/new-chairman-appointed-to-close-down-the-audit-commission

[16] House of Commons Communities and Local Government Committee *Pre-appointment hearing for the Chair of the Audit Commission*, Fourth Report of Session 2012-13, HC553

[17] Audit Commission (2012) *Annual Report and Accounts 2011/12*, HC 249, London: The Stationary Office http://www.official-documents.gov.uk/document/hc1213/hc02/0249/0249.pdf

[18] HM Treasury (2010) *Budget 2010*, HC61, para 1.89

Agreement to change the local economic delivery landscape, and to reduce the number of public bodies.

The BIS (Department for Business, Innovation and Skills) Structural Reform Plan, published in July 2010, contained the following action:

> Work ... to abolish the Regional Development Agencies (RDAs). Support the creation of Local Enterprise Partnerships (LEPs), including … accelerat[ing] the transition of functions from RDAs …

Tasks within this action include 'review and transfer all remaining RDA functions to other bodies' and 'manage out assets, commitments and liabilities of RDAs in an orderly fashion'. [19]

Because RDA closure was a Structural Reform Plan priority for BIS and DCLG, a closure programme was developed. Its aim was 'to close the RDAs swiftly in order to put the new economic landscape in place, also avoiding prolonged uncertainty for staff or for part-completed projects.' [20] A BIS-led transition team was established in order to deliver this ambition. The team recognised that closure was dependent on legislation. The Bill was published 4 months after the closure announcement.

Financial considerations were paramount once the intention to close the RDAs had been announced. Ministers quickly withdrew delegated authority to enter new financial commitments, other than those relating to transition and closure, in order to focus available RDA resources on decommitment and to manage down RDA expenditure. The Spending Review settlement subsequently reinforced this, requiring RDAs to decommit where possible.[21]

There were considerable transfers of staff and activities in advance of the Act, including:[22]

- May 2011: Transfer of c.70 staff to PA Consulting, UKTI's contractor for Foreign Direct Investment services.

- July 2011**:** Transfer of 196 staff to DCLG to manage ERDF (European Regional Development Fund); transfer of 102 staff to DEFRA to manage RDPE (Rural Development Programme for England)**.**

- August 2011: Transfer of RDAs' 52 coalfields staff to the Homes and Communities Agency (HCA).

- September 2011: Transfer of £600m of RDA land and property assets and associated projects and contracts, plus 91 associated staff; transfer of Grants for Business Investment programme to BIS with 16 staff; transfer of most RDAs' Grant for Research

[19] BIS *Draft Structural Reform Plan*, July 2012, page 14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31920/10-1086-bis-draft-structural-reform-plan.pdf

[20] BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, para 2.3.1 http://www.bis.gov.uk/assets/biscore/economic-development/docs/c/12-986-closing-rdas-lessons-from-transition-and-closure-programme.pdf

[21] BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, para 4.7.6

[22] BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, annex A

and Development programmes to the Technology Strategy Board; transfer of 6 staff to BIS Local.

- October 2011: Transfer of RDA interests in Venture Capital and Loan Funds (VCLFs) to BIS; transfer of Business Link staff to Business Link helpline contractor.

By the time of Royal Assent in December 2011, the majority of activity necessary for closure had been undertaken. RDAs were eventually closed in July 2012.

Case Study 3: Proposed reform of NHS local commissioning in England

The NHS White Paper was published in July 2010 and proposed devolving power and responsibility for commissioning health services in England to local GP consortia (subsequently termed clinical commissioning groups – CCGs).[23] The Health and Social Care Bill was published in January 2011.

In October 2010, just prior to publication of the Bill, the Department of Health launched a GP Pathfinder Consortia Programme, inviting groups of GPs to come together to pilot and learn from GP-led commissioning of services prior to the introduction of formal arrangement envisaged in the White Paper and yet to be published Health and Social Care Bill.[24] Applications from GP consortia were vetted, and the consortia were announced in a series of phases over the following 12 months. The intention was that GP consortia would eventually become the CCGs proposed in the Bill.

Commissioning remained the duty of PCTs as the responsible statutory bodies, and could not be delegated or transferred. GP consortia took on a number of specific responsibilities, using powers and budgets formally delegated to them by PCTs within their statutory framework. The mechanism through PCTs retained their ultimate responsibility was by establishing a formal scheme of delegation to the GP consortia, and by constituting the board of the consortia as a committee or sub-committee of the relevant PCT board.

In light of this process of delegation, and the pressure on NHS management costs, PCTs were required to aggregate their management into formal 'cluster' arrangements by mid 2011.[25] This involved establishing a combined board and single management team across several PCTs. Nominally, the constituent PCTs remained as individual statutory organisations, but worked in an integrated way. The *NHS Operating Framework* emphasises that this development was designed to ensure PCT statutory functions were delivered up to April 2013, when the new system is planned to become operational.

The new NHS Commissioning Board Authority was created in shadow form in October 2011, and began to develop draft guidance for the new system. The Health and Social Care Act received Royal Assent in March 2012.

8 January 2013

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[23] Department of Health (2010) *Equality and Excellence: Liberating the NHS*, London: Department of Health

[24] Department of Health (2010) 'GP commissioning pathfinders announced', 8 December http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Aboutus/Features/DH_122396

[25] Department of Health (2011) *The Operating Framework for the NHS in England 2011/12*, London: Department of Health, para 2.12

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Submission to be found under Professor Christopher Skelcher