

MODULE 2

POWER AND MONEY

INTRODUCTION

This module concerns some of the most fundamental and important issues government lawyers face. It is about the powers of Government to give effect to its policy. This includes questions like:

- *What powers does my Minister have?*
- *What limitations are there on the exercise of those powers?*
- *How does my Minister obtain funding for his or her projects?*
- *What restrictions are there on getting that funding?*
- *What authority does my Minister need to spend money on his or her projects?*

Ministers must act in accordance with the law, and specifically act within their legal powers. The rule of law requires that laws be rational, prospective, intelligible, accessible and relatively stable. Therefore everything done by Ministers and officials must have a legal basis.

There are various sources of power but also various restrictions upon the exercise of such power, and those restrictions arise from a variety of sources. These include rights under the European Convention on Human Rights and the Human Rights Act, international law, and constitutional conventions, which although they may not have the force of law are nevertheless treated as binding in practice. Government activity remains subject to the requirements of the European Union law at present, and, depending on the outcome of the negotiations for the UK to withdraw from the EU, may in future be subject to some other specific international agreement with the EU. Equally, there are the restrictions on the exercise of power which arise from general considerations of public law – so in particular the obligation to act rationally.

A Government lawyer must also appreciate the political context in which Ministers are required to wield their power. Clearly, practical restrictions will arise from what is politically possible. The most solid manifestation of that is the relationship between Government and

Parliament, and as you will appreciate as you work through this module, a particular aspect of that relationship is the need for Government to have Parliamentary authorisation not only to raise money, but to spend it.

Learning objectives

As a result of successfully completing this module, you will:

- *Be able to identify available sources of power for your Minister to achieve his or her policy objectives and advise as to the scope of those powers;*
- *Advise on whether common law powers are available to achieve a policy and whether there is any limitation on their use;*
- *Advise as to regularity and propriety in Government expenditure related to the policy;*
- *Be mindful of the need for Treasury consent to spending;*
- *Identify and advise on restrictions on spending arising from the PAC concordat, the new services rules and rules regarding the raising of fees, levies and charges.*
- *Know where to go for further information and advice*

WORKPLAN – index to the module

This is how the module is constructed. You should follow it in order, though of course it does not all need to be done at once. You should watch the webinar elements only once you have read the material immediately preceding it.

Topic	Type of activity	Where to find it	How long it will take
Essential context			
2.1	Sources of ministerial power	Workbook reading and web-based material	60 minutes
2.2	Money 1 – overview	PowerPoint presentation	15 minutes
2.3	Money 2 – HMT control, departments' role, fees and charges	PowerPoint presentation	15 minutes
Case study – probation services			
2.4	Part 1: current powers	Introductory reading	5 minutes
2.5		Webinar discussion	
2.6	Part 2: changing institutions	Background reading	20 minutes
2.7		Webinar discussion	

[Revision history: v 1 - Emma Burgess, James Cooper, Tim Jewell: Jan 2017]

2.1 SOURCES OF MINISTERIAL POWER

This section sets out in some depth the key sources of UK ministerial power. It explains core features and characteristics, along with practical pointers and places to get help, and links to additional material that may be useful. As elsewhere throughout the curriculum it makes points of essential awareness that all government lawyers need to know.

It covers:

- UK Primary legislation
- Powers in primary legislation to make secondary legislation
- The common law
- Prerogative powers

The material and links are set out in the attached document:

[INSERT LINK TO:

admin law pilot – module 2 power and money – 2.1 sources of ministerial power – 23 Jan 2017

2.2 and 2.3 MONEY

This section of the module introduces the principles that inform the spending and raising of money by the UK Government. It comprises two sets of PowerPoint slides, and sets the content for a worked case study in the next section.

Essential awareness: managing public money

The public, and Parliament acting on their behalf, have a right to expect that funds raised using powers agreed by Parliament will be used for the purposes intended. Public servants have a demanding fiduciary duty to use public money responsibly.

Much of what managing public money requires is just good common sense, or sound financial management. There are also some specific rules and conventions about how certain things are handled, which ensure that policies, programmes and projects work smoothly and serve their intended purposes. This document sets out what those rules and conventions are. It can be found on GOV.UK: [here](#).

