

ATTORNEY GENERAL'S LEGAL RISK GUIDANCE

Introduction

1. A central element of the rule of law is that everyone – including the government – is subject to the law. As such, the government is required to comply with legal obligations arising under domestic and international law. This is affirmed in the Ministerial Code which refers to “the overarching duty on Ministers to comply with the law”, including international law.
2. This Guidance is for lawyers and others advising on lawfulness and legal risk in government in domestic or international law. In that capacity, you have a key role in helping Ministers meet their overarching obligation while delivering their policy objectives. The Civil Service Code recognises officials’ obligation to act with integrity, honesty, objectivity and impartiality and lawyers owe additional duties arising from their professional obligations.
3. This Guidance explains the common framework to assess risk across the Government Legal Profession. It provides guidance on making advice practical, meaningful and focused on solutions within the law and complying with professional obligations as qualified lawyers in any UK jurisdiction. Designed to help you in your role, it is focused on Ministers making policy or operational decisions, but should also be used in advising other decision-makers across government.

Why is legal risk important?

4. As civil servants, the job of government lawyers is to advise Ministers and other decision-makers how best to achieve their policy or operational objectives lawfully. This will include identifying legal risks and ways of reducing those risks. Ministers will want to understand the nature and scale of a range of risks, including legal risks, before making their final decision. Ministers will necessarily sometimes need to take decisions at a point when the legal or factual position is uncertain – for example when using powers for the first time, when formulating policy or when the state of the relevant law is uncertain. They need to be well informed about the chance of successful legal challenge, and clear about the impacts, consequences, and limits of legal risk.

Meaning of legal risk and method of assessment

5. ‘Legal risk’ means the risk that a decision or act is unlawful under domestic or international law.
6. The principal factor for legal risk is the **likelihood of a legal challenge being successful (assuming one were brought)**. Some legal issues will not, or are unlikely to, be tested before a court. For example, they may not be justiciable before a domestic court or possible claimants may be unlikely to bring a legal challenge. Nevertheless, for the purpose of assessing legal risk, you should assume that a challenge will be brought and consider what a court would be likely to decide.
7. You will need to analyse and weigh the robustness of the legal arguments on both sides. This is your role as the lawyer, with policy and operational input in relation to the rationale of the policy/action and the available evidence. Well-made, carefully justified, evidence-based decisions may carry a low or medium risk of successful challenge, whereas a dearth of transparent justification or usable evidence may conversely increase such risk. The level of certainty in the relevant law and the novelty of proposed legal arguments will be relevant.
8. You must advise that a proposed course of action is unlawful if you assess that if the action was legally challenged, there is no tenable legal argument that could be put to a court. A legal argument is tenable if a lawyer representing the government could properly advance that argument before a court or other tribunal in accordance with their professional obligations. If you are concerned that there is no tenable legal argument, you should consult your line manager and Legal Director before you advise. AGO and LSAG may need to be alerted at this stage.

9. This guidance applies in equal force to assessing risk in the context of international law. The UK, like other States, has obligations which are binding in international law. The Ministerial Code recognises the “overarching duty” on Ministers to “comply with the law”, which has been confirmed by successive governments as including international law. Further, the rule of law requires compliance by the state with its obligations in international law as in national law, even though they operate on different planes: the government and Ministers must act in good faith to comply with the law and in a way that seeks to align the UK’s domestic law and international obligations, and fulfil the international obligations binding on the UK. To honour the UK’s international obligations, the government should not invite Parliament to legislate contrary to those international obligations.
10. There are two other important factors which must be included in advice to Ministers on legal risk:

A. Likelihood of a legal challenge being brought

11. Policy or operational colleagues may be in a better position than lawyers to assess who, if anyone, might want to challenge and the likelihood of this occurring. The forum and timeframe of such a challenge, and the possibility of interim relief (on which lawyers can advise), should also be considered, as should any variation across the UK’s separate legal jurisdictions.

B. Impact and consequences of legal risks

12. Understanding the potential impact of a challenge, whether successful or not, is a core part of Ministers’ decision whether to accept the legal risk. You will need to identify and explain the potential remedies if a challenge were to succeed and work closely with policy or operational colleagues when assessing impacts and broader consequences of any legal risks you identify. A successful legal challenge may, for example, result in financial penalties, quashing of decisions or legislation, requiring them to be remade. It may also result in reputational damage, regulatory confusion and enforcement gaps, criticism by an oversight body and/or departmental resource implications. Some of these impacts may result from the challenge process itself irrespective of the outcome e.g. defending a judicial review can be very resource-intensive, cause delays or generate additional attention and controversy. More broadly, a course of action may adversely affect individuals or groups, whether or not they challenge it.
13. As noted above, this Guidance applies when assessing the legal risks of breaching the UK’s obligations in international law. As with other areas of law, it is important to consider the content of the international obligations, their relevance and applicability, who they bind and at what level. In that context, however, there are important differences between international law and domestic law which must be considered when undertaking a legal risk assessment:
- a. International law principally applies between states. It may not give rise to legally enforceable rights or duties in UK domestic law, which will usually depend on implementing legislation.
 - b. States are not automatically obliged to submit their disputes with other States to courts or tribunals and are, in principle, subject to such mechanisms only with their consent. The legal risks need to be assessed in their specific context or system, considering the extent to which states involved have submitted to a dispute settlement mechanism at the international level. Policies or actions which have little or no chance of being tested before a court and which are assessed as carrying a high risk under international law should be scrutinised very carefully by government lawyers.
 - c. The UK attaches great importance to its compliance and respect for international law and its reputation for doing so. This must be a critical factor in legal advice in this area. In international law terms, the impact or consequences of a high risk legal position or perceived breach may perhaps appear less tangible or direct for the government than those that usually follow a breach of domestic law. However, these may incur significant consequences, be they legal, political, diplomatic and/or reputational. An assessment of the risks of a breach of international law will require legal and policy assessments of the reputational, diplomatic and Parliamentary impact to be put clearly to Ministers. It will also require an assessment of the likely response of the actors to which the UK owes the international obligation, the likely response of the international community as a whole and any broader implications for the application and development of international law.

