The pre-emption of Parliament - Constitution Committee Contents

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

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

The 1932 concordat

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

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

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

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

13. It seems, therefore, that the 1932 concordat amounts to a self-denying ordinance by the Treasury, which has in general worked well. Although the Government could apparently rely on the Appropriation Acts to authorise lawful expenditure, they will in general not do so, in the interests of constitutional propriety.

The Treasury framework: *Managing Public Money*

14. The 1932 concordat sets out the principle of parliamentary authorisation of Government expenditure, but it does not set out detailed rules on how that principle is to be applied. Such rules have been contained in a series of Treasury documents, the current iteration of which is *Managing Public Money*, with the latest version produced in October 2007.[11]

15. In order to engage in pre-emptive activity that involves public money, the Government must have the legal authority both to act[12] and to spend. *Managing Public Money* provides the rules under which the Treasury will authorise expenditure before a bill becomes law. These rules, known as the "new services rules", set out the specific requirements which departments must meet in order to fund pre-emptive activities.[13] In the words of *Managing Public Money*, these requirements are—

- "the proposed expenditure must be genuinely urgent and in the public interest—i.e. there must be wider benefits to outweigh the convention of awaiting parliamentary authority;
- the relevant bill must have successfully passed second reading in the House of Commons;
- Parliament must have been made aware of the intended steps in appropriate detail when relevant previous legislative steps were taken;
- the planned legislation must be certain, or virtually certain, to pass into law in the near future, and usually within the financial year; and
- the department responsible must explain clearly to Parliament what is taking place, why, and by when matters should be placed on a normal footing."[14]

16. These requirements clearly raise constitutional issues; from Parliament's perspective the third and fifth requirements seem particularly important.

17. The Treasury Officer of Accounts, Mrs Paula Diggle, informed us that: "We take [*Managing Public Money*] as the essence of what Parliament wants. Parliament knows about it because it is a published document. We have no reason to think that it is not what Parliament wants, and I am sure that the PAC [Public Accounts Committee] would tell us very quickly if it was not."[15]

The Treasury's role: "Parliament's guardian in Whitehall"

18. The Treasury is one of the oldest Government departments, and exercises a number of functions which are not analogous to those of other departments. The Treasury told us that, "there is an ancient convention that the Treasury should strive to look after Parliament's interests in Whitehall."[16] The Treasury Officer of Accounts also described the Treasury as acting "as the guardian of Parliament."[17] She drew our attention to a passage from a report of the House of Commons Public Accounts Committee from 1884—

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

19. The Treasury Officer of Accounts informed us that no documentation exists in support of the convention's ancient origins—she thought any such documents were "lost in the mists of time."[19] She accepted that Parliament itself had probably never debated the Treasury's practice,[20] but she believed "that it is a long-standing arrangement that the PAC has understood and accepted."[21] We know of no evidence to the contrary.

20. Several witnesses considered that the Treasury's description of its role in terms of "guarding" or "looking after" Parliament may not be appropriate. They thought it better to consider the Treasury as a watchdog within Whitehall, which is then held to account by Parliament.[22]

21. We recognise the role of the Treasury as the department responsible for policing the proper use of public money within Government, and welcome the seriousness and diligence with which this role is performed by the Treasury Officer of Accounts. We also acknowledge that the Treasury is the principal department through which the Government are held to account by Parliament for public expenditure. However, it does not follow that the Treasury should regard itself as seeking to guard or protect the interests of Parliament. Parliament, using its undoubted power to hold ministers and accounting officers to account, can guard its own interests against inappropriate executive action, and regularly does so. We also note that, should a Government department act in contravention of the *Managing Public Money* conditions in this area, the Comptroller and Auditor General (as an officer of the House of Commons and auditor of the Government's accounts) would bring this to Parliament's attention.[23]

22. Indeed, there will often be cases where Treasury ministers themselves wish to engage in actions which pre-empt legislation; in such cases the interests of Parliament and the interests of Treasury ministers may conflict. For example, we were informed of two occasions in recent years when Treasury ministers issued ministerial directions to require expenditure on projects which the Treasury's accounting officer did not think met the tests of regularity and propriety.[24]

23. **The Treasury is responsible to Parliament for the regularity and propriety of Government expenditure; it follows that the Treasury will wish to police these areas within Whitehall. However, it should be recognised that Parliament's interests are primarily guarded by Parliament itself.**

24. A second aspect of the Treasury's evidence in this area to draw criticism was the suggestion that its watchdog role arises from an ancient convention.