The two sets of slides are:

Money 1 – overview

INSERT LINK TO: admin law pilot – module 2 power and money – 2.2 money 1

And

Money 2 – HMT control, departments' role, fees and charges

INSERT LINK TO: admin law pilot – module 2 power and money – 2.3 money 2

2.4 to 2.7 CASE STUDY – PROBATION SERVICES

This case study is designed to build on the knowledge and understanding you have gained from your background work, and give an opportunity to think through how those general principles apply in practice. What follows are two segments: a written introduction followed by a filmed webinar element in each case. We recommend you read the materials then watch the related webinar, keeping the relevant materials to hand.

2.4 Part 1: current powers

A new Secretary of State for Justice has been appointed with a vision for radically reforming the probation service. The probation service manages offenders in the community. Under section 2 of the Offender Management Act 2007 (“OMA”) it is the function of the SoS to ensure that sufficient provision is made for probation purposes. Probation purposes are set out in section 1 and in broad terms include the supervision of offenders in the community, whether on licence, subject to a community order or on bail and the provision of assistance to court.

The Secretary of State may by order under section 5 of the establish Probation Trusts, whose purposes include contracting with the Secretary of State to provide probation services (section 3(2)). At present there are 35 separate Probation Trusts covering different regions of the country (the London Probation Trust, the Wales Probation trust etc). The SoS however isn’t happy with the way probation trusts work. They are public bodies and he thinks they lack the innovation, investment and drive that the private sector would bring, and in particular he’d like to introduce incentives to performance where providers are paid by results.

What the SoS would like to do is to abolish the probation trusts (as he may do under section 5 of the OMA), and transfer the staff and their case load to private sector companies. However, he is anxious to avoid risks involved in a direct and immediate transfer. What he would like to do is to set up the companies himself, undertake the moving of staff and caseloads from the trusts to the new companies and for those companies to run the provision of services for 6 months. The companies will be wholly owned by the SoS during this period. He would then sell the companies to bidders in the course of a procurement programme. This procedure will enable him to test run the companies in order to ensure that the envisaged contracts and arrangements with bidders will work, enable bidders to see what they are getting and therefore maximise the value he can realise for the benefit of the public upon sale, and also to ensure that staff pensions are properly sorted out and staff reassured before the private sector take charge.

He wants these reforms in place before the next election. Commercial colleagues have said if he wants private companies involved that means starting a national procurement exercise in the next 6 months.

Your clients have said the Trade Unions will be implacably opposed to anything that looks like privatisation of public services and you can expect opposition including in parliament and via legal challenge every step of the way.

Your clients commission advice from you to resolve the following issues:

(a) Can the SoS achieve the result he wants using the current powers in and provisions of the OMA [For the purposes of this question assume that you don't need to look outside of sections 1 to 5, provided in the workbook]

(b) What powers does the SoS have to create these companies? Is primary legislation needed or is there an alternative? What would be the pros and cons of primary legislation compared to any alternative?

(c) Does the fact that there is a specific and detailed scheme in the OMA for the SoS to set up probation trusts exclude him from creating companies?

(d) If the SoS chooses to deal with this by primary legislation, is there any problem with running the procurement competition in parallel with the progress of the Bill through Parliament, given the concern that if the new regime is to be achieved by the next election that competition needs to start in the next 6 months?

Now watch and consider the first power and money webinar.

INSERT LINK TO:

2.5 FIRST POWER AND MONEY WEBINAR (REFILMED 23 Jan 2017)

2.6 Part 1: changing institutions

This part picks up after the end of the first webinar/

Assume you've advised that the SoS does have the power to set up companies. Once the Companies are sold off, the Secretary of State is concerned that they will require supervision to ensure that the function of providing probation services is being done properly to deliver the SoS's obligation to provide probation services to a sufficient standard and in line with the requirements of the contracts with the SoS. Further, there are probation services that the companies cannot deliver (e.g., advice to the court on sentencing options). He/she therefore wants to establish a non-departmental public body to supervise the provision of the services and to undertake functions of provision of advice on sentencing to the court and perhaps other functions too.