Mitigations: reducing legal risk

14. A mitigation strategy is important to achieving solutions which remove or drive down risk for Ministers while advancing their aims. Part of a lawyer's role – and skillset – is to suggest and test measures designed to avoid or reduce legal risk. This will mean working with officials to adapt proposals in ways that achieve the desired outcome, by building in additional or different elements to policy design, delivery or communications to reduce the risks identified or conducting further analysis to refine the justification or improve the evidence base or other courses of action. Creativity and good communication are needed to ensure all mitigations are fully explored and put before Ministers. Mitigations may avoid or reduce all or any of the elements of the legal risk.
15. There will be times when, having explored all mitigations, a proposed activity or policy remains high risk or simply unlawful.

Presenting legal risk

16. Legal risks should be fully integrated into policy analysis and the appraisal of options, and communicated accurately and accessibly to senior decision makers and to Ministers. The legal risk section of any submission should be clear and succinct (even if you attach a more detailed annex). When setting out an assessment of legal risk, it should also cover the other two factors outlined above – likelihood of a challenge being brought and impact and consequences. Any subsequent changes must be checked by a lawyer so that it still properly reflects the legal advice.
17. It is important that the government should receive **full merits legal advice**, wherever practicable, namely, advice assessing the strength of the legal arguments for and against the lawfulness of the policy/decision, not just advice focused on whether a tenable legal argument is available. In doing so, lawyers should use this guidance to advise on the level of legal risk, and also give their full and frank advice on the better approach in legal terms (including possible mitigations) and the likelihood and impact of challenge, recognising that decisions are for Ministers, dependent on their risk appetite.
18. To achieve consistency, transparency and clarity in the assessment and presentation of legal risk, lawyers should use the framework below when giving legal advice. You should use the numerical risk percentages as a way to assist your audience to understand the advice, and draw on the brief narrative summary to describe the likelihood of the proposal being lawful.
19. It is also important to remember that your assessment can change over time as relevant facts and evidence are explored and arguments are developed, including in response to questions you ask or suggestions you make or in light of developing case law. Changes may be likely when advising at the very early stages of policy development or potential litigation. You should use your professional judgment to reassess and reconfirm or change your legal risk assessment over time.
20. Reliance on a legal basis which is underpinned only by a tenable legal argument carries a high risk that the responsible Minister may be in breach of the law. Therefore:
 - a. It should be a last resort and only pursued when all other options have been considered and discounted.
 - b. It may not be appropriate in some cases – for example, in situations where the fundamental rights of individuals are significantly undermined, particularly where the proposed policy or action is unlikely to be challenged before a court or otherwise subject to judicial scrutiny.
 - c. In cases where there is a high risk that a legal challenge would succeed, the impact and context of the proposed course of action will be particularly relevant and your advice should be clear about this.
 - d. Submissions which refer to a tenable legal argument should also make clear that a tenable legal argument is one which we are significantly more likely to lose.
21. There may be circumstances in which Ministers will decide it is appropriate to rely only on a tenable legal argument. Examples include, but are not limited to, situations where an area of law is particularly

uncertain or unsettled, where a fundamental point of principle is at stake requiring clarification by the courts or where the benefit of proceeding plainly and clearly outweighs the risk a decision or policy may be unlawful or successfully litigated.

22. The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. Proposals to rely only on a tenable legal argument or where the legal risk is assessed as being otherwise high or medium-high should always be brought to the attention of your line manager or Legal Director, who will consider consulting the Law Officers.
23. If it is proposed to proceed with a course of action despite advice that it would be unlawful to do so because it is not supported at least by a tenable legal argument, Law Officer advice must be sought immediately.

ATTORNEY GENERAL'S GUIDANCE ON LEGAL RISK: SUMMARY TABLE

Narrative Summary – points to consider in advising Ministers on likelihood of unlawfulness Legal to summarise position, drawing on this language	Likelihood of any challenge being successful Legal lead with Policy input	Likelihood of legal challenge Policy lead with Legal input	Impact of challenge Policy lead with Legal input
We have strong legal arguments.	Low <30%	Low <30%	Low
We have good legal arguments.	Medium Low 30-50%	Medium Low 30-50%	Medium Low
We have supporting legal arguments, but the counterarguments are stronger.	Medium High 50-70%	Medium High 50-70%	Medium High
We could mount at least a tenable legal argument but are significantly more likely to lose.	High >70%	High >70%	High
No tenable legal argument exists to justify the decision or policy.	Policy or decision unlawful.		