

# Attorney General's Guidance on Legal Risk

## Introduction

1. This Attorney General's Guidance is for lawyers advising on lawfulness and legal risk in Government. It explains the common framework to assess risk across the Government Legal Profession. It provides guidance on how to make advice practical, meaningful and focused on finding solutions. When dealing with legal risk, there can be a perception that because there is some legal risk in a proposed policy or course of action, that may prevent it from happening. In fact, that is rarely the case. Advice on legal risk should be used as one tool to help guide the best development of plans and policies and to support Ministers to deliver the Government's objectives. This Guidance is designed to help you in your role as a lawyer advising the Government on risk. It is focused on Ministers making policy or operational decisions, but is adaptable to other decision-makers and other areas of law across central government.

## Why is legal risk important?

2. As civil servants, the job of government lawyers is to advise Ministers, and to help them in their overarching duty to comply with the law. Ministers will want to understand the nature and scale of risks before making their final decision. Government lawyers should be clear about their Ministers' objectives when drafting advice. Solutions-based advice and proposals to mitigate risks are most useful to Ministers. Legal risk is one, but not the only, type of risk that they will want to consider. The fact that something is judged to involve high legal risk does not mean it cannot or should not be taken. For example, something that is very high risk may have little or no impact and, equally, something low risk could have a major impact. Only if no respectable legal argument can be put to a court should it be advised as being unlawful. This will be rare.

3. It is important that Ministers and officials have confidence that lawyers are acting in their interests and looking actively for ways to deliver policy objectives or operational outcomes while minimising risks. This will include gaining an understanding of your Minister's risk appetite, both in relation to a specific issue you are advising on, and more generally in their portfolio. Your Legal Director and line manager will be able to support you to understand how your Ministers prefer legal risk advice to be presented, and identify what solutions are available where you have identified legal risks that the Ministers need to consider.

4. You will as a lawyer be conscious of your wider professional obligations, and may at times need to highlight the interaction between Parliament, government and the courts. In a democratic society, access to justice and the courts to uphold rights is critical and, at the same time, the courts will take care to exercise appropriate deference for the executive's role in policy and decision making.

## Meaning of legal risk and method of assessment

5. 'Legal risk' means any risk of a court, whether domestic or international, deciding that something is unlawful, or the risk of a penalty resulting from non-compliance with legal requirements. The following factors are relevant to your assessment of legal risk:

### 1. Likelihood of a legal challenge being brought

6. 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.

### 2. Likelihood of that challenge being successful

7. The assessment of success will require you to analyse and weigh the robustness of the legal arguments on both sides, including procedural issues such as whether the other party has standing. This is for lawyers to assess, with policy input in relation to the rationale of the policy/action and the available evidence. Most well-made evidence-based decisions will carry a low or medium risk of successful challenge, whereas a dearth of usable evidence can conversely increase such risk. The level of certainty in the relevant law, the novelty of our arguments or a policy desire to challenge existing case law may be among relevant factors for you to consider and will not by themselves be determinative.

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8. If, having assessed the likelihood of a successful challenge, you conclude that there is no respectable legal argument that can be put to a court, then you will need to advise that the proposed action is unlawful. A legal argument is respectable if a lawyer representing the Government could properly advance that argument before a court or other tribunal. In other words, unless there is no respectable legal argument that can be put to the court in support or defence of the action we wish to take, you can advise that there is a sufficient legal basis to proceed, even if high risk. It is likely to be exceptional that there are no respectable arguments and if you are in this territory you should refer the matter to your line manager and Legal Director before you advise.

### 3. Impact and consequences of that challenge, whether successful or not

9. You will need to work closely with policy or operational colleagues when assessing impacts. A challenge may delay implementation of a policy. A successful legal challenge may result in financial penalties, reputational damage, quashing of decisions that have to be retaken, regulatory confusion and enforcement gaps, criticism by an ombudsman or other oversight body and departmental resource implications. Many 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.

