

A

ANNEX 5.5 LIABILITIES

Parliament expects advance notice of any commitments to future use of public funds for which there is no active request for resources through Estimates. This annex discusses how a number of different kinds of liability should be dealt with.

A.5.5.1 As with expenditure, ministers may enter into liabilities – in effect, conditional commitments to future expenditure – without explicit Parliamentary authority. But Parliament expects to be notified of the existence of these commitments when they are undertaken. Should they eventually give rise to the need for public expenditure, they will require the authority of an Appropriation Act and frequently also specific enabling legislation.

A.5.5.2 Because the Crown is indivisible, ministers (and their departments) cannot give guarantees to each other. They can, however, enter into commitments to conditional support with the same effect – though this is rare.

A.5.5.3 Some liabilities are uncertain. These contingent liabilities recognise that future expenditure may arise if certain conditions are met or certain events happen. That is, the risk of a call on Exchequer funds in the future will depend on whether or not certain circumstances arise. For example, payment under a government guaranteed loan would only be required if the body covered by the guarantee was unable to repay the loan.

A.5.5.4 Arm's length bodies (ALBs) sponsored by departments do not generally have powers to take on liabilities, because these would in effect bind their sponsoring departments. So the documentation governing the relationship between a department and an ALB (see chapter 7 and annex 7.4) should require the ALB to gain the sponsor department's agreement to any commitment, including borrowing, into which it proposes to enter. Departments should ensure that ALBs have systems to appraise and manage liabilities to the standards in this annex, so that they can report to Parliament any liabilities assumed by ALBs in the same way as they would their own.

Need for statutory powers

A.5.5.5 It is good practice to enter into liabilities on the strength of specific statutory powers – as with items of expenditure. This is essential if a regular scheme of loan guarantees or other support is intended. Departments should consult the Treasury about proposals for such legislation, which should include arrangements for reporting new liabilities to Parliament. It is usual to put a statement to both Houses when statutory liabilities are undertaken. Provision in budgets and Estimates should be scored as the department's best assessment of the need to pay out in support of the liabilities.

A.5.5.6 In the nature of giving liabilities, many will arise with little notice. Departments should report these to Parliament at the earliest opportunity. There is a standard procedure for doing this: see paragraphs A.5.5.21 to A.5.5.35 of this annex.

A.5.5.7 If a liability taken on in this way seems likely to persist, the department concerned should consider backing it with statutory cover. This is because any expenditure which arises because of it is subject to the same Parliamentary expectations about statutory powers as any other expenditure (see section 2.1). If a contingent liability could give rise to a loan, the organisation should ensure that there is reasonable likelihood of the loan being serviced and repaid (see section 5.6).

A.5.5.8 There is an exception to the need for statutory powers for accepting liabilities. Commitments taken on in the normal course of business do not need specific cover, just as routine administrative expenditure does not (see para 2.3.2). The standard conditions for treating liabilities as undertaken in the normal course of business are set out in box A.5.5A, with some common examples.

box A.5.5A liabilities in the normal course of business

In order to treat a liability as arising in the normal course of business, the organisation concerned should be able to show that:

- the activity is an unavoidable part of its business and/or
- Parliament could reasonably be assumed to have accepted that such liabilities can rest on the sole authority of the Appropriation Act.

Examples of common liabilities arising in the normal course of business include:

- liabilities arising in the course of the purchase or supply of goods and services in the discharge of the department's business
- contractual commitments to make payments in future years arising under long-term contracts, eg major building works
- commitments to pay grants in future years under a statutory grant scheme
- contingent liabilities resulting from non-insurance (see annex 4.5).

A.5.5.9 If procurement in the normal course of business gives rise to proposals for liabilities outside the normal range (eg a cap on the contractor's liabilities), the public sector organisation should consider renegotiating. The acid test is whether two private sector bodies would use the same terms. In cases of doubt, the Treasury should be consulted.

A.5.5.10 PFI contracts are a special case of procurement and so can cause departments to take on liabilities. For these, departments should use the standard terms in the Treasury Taskforce publication *Standardisation of PFI Contracts* www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_standardised_contracts.cfm.

Departments should report details of use of these standard terms to OGC so that it can provide an annual consolidated report to Parliament. There is no need to notify use of standard PFI terms to Parliament, but any use of non-standard terms should be reported like any other.

A.5.5.11 There are additional conditions for taking on non-statutory liabilities, namely:

- the need must be urgent and unlikely to be repeated; and
- it would be in the national interest to act even though there is no statutory authority.