25. The word "convention" is, in constitutional parlance, a term of art. Although there is no universally accepted definition of the term, the feature common to all definitions is that, whilst a convention is not justiciable, it is nevertheless regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices which are politically binding on all involved, but not legally binding.

26. Given that Parliament has not delegated the protection of its interests to the Treasury, the Treasury's practice of taking responsibility for financial regularity and propriety within the executive cannot be considered a constitutional convention in the strict sense. In supplementary written evidence, the Treasury Officer of Accounts confirmed that, when using the term convention, she was: "using [it] in the primary sense in the OED [Oxford English Dictionary], i.e. to denote common practice rather than formal agreement."[25] We accept that the Treasury was not seeking to elevate its internal practices to the status of constitutional conventions. However, clarity in this area is important. **We recommend that the Treasury's practices should not be described as "conventions".**

The "second reading convention"

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

A true convention?

28. It is questionable whether the second reading convention is a true constitutional convention. Sir Stephen Laws KCB QC, former First Parliamentary Counsel, commented that, "whether or not the second reading rule is a convention, I would say it is a rule of thumb."[27]

29. We are of the view that the Treasury's practice in this area is just that: a practice. Parliament is not, and does not regard itself as, bound by the Treasury's guidance. **The second reading practice is not a convention, and should no longer be described as such.**

Operation of the second reading practice

30. A number of points have arisen about the scope of the second reading practice, and its enforcement by the Treasury.

31. First, it is clear that, whilst a bill passing second reading in the House of Commons is a useful indicator of its prospects of becoming law, it is not a foolproof indicator. A bill which has received second reading in the House of Commons can be abandoned or defeated at a later stage in the parliamentary process.[28] We were pleased, therefore, to be informed that the Treasury's approach recognises these uncertainties: "It is a matter of judgement whether a bill is likely to get through. If a bill has gone through second reading in the Commons with a large majority, we normally take that as a strong indication. If it is a closely fought bill and lots of questions have been raised, that is a warning flag and we would exercise caution."[29] Sir Stephen Laws also told us that Commons second reading: "is not a green light to do whatever you want. You will not get permission [for pre-legislative expenditure] before second reading in the House of Commons. You may not get permission then."[30] Indeed, a bill may receive a large majority for its second reading, yet a particular clause (relevant to pre-emption) may be highly contentious and its passage through Parliament open to considerable doubt.

32. Secondly, the Treasury's practice is restricted to second reading in the House of Commons. The result is that expenditure can take place for bills introduced in the Commons at a much earlier stage than for those introduced in the Lords. The Treasury's view is that this is because the power to grant supply to the executive is vested in the House of Commons alone.[31] Yet the House of Commons is not asked to authorise such expenditure.[32]

33. Thirdly, the second reading practice is clearly limited to cases where the pre-emption is to occur under new powers proposed in a bill. It does not apply to pre-emptive reorganisation within Government departments (and public bodies for which they are responsible) carried out under existing powers and not involving new expenditure.[33] There is, therefore, a potentially wide range of pre-emptive activity to which the second reading practice does not apply.[34]

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

Informing Parliament

35. In order to hold ministers properly to account, it is essential that Parliament receives full and timely information on Government activity. This principle applies to actions taken and expenditure incurred in advance of legislation, as it does to all other Government functions.

36. We were told that Parliament currently receives a considerable amount of information about pre-emptive activities from the Government. The Treasury told us that, where the new services rules are engaged, "a minister must warn Parliament of what action is intended, e.g. in a written ministerial statement, explaining the urgency, and setting out when matters will be normalised."[35] Where it is not possible to notify Parliament in advance of such expenditure, the expectation is that Parliament must be notified retrospectively.[36]

37. Others, however, thought that the information provided by Government to Parliament lacked transparency. Dr Katharine Dommett, Research Fellow at the University of Sheffield, argued that many of the difficulties that arose in organisational pre-emption did so because of a lack of clarity about what was happening.[37]

38. The Treasury Officer of Accounts told us that there is no general procedure for how Parliament is notified of pre-emption, though she stressed that written ministerial statements are usually issued where expenditure is involved.[38] The Economic Secretary to the Treasury accepted that, "there may be a more transparent way of doing this, and I would be happy to look at any suggestions."[39]

39. We received a number of suggestions on how to inform Parliament of pre-emption. They include—

- a statement made orally during the second reading debate in each House on the bill;[40]
- an oral statement to the relevant House;[41]
- a statement in the explanatory notes to the bill;[42]
- a statement in the relevant impact assessment.[43]

40. These could be used instead of or in addition to a written ministerial statement. It might also be necessary to inform a pre-legislative scrutiny committee of action taken in preparation for a draft bill becoming law.