The SoS thinks the public body should have an array of powers, including power to enter onto company property to undertake effective inspections, and perhaps powers to fine. The Minister would also like the body to be financially self-sufficient through charging for inspections and other services. The SoS would also like the recruitment process for a new chief executive for the body to start immediately – he wants to feel that someone has a real grip of this right from the outset. Policy colleagues are also considering starting early on any necessary IT procurement – they are conscious that this could be a complex IT procurement and are hoping to be able to take advantage of opportunities to keep costs down by closing the deal early.

These are the questions you should consider for yourself, having reviewed the material below, before you watch the webinar.

- (a) Can the SoS achieve the establishment of such a body using common law powers?
- (b) What public finance issues arise regarding the establishment of the NDPB?
- (c) What propriety issues does the enthusiasm for early recruitment of the chief executive, and possible early procurement of the IT system raise? [Ignore any procurement law issues which may arise]

INSERT LINK TO:

2.7 SECOND POWER AND MONEY WEBINAR (REFILMED 23 Jan 2017)

Offender Management Act 2007 sections 1 to 5

1 Meaning of “the probation purposes”

- (1) In this Part “the probation purposes” means the purposes of providing for—
- (a) courts to be given assistance in determining the appropriate sentences to pass, and making other decisions, in respect of persons charged with or convicted of offences;
 - (b) [the giving of assistance to persons] determining whether conditional cautions should be given and which conditions to attach to conditional cautions;
 - (c) the supervision and rehabilitation of persons charged with or convicted of offences;
 - (d) the giving of assistance to persons remanded on bail;
 - (e) the supervision and rehabilitation of persons to whom conditional cautions are given;
 - (f) the giving of information to victims of persons charged with or convicted of offences.
- (2) The purpose set out in subsection (1)(c) includes (in particular)—
- (a) giving effect to community orders and suspended sentence orders (or, in the case of persons mentioned in subsection (3), any corresponding sentence which is to be carried out in England and Wales);
 - (b) assisting in the rehabilitation of offenders who are being held in prison;
 - (c) supervising persons released from prison on licence;
 - (d) providing accommodation in approved premises.
- (3) That purpose also applies in relation to persons who—
- (a) are convicted of an offence under the law of a country outside England and Wales, and
 - (b) receive a sentence which is to any extent to be served or carried out in England and Wales,

as it applies in relation to persons convicted of offences.

...

2 Responsibility for ensuring the provision of probation services

- (1) It is the function of the Secretary of State to ensure that sufficient provision is made throughout England and Wales—
- (a) for the probation purposes;
 - (b) for enabling functions conferred by any enactment (whenever passed or made) on providers of probation services, or on officers of a provider of probation services, to be performed; and
 - (c) for the performance of any function of the Secretary of State under any enactment (whenever passed or made) which is expressed to be a function to which this paragraph applies;

and any provision which the Secretary of State considers should be made for a purpose mentioned above is referred to in this Part as “probation provision”.

(2) The Secretary of State shall discharge his function under subsection (1) in relation to any probation provision by making and carrying out arrangements under section 3.

(3) The Secretary of State must have regard to the aims mentioned in subsection (4) in the exercise of his functions under subsections (1) and (2) (so far as they may be exercised for any of the probation purposes).

(4) Those aims are—

- (a) the protection of the public;
- (b) the reduction of re-offending;
- (c) the proper punishment of offenders;
- (d) ensuring offenders' awareness of the effects of crime on the victims of crimes and the public; and
- (e) the rehabilitation of offenders.

(5) The Secretary of State is not required by subsections (1) and (2) to take any action in relation to the making of provision for a purpose mentioned in subsection (1) if it appears to him that appropriate provision is being or will be made by any person acting otherwise than in pursuance of arrangements under section 3.

(6) In this section “enactment” includes subordinate legislation (within the meaning of the [Interpretation Act 1978 \(c 30\)](#)).

3 Power to make arrangements for the provision of probation services

(1) This section applies to any probation provision which the Secretary of State considers ought to be made for any of the purposes mentioned in section 2(1).

(2) The Secretary of State may make contractual or other arrangements with any other person for the making of the probation provision.

(3) Arrangements under subsection (2) may in particular authorise or require that other person—

- (a) to co-operate with other providers of probation services or persons who are concerned with the prevention or reduction of crime or with giving assistance to the victims of crime;
- (b) to authorise individuals under section 9(2) to act as officers of a provider of probation services;
- (c) to make contractual or other arrangements with third parties for purposes connected with the probation provision to be made, including in particular contractual or other arrangements—
 - (i) for provision to be made, or for activities to be carried out, by third parties on behalf of that other person; or

- (ii) for individuals who are not members of that other person's staff to act as officers of a provider of probation services.