Taking on liabilities

A.5.5.12 Before accepting any liability, the organisation should appraise the proposal using the *Green Book* www.hm-treasury.gov.uk/Economic_Data_and_Tools/greenbook/data_greenbook_index.cfm, to secure

value for money, just like a proposal to undertake any other project. The liability should be designed to restrict exposure to the minimum, eg by imposing conditions about duration. Other possible features to limit liabilities might include:

- a commitment fee from the beneficiary (though this does not remove the need for appraisal of the proposition) and/or
- arrangements to lift the liability if the beneficiary no longer needs it.

A.5.5.13 Similarly, it is not good practice to take on liabilities to contractors which would indemnify them in the event of their own negligence or that of a sub-contractor. But it may be reasonable to give an indemnity to a private sector body against damage to property it owns arising out of government use, eg if a public sector organisation uses a private sector body's premises or equipment. Any such indemnity should of course exclude damage caused by the body's own staff or contractors.

A.5.5.14 Subject to the statutory powers of the public sector organisation and its delegated authorities, it is important for an organisation contemplating assuming a new liability to consult the Treasury (or the sponsor department, as the case may be) before assuming it. Departments' delegated authorities for incurring liabilities should include the liabilities of any sponsored bodies which should not exceed £1m for any single transaction.

Types of liability

A.5.5.15 Public sector organisations may take on liabilities by:

- issuing specific guarantees, usually of loans;
- writing a letter or statement of comfort; or
- providing indemnities.

A.5.5.16 It is important to remember that any of these instruments issued by a minister may be legally enforceable.

A.5.5.17 Guarantees should normally arise using statutory powers. They typically involve guarantees against non-payment of debts to third parties.

A.5.5.18 Letters of comfort, however vague, give rise to moral and sometimes legal obligations. They should therefore be treated in the same way as any other proposal for a liability. Great care should be taken with proposals to offer general statements of awareness of a third party's position, or oral statements with equivalent effect. Creditors could easily take these to mean more than intended and threats of legal action could result. Treasury approval is normally essential.

A.5.5.19 It is common to give certain kinds of indemnity to members of boards of central government departments or of NDPBs; or to civil servants involved in legal proceedings or formal enquiries as a consequence of their employment, perhaps by acting as a board member of a company. The standard form is set out in box A.5.5B, in line with the Civil Service Management Code www.civilservice.gov.uk/publications/doc/csmc_june06.doc. This cover is comparable to what is obtainable on the commercial insurance market. So it excludes personal criminal liability, reckless acts or business done in bad faith.

A.5.5.20 Liabilities of this kind to individuals do not normally need to be reported to Parliament unless they go beyond the standard form or are particularly large or risky.

box A.5.5B standard indemnity for board members

The government has indicated that an individual board member who has acted honestly and in good faith will not have to meet out of his or her personal resources any personal civil liability which is incurred in the execution or the purported execution of his or her board functions, save where the board member has acted recklessly.

A.5.5.21 The rules for notifying Parliament of liabilities are very similar to those for public expenditure:

- there is no need to tell Parliament about:
 - new liabilities arising under statutory powers unless the legislation calls for it;
 - liabilities taken on in the normal course of business, except for those not in standard form and above £250,000;
- departments should notify Parliament of:
 - statutory liabilities, in the form expected by the legislation;
 - any liability outside the normal course of business and above £250,000, or of a non-standard kind undertaken in the normal course of business;
 - any liability which is novel, controversial or significant in relation to the organisation's (or the particular programme) expenditure, which is large and unquantifiable.

A.5.5.22 It is important to note that undertakings in the normal course of business should be judged against the department's normal business pattern authorised by Parliament. So what may be normal for some departments may not be normal for others. In cases of doubt it is best to report.

A.5.5.23 Non-statutory liabilities which need to be reported to Parliament should be notified using a standard form of Minute (see box A.5.5C). Treasury approval is required before going ahead. It is sometimes necessary, with Treasury agreement, to adapt the form of wording, eg if the liability arises immediately.

A.5.5.24 Such Minutes should be laid in the House of Commons and should:

- describe the amount and expected duration of the proposed liability, giving an estimate if precision is impossible;
- explain which bodies are expected to benefit, and why;
- if applicable, explain why the matter is urgent and cannot observe the normal deadlines (paragraph A5.5.25);

- use the standard wording for the opening and closing passages, which has been agreed with the PAC (box A.5.5C);
- explain that authority for any expenditure required under the liability will be sought through the normal Estimates procedure;
- be copied to the chairs of both the PAC and departmental committee;
- in cases of particularly large or unusual liabilities, be accompanied by a ministerial statement.

A.5.5.25 The indemnity should not go live until 14 Parliamentary sitting days, excluding weekends, after the Minute has been laid. Every effort should be made to ensure that the full waiting period falls while Parliament is in session.