41. An oral declaration of pre-emptive activity during the second reading debate in each House would ensure that, in granting the bill a second reading, the relevant House would have the details of pre-emptive actions firmly in mind. It would add legitimacy to the Treasury's treatment of Commons second reading as a requirement for authorising reliance on the Contingencies Fund to pay for pre-emption. What is most important, however, is that the process by which the information is provided is regular and clear.

42. Although ministers usually inform Parliament of the fact of pre-emption, the power under which the pre-emption occurs may not always be clear. For example, the Treasury Solicitor told us that in relation to the Health and Social Care Act 2012, "the clarity about what was going on in terms of pre-emption and the *vires*—the powers—that were being used was obtained … by Lord Owen writing to the Cabinet Secretary and getting a detailed response setting out what the *vires* were."[44] Though the Treasury Solicitor gave this as an example of how parliamentarians can obtain the information they require, we note that it took a letter to the Cabinet Secretary to secure this information. **Details of the powers under which ministers are acting should always be made clear to Parliament.**

43. **Information should be provided to Parliament on pre-emptive activities in a consistent manner. There are a number of options as to how this might occur; the key is to enable Parliament to scrutinise the Government's actions effectively. Whatever approach is adopted, it should ensure that Parliament is fully informed in a timely manner of what activities have taken place, when, how much they cost and under what powers ministers acted. We invite ministers to decide which of the options in paragraph 39 (or other possibilities) to adopt as a practice to enhance scrutiny and transparency in this context.**

44. **In addition, the Government should at the end of each session provide Parliament with a summary of pre-emptive activity undertaken across all departments. This should be provided in a written ministerial statement, and should summarise the amounts spent and the powers under which ministers acted. This statement should be in addition to information given on each individual instance of pre-emption.** Such a statement would assist Parliament in ensuring that the Government are not engaging in excessive pre-emption, and will allow Parliament to hold ministers to account for their decisions.

Ministerial directions

45. We heard evidence that, where a minister wishes to incur expenditure in contravention of the rules in *Managing Public Money*, the relevant departmental permanent secretary will seek a written ministerial direction from the minister allowing the permanent secretary to proceed.[45] In a previous report we commented on the importance of ministerial directions as a safeguard against impropriety;[46] this function of the ministerial direction is also pertinent to pre-emption. In particular, where a permanent secretary receives a ministerial direction, he or she must copy it to the Comptroller and Auditor General, who in turn will usually forward it to Parliament via the Public Accounts Committee. This provides an important mechanism for ensuring transparency of and accountability for such decisions.

46. We are concerned that information on the nature and frequency of ministerial directions may not be readily available to parliamentarians. The Treasury Officer of Accounts helpfully provided us with a list of all ministerial directions made since 1997—37 in total.[47] We consider, however, that summaries of this nature should be provided to Parliament on a regular basis.

47. **At the end of each session the Government should provide Parliament with a list of all ministerial directions made, across all departments. This should be provided in a written ministerial statement.**

Restatement of principles and practices governing pre-emption

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

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8 *Managing Public Money*, A.2.1.6. Back

9 Q 71. Back

10 Q 72. Back

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

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

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

14 *Managing Public Money*, para 2.4.3. Back

15 Q 39. Back

16 HM Treasury, para 6. Back

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

18 Q 39. Back

19 Q 40. Back

20 Q 39. Back

21 Q 40. Back

22 QQ 66 and 81. Back

23 HM Treasury, para 17. Back

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

25 HM Treasury supplementary evidence, para 7. Back

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

27 Q 33. Back

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

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

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

31 HM Treasury, para 16. Back

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

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

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

35 HM Treasury, para 16. Back

36 HM Treasury supplementary evidence, para 6. Back

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

38 Q 49. Back

39 Q 45. Back

40 Q 49. Back

41 *ibid.* Back

42 Q 10. Back

43 *ibid.* Back

44 Q 82. Back

45 Q 41; Laws, para 21. Back

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

47 HM Treasury, supplementary evidence, annex 2. Back

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