(4) The Secretary of State may make provision for the performance of any function to which section 2(1)(c) applies by making arrangements under subsection (2) above providing for the delegation of that function to the other person.

(5) If instead of making arrangements under subsection (2) the Secretary of State considers it appropriate to make any probation provision himself, he shall make arrangements for the making of that probation provision (and for the avoidance of doubt the members of staff through whom he may act in making and carrying out those arrangements include prison officers or other persons employed at a prison).

(6) In this Part “provider of probation services” means—

- (a) a person with whom the Secretary of State has made arrangements that are in force under subsection (2); or

- (b) the Secretary of State (in relation to probation provision which is the subject of arrangements that are in force under subsection (5)).

[(6A) The Secretary of State must ensure that arrangements under subsection (2) or (5) for the supervision or rehabilitation of persons convicted of offences—

- (a) state that the Secretary of State has, in making the arrangements, complied with the duty under [section 149](#) of the Equality Act 2010 (public sector equality duty) as it relates to female offenders, and

- (b) identify anything in the arrangements that is intended to meet the particular needs of female offenders.]

(7) In carrying out functions under this Part in relation to arrangements under subsection (2) with another person (“the provider”), the Secretary of State shall have regard to the need to take reasonable steps to avoid (so far as practicable) the risk that—

- (a) the provision, in pursuance of the arrangements, of assistance to a court *or to the Parole Board for England and Wales* [, to the Parole Board for England and Wales or to a recall adjudicator (as defined in [section 239A](#) of the Criminal Justice Act 2003)], and

- (b) the carrying out, in pursuance of the arrangements, of any other activities,

might be adversely affected by any potential conflict between the provider's obligations in relation to those activities and the financial interests of the provider.

4 Restriction on certain arrangements under section 3

(1) Arrangements under section 3(2) relating to restricted probation provision may only be made with a probation trust or other public body.

(2) In this section “restricted probation provision” means probation provision which—

- (a) is made for a purpose mentioned in section 2(1)(a) or (b); and

- (b) relates to the giving of assistance to any court in determining the appropriate sentence to pass, or making any other decision, in respect of a person charged with or convicted of an offence.

[(3) The provision described in subsection (2)(b) includes provision which relates to the making of an application by an officer to a court under—

- (a) paragraph 13, 14, 17, 19A or 20 of [Schedule 8](#) to the Criminal Justice Act 2003 (revocation or amendment of community orders),
- (b) paragraph 13, 15, 17 or 18 of Schedule 12 to that Act (amendment of suspended sentence orders), or
- (c) paragraph 10 of Schedule 19A to that Act (revocation or amendment of supervision default orders).]

5 Power to establish probation trusts

(1) The Secretary of State may by order—

- (a) establish a probation trust for purposes specified in the order;
- (b) alter the name or purposes of a probation trust;
- (c) dissolve a probation trust.

(2) The purposes of a probation trust must consist of or include the making or performance by the trust of contracts with the Secretary of State under section 3(2).

(3) The purposes of a probation trust may include all or any of the following purposes—

- (a) the making or performance by the trust of contracts with another probation trust or any other person which provide for the carrying out by the trust of activities which contribute to the achievement of any purpose mentioned in section 2(1);
- (b) the making or performance by the trust of contracts with the Secretary of State for the carrying out by the trust of activities anywhere in the world which—
 - (i) are to be carried out in connection with persons who are or have been subject to proceedings in service courts; and
 - (ii) correspond to activities which, if carried out in connection with persons charged with or convicted of offences, would contribute to the achievement of any purpose mentioned in section 2(1);

(c) any other purpose specified for the purposes of this section by regulations made by the Secretary of State.

(4) A purpose specified for a probation trust under subsection (1)(a) may be expressed in more specific terms than those used in subsection (2) or (3)(a) or (b) or in regulations under subsection (3)(c).

(5) A purpose so specified which relates to the making or performance of contracts includes the carrying out of any activities relating to a contract of a relevant kind (including activities taking place before it is made or after it is terminated).

