

THE CORE CURRICULUM
FOR GOVERNMENT LAWYERS
MODULE 2

Power and Money

Money 2.3 – HMT, departments' role, fees and charges

Regularity and propriety

These concepts are fundamental to the right to use public funds, referring to probity and ethical conduct in the use of the funds.

- Regularity – compliance with relevant legislation, delegated authorities and guidance from the Treasury – see Managing Public Money
- Propriety – meeting high standards of public conduct, including robust governance, meeting Parliamentary expectations (including as to transparency)

These principles are particularly relevant in the relationship between Ministers and their departmental accounting officer.

See the Seven Principles of Public Life (“Nolan principles”) – www.public-standards.gov.uk

Role of the Treasury

HMT has a key role in controlling Government expenditure, and accounting to Parliament for Government's use of the money.

Money cannot be spent, nor expenditure commitments made, without Treasury consent. The Treasury controls access to the consolidated fund.

Usually, HMT agrees general approvals for each department, subject to delegated limits or exclusions. This provides authority for the department to enter into commitments and to spend within predefined limits without specific further approval from the Treasury.

Role of the Treasury – *cont'd*

Such approvals cannot cover transactions which set precedents which are novel, contentious, or could cause repercussions elsewhere in the public sector – for these, advance HMT consent is required.

Examples might include special severance payments such as compromise agreements in excess of contractual commitments, ex gratia payments similar to but outside statutory schemes. See box 2.3 of MPM for more examples.

When HMT consent is administrative, and where it is required as a matter of law

It is improper for a department to spend, or make spending commitments, outside the agreed delegations. Such spending may not be unlawful per se, but would attract significant criticism. In such situations the Treasury may be prepared to grant consent retrospectively if the expenditure would have been agreed if permission had been sought at the proper time.

It is unlawful for a department to proceed without Treasury consent where legislation calls for explicit Treasury consent – and such consent cannot be obtained retrospectively.

Ministerial and departmental accountability for use of public money

Ministerial responsibility for his or her department includes responsibility for management of the funds voted to it.

The Ministerial Code requires Ministers to take notice of the advice of their accounting officer regarding proper management of these funds.

The accounting officer of a department is usually its permanent secretary. He or she has specific personal responsibilities for probity in the management of the funds, and signs off the accounts. The AO can be called to account for such management by Parliament (usually by appearance before the Public Accounts Committee).

Ministerial and departmental accountability for use of public money – *cont'd*

Further details of the AO's responsibilities are to be found in Chapter 3 of MPM, in particular box 3.1. Note in particular the obligation to ensure that the department "uses its resources efficiently, economically and effectively, avoiding waste and extravagance"

Relationship between AO and Minister – and Ministerial Directions

The AO cannot simply accept a Minister's aims or policies without examination. IN particular, he or she must bring to the Minister's attention any conflict between the Minister's instructions and his or her duties.

If (exceptionally) a Minister insists on continuing with a course of action against which the AO has advised, the AO must ask for a formal written direction to proceed. The department cannot proceed without it.

Relationship between AO and Minister – and Ministerial Directions – *cont'd*

Once such a direction is issued, the relevant papers should be promptly copied to the Comptroller and Auditor General and the Treasury; the minister's direction should be implemented without further ado; and the existence of the direction be published, no later than in the department's next resource accounts.

This moves the issue into the political sphere. The C&AG will draw it to the PAC's attention.

IMPORTANT – if the proposal is outside the Minister's powers and therefore unlawful, it cannot be implemented in any event.

Fees, charges and levies

Article 4 of the Bill of Rights 1689 and modern day charging

“That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlayament for longer time or in other manner than the same is or shall be granted is illegal”

Effect – new levies, or variations to existing ones, are unlawful unless they have been approved by Parliament.

“Levies” includes conventional taxation but also any fee or charge that public bodies raise where the subject matter of the fee is closely connected with the exercise of official authority and power.

Article 4 of the Bill of Rights 1689 and modern day charging – *cont'd*

Clear and direct statutory authority is required to impose a tax or fee. Very often Ministers will have powers in primary legislation to set fees or charges in secondary legislation subject to Parliamentary scrutiny.

A charge that is purely discretionary or commercial does not require such authority, but the line can be difficult to draw.

Relevant case law...

Attorney General v Wilts United Dairies [1922] – HL

Held: that the Ministry of Food had engaged in unauthorised taxation when it granted licenses to the dairies to purchase milk on the wholesale market on condition that they paid 2d/gallon for such milk. The licensing legislation contained no power to charge.

China Navigation Co Ltd v Attorney General [1932] – CA

Held: no duty on Crown to provide military protection to British subjects overseas, therefore lawful to charge for providing armed guards on merchant vessels. By implication, had there been a duty it seems charging would have been unlawful.

Statutory construction of powers to charge

Such powers are strictly construed.

An apparently unqualified power to charge will be interpreted as a power to charge up to the full cost of providing the service, and no more.

If a more extensive power is needed, explicit authority will be required in the statutory charging power.

Be aware of s.102 of the Finance (No.2) Act 1987. Fee powers can sometimes be varied by an order under this provision – but explicit HMT consent is required.

Policy context

HMT guidance in Chapter 6 MPM

Including costs that go beyond the norm, even if within the power, may result in a revenue stream being classified as taxation, which has implications for the ability of the department to retain the income.

New fee powers and changes to existing fee regimes must be cleared with HMT, even if the power does not require statutory consent from HMT.