A.5.5.26 If an MP objects by letter, Parliamentary Question or Early Day Motion, the indemnity should not normally go live until the objection has been answered. In the case of an Early Day Motion, the Member(s) should be given an opportunity to make direct personal representations to the minister, eg proactively arranging a meeting with them. The Treasury should be kept in touch with representations made by MPs and of the outcome.

A.5.5.27 If, exceptionally, the guarantee or indemnity would give rise to an actual liability, the department should consult the Treasury about the wording of the Minute. The department should discuss the implications for the actual liability on its budget, Estimate and resource accounts.

box A.5.5C standard text for departmental Minutes on liabilities

Opening passage

It is normal practice, when a government department proposes to undertake a contingent liability in excess of £250,000 for which there is no specific statutory authority, for the department concerned to present to Parliament a Minute giving particulars of the liability created and explaining the circumstances; and to refrain from incurring the liability until fourteen parliamentary sitting days after the issue of the Minute, except in cases of special urgency.

The **body of the Minute** should include:

If the liability is called, provision for any payment will be sought through the normal Supply procedure.

Closing passage

The Treasury has approved the proposal in principle. If, during the period of fourteen parliamentary sitting days beginning on the date on which this Minute was laid before Parliament, a Member signifies an objection by giving notice of a Parliamentary Question or by otherwise raising the matter in Parliament, final approval to proceed with incurring the liability will be withheld pending an examination of the objection.

Non-standard notification

A.5.5.28 Sometimes it is not possible to give details of a contingent liability with full transparency. In such cases the department should write to the chairs of both the PAC and departmental committee to provide the same details as those outlined in paragraph A5.5.24,

with the same notice period. The letters should explain the need for confidentiality. Any objection by either chair should be approached in the same way as MPs' objections (paragraph A.5.5.26).

A.5.5.29 Sometimes departments want to report an urgent contingent liability providing less than the required 14 days notice. In such cases, the department should follow the procedure in paragraph A.5.5.24 and explain the need for urgency.

A.5.5.30 Departments may also want to report a contingent liability at short notice, ie less than 14 days before the end of the session. In such cases the contingent liability should only go live after lying before Parliament during 14 sitting days, ie some days after the start of the next session. If the proposal is more urgent than this rule would allow, the department should write to the chairs of the PAC and the departmental committee, giving the information in paragraph A.5.5.24 and explaining the need for urgency. As a matter of record, when Parliament reconvenes, a Minute should be laid explaining what has happened, including any liabilities undertaken.

A.5.5.31 The same procedure as in paragraph A.5.5.29 should be used to report liabilities during a Parliamentary recess. In such cases the notice period should be 14 working days notice, ie excluding weekends and bank holidays.

A.5.5.32 Similarly, it is possible that a department might want to undertake a non-statutory contingent liability when Parliament is dissolved. Every effort should be made to avoid this, since members cease to be MPs on dissolution, and committees will be reconstituted in the new Parliament. If the department nonetheless considers the proposed liability to be essential, it should consult the Treasury.

Reporting liabilities publicly

A.5.5.33 Any changes to existing liabilities should be reported in the same way as they were originally notified to Parliament, explaining the reasons for the changes. If an originally confidential liability (see paragraph A.5.5.28) can be reported transparently, the standard Minute (paragraph A.5.5.24) should be laid.

A.5.5.34 Departments should report all outstanding single liabilities, or schemes of liabilities, in their resource accounts unless they are confidential. Any which would fall as a direct charge on the Consolidated Fund should be reported in the Consolidated Fund accounts. The conventions in the FreM should be used.

A.5.5.35 Estimates should similarly be noted with amounts of any contingent or actual liabilities. The figures quoted should be the best assessments possible at the time of publication. Actual liabilities should appear as provisions. The rubric should refer back to notification of Parliament.

A.5.5.36 When the conditional features of contingent liabilities are met, it is good practice to wait until Parliament has approved the relevant Estimate before providing the necessary resources. But if providing support is more urgent, departments should apply for an advance from the Contingencies Fund (see Annex 2.5 and the Estimates Manual www.hm-treasury.gov.uk/media/A/1/estimatesmanual_011007.pdf) under the usual conditions. If an advance is approved, a statement to Parliament should explain what is happening, and in particular how the crystallised liability is to be met.

International agreements

A.5.5.37 International treaties, agreements or commercial commitments which mean the UK incurring specific contingent liabilities should follow the parliamentary reporting procedures as far as possible whether or not the agreement is covered by legislation. Even if an international

agreement does not require legislation for ratification, it should nevertheless be laid before Parliament, accompanied by an explanatory memorandum, for 21 sitting days before it is ratified (the Ponsonby rule).