(6) Schedule 1 (which contains other provision relating to probation trusts) has effect.

Excerpt from the Schedule to Supply and Appropriation (Main Estimates) Act 2014 (MoJ Ambit)

Ministry of Justice, 2014-15

Ministry of Justice

<i>Estimate</i>	<i>Net resources authorised for current purposes</i>	<i>Net resources authorised for capital purposes</i>	<i>Net Requirement</i>	<i>Cash</i>
	<i>(£)</i>	<i>(£)</i>	<i>(£)</i>	
Ministry of Justice				
Departmental Expenditure Limit	7,252,861,000	301,100,000		
Annually Managed Expenditure	121,100,000	0		
Non-budget Expenditure	0			
Net Requirement			6,956,955,000	
Total	7,373,961,000	301,100,000	6,956,955,000	

<i>Estimate</i>	<i>Net resources authorised for current purposes</i>	<i>Net resources authorised for capital purposes</i>	<i>Net Requirement</i>	<i>Cash</i>
	<i>(£)</i>	<i>(£)</i>	<i>(£)</i>	

Departmental Expenditure Limit

Expenditure arising from:

- Administration of Ministry of Justice HQ and associated offices; administration of judicial pay; administration of the Judicial pension scheme; costs of operating the Office of the Information Commissioner and the Judicial Appointments Commission; costs of operating the Legal Services Board and the Office of Legal Complaints and the associated Levy. Payment of grant and grant in aid and the related expenditure for organisations promoting Ministry of Justice objectives including executive and advisory NDPBs; Wider Markets Initiatives; payments and grants to Local Authorities, loan charge payments to Local Authorities, payments to other government departments and associated depreciation and any other non-cash costs falling in DEL.
- HM Courts and Tribunals Service; Court of Protection; the Office of the Public Guardian; Offices of Court Funds, Official Solicitor and Public Trustee; Children and Family Court Advisory and Support Service (CAFCASS); The Legal Aid Agency and Director of Casework as created by Legal Aid Sentencing and Punishment of Offenders Act 2012; costs paid from central funds; the Administrative Justices and Tribunals Council. Re-imbursement of Lord Lieutenants' expenses; costs in relation to judicial training; The Judicial Office which includes the Judicial College; the Civil Justice Council; the Family Justice Council and the Office for Judicial Complaints; costs in relation to continued liaison with the Supreme Court. Criminal Injuries Compensation Authority; Criminal Cases Review Commission; Victims Commissioner; Judicial Appointments Commission Ombudsman; Law Commission; compensation payments for victims of overseas terrorism; administration of and payments in respect of pleural plaques; joint initiatives in the Criminal Justice System and other legal services.
- Human rights workshops and surveys; promotion of information rights; citizen and youth engagement. Conduct of MoJ's European and international business in the justice and home affairs field and the management of the UK's relationship with the Crown Dependencies. UK payments to the Hague Conference on Private International Law. Judicial Exchange programmes; sponsorship of the British Institute of International and Comparative Law and bilateral training projects with other national governments. Grant to Magna Carta Trust for 800 year anniversary commemorations. Policy on coroner and cremation services and associated support

<i>Estimate</i>	<i>Net resources authorised for current purposes</i>	<i>Net resources authorised for capital purposes</i>	<i>Net Cash Requirement</i>
	<i>(£)</i>	<i>(£)</i>	<i>(£)</i>

to Local Authorities; applications for exhumations; cremated repatriated remains and the closing of burial grounds. Payments in respect of the July 2005 bombings inquest; payments in respect of public inquiries.

- Criminal policy and programmes including, administration of the National Offender Management Service, payments to Probation Trusts and the replacement 21 Community Rehabilitation Companies, Payments to the National Probation Service, Payments in respect of the Electronic Monitoring and Prison Escort and Custody Service (PECS), payments to providers in respect of Payment by Results (Pbr) Programmes, Her Majesty's Inspectorate of Prisons, Her Majesty's Inspectorate of Probation, Prisons & Probation Services Ombudsman. The prevention and treatment of drug abuse; counter terrorism and intelligence; secure accommodation placements, public and private prisons, Prison Service College, the Parole Board, Youth Justice Board, grants to 'prisoners abroad', welfare to work schemes.

Income arising from:

- Civil Court fee income; fine income; tribunals fee income from Asylum and Immigration Tribunals; netting off and receipts retained in accordance with the fine incentive scheme; receipts relating to the asset recovery incentive scheme; receipts under the victims surcharge; pre-1990 loan charges debt payments; receipts retained in relation to the costs of enforcement of fines; Fees charged by the Public Trustee; recoveries by the Official Solicitor; fees charged by the Office of the Public Guardian and Court of Protection; recoveries from the Debt Management Office for the cost of administering funds in court; contributions paid by legally aided defendants in the higher courts; Receipts in relation to legal aid contributions received from assisted clients; receipts in relation to costs and damages received; including recoveries via the statutory charge; by the legal fund in relation to assisted clients; Grants from other third parties received to the legal aid fund; receipts in relation to the use of Deputy District Judges as prison adjudicators.
- Recoveries from the National Insurance Fund for the cost of Social Security Commissioners; income from National Insurance Fund received by HM Courts and Tribunals Service; receipts in relation to tribunals received by HM Courts and Tribunals Service; receipts in relation to the Scottish Criminal Injuries Compensation Appeals Panel remitted to the HM Courts and Tribunals Service.
- Fees relating to the Office of the Information Commissioner and receipts in relation

<i>Estimate</i>	<i>Net resources authorised for current purposes</i>	<i>Net resources authorised for capital purposes</i>	<i>Net Cash Requirement</i>
	<i>(£)</i>	<i>(£)</i>	<i>(£)</i>

to data protection enquiries; Fees charged for Subject Access Requests under the Data Protection Act; Receipts in relation to Legal Services Complaints Commission; receipts in relation to Claims Management Regulation; recovery from the investment managers for the cost of administering the Commons Investment Schemes; recoveries for research and recommendation work undertaken by the Law Commission; Payments from other departments for legal services and other recoveries associated with the work of the MoJ.

- Share of gross profits from prison shops and from services purchased by staff etc from the activities of prison industries and farms from the supply of inmate labour and from other goods and services; Income in relation to Prisoner's earnings; Receipts in relation to Probation Trusts income and the replacement 21 Community Rehabilitation Companies income; receipts from the Youth Justice Board; Receipts from agricultural subsidies; from advertisements in the Prison Service News and from the sale of waste; Contributions from prisoners in relation to damage to property.
- Receipts in respect of judicial superannuation contributions and receipts from the Judicial Pensions supply estimate to fund administrative costs; Receipts from the European Commission, receipts from Royal Licences; receipts in relation to the devolution Service Level Agreement; receipts in relation to the Territorial Offices; receipts in respect of the Crown Office fees; European fast stream receipts from the Cabinet Office; subsidies under the welfare for work programmes; contributions towards grant programmes and training services; payments from health authorities; receipts in relation to the Scottish Executive, Northern Ireland Executive and the Welsh Assembly Government; Payments from the Skills Funding Agency, the Heritage Lottery Fund and Sport England.
- Receipts under the New Deal Scheme and receipts from Wider Markets Initiatives; Receipts from other government departments; sale of vehicles; plant; machinery; land and buildings; sale of equipment and scrap; tax rebates; recovery of staff costs for staff on loan or seconded to outside bodies; repayment services; payments for information and publications; private telephone calls; vending machines; telex; postal and bank charge recoveries; Receipts of VAT refunds on contracted out services; Profit on the sales of capital assets; compensation and insurance; contributions towards criminal justice systems initiatives; rebates and commission from service contracts; fees from nursery facilities and other fees; receipts from

<i>Estimate</i>	<i>Net resources authorised for current purposes</i>	<i>Net resources authorised for capital purposes</i>	<i>Net Cash Requirement</i>
	<i>(£)</i>	<i>(£)</i>	<i>(£)</i>

rents and receipts of premia on assignment of leases; service charges and site usage; recovery from the subletting of magistrates accommodation, other charges and receipts received.

Annually Managed Expenditure

Expenditure arising from:

- Corporation tax, Pensions, provisions for the Criminal Injuries Compensation Authority, Central Funds and Legal Aid; other areas of the MoJ business, including arms length bodies; impairment of land and buildings; and provisions and other non-cash costs falling