### Mitigations

10. In assessing the consequences, you should also work with policy or operational colleagues to consider mitigations that can be put in place to reduce legal risks and impacts. A mitigation strategy is an important strand to achieving solutions which drive down risk for Ministers while advancing their aims. This will mean working with officials to adapt proposals in ways that achieve the desired outcome, but build in additional or different elements to the way a policy is designed, delivered or communicated to reduce the risks identified or conduct further analysis to explore or improve the evidence base for this or other courses of action. Creativity and good communication are both needed to ensure all mitigations are fully explored and put before Ministers.

11. There will be times when, having explored all mitigations, a proposed activity or policy remains high risk. Therefore, a mitigation strategy should include your advice on the best defence that can be made to any potential challenge, particularly as that advice develops over time. This will give Ministers confidence that where there is a legal basis for them proceeding, and they have accepted the legal risk identified, any challenge that emerges will be defended as effectively as possible.

### Presenting legal risk

12. Legal risks should be fully integrated into policy analysis and the appraisal of options, and communicated **accurately and clearly** 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). Any subsequent changes must be checked by a lawyer so that it still properly reflects the legal advice.

13. It is important that Ministers and civil servants have a clear understanding of what practical consequences arise from your advice on legal risk. Sometimes the simple fact that you will advise that there is *some* legal risk can lead to an assumption that a course of action or policy cannot be taken. Therefore, in presenting legal risk, take care to explain what solutions are available to the Minister, ensuring that legal risks are described appropriately in wider submissions. For example, starting your advice in a submission with clarity that there is a sufficient legal basis for a decision or course of action and going on to explain clearly that it carries legal risk, using the framework below, helps to ensure legal risk doesn't become a perceived "block" to what a Minister wishes to achieve.

14. In using this framework, 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 are particularly likely when advising at the very early stages of policy development or potential litigation. That is because the position, and identified mitigations, may well develop over time and provide new information. You should feel confident in using your professional judgement to reassess and reconfirm or change your legal risk assessment over time. Doing so is part of our normal process of risk analysis.

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15. Any situation where no respectable legal argument can or is likely to be found to justify a proposed decision or policy should be reported early to your line manager and Legal Director who may need to alert the AGO. In communicating any such advice to Ministers, any further mitigation prospects which could permit a respectable legal basis to be found should be set out and, in accordance with the Cabinet Manual's provisions, the Ministers must be clear on the available routes they may wish to take to escalate and seek further advice, from your Legal Director, from outside counsel and/or from the Law Officers.

16. Bringing all this together, to achieve greater transparency and clarity in the assessment and presentation of legal risk, lawyers should use the risk chart below to address each of the three elements of risk when giving legal advice, and draw on the narrative summary focussed on the likelihood of success:

Narrative Summary and Commentary – points to consider in advising Ministers  Legal lead to summarise position, drawing on this language and noting the italicised comments in doing so.	Likelihood of legal challenge  Policy lead with Legal input	Likelihood of successful challenge  Legal lead with policy input	Impact of challenge  Policy lead with Legal	Colour key (for each category separately)
We have strong legal arguments, and there is a low risk of successful challenge. <i>In presenting such assessments, it is important to ensure negligible or discounted risks are not given undue weight.</i>	<b>Low</b> <b>Less than 30%</b>	<b>Low</b> <b>Less than 30%</b>	<b>Low</b>	<b>Green</b>
We have stronger legal arguments in support, and there is a medium-low risk of successful challenge. <i>In presenting such assessments, it is important that legal risk is not elevated to disproportionate levels.</i>	<b>Medium Low</b> <b>30-50%</b>	<b>Medium Low</b> <b>30-50%</b>	<b>Medium Low</b>	<b>Green/Amber</b>
We can identify comparable legal arguments for and against and there is a medium-high risk of successful legal challenge. <i>Identifying mitigations will be important in seeking to reduce the identified risk further.</i>	<b>Medium High</b> <b>50-70%</b>	<b>Medium High</b> <b>50-70%</b>	<b>Medium High</b>	<b>Amber</b>
We could mount at least a respectable legal argument in support, but there is a high risk of successful challenge. <i>A high risk assessment does not mean something will necessarily be found unlawful: advice should be clear on the impact and the distinction with unlawfulness drawn out for Ministers.</i>	<b>High</b> <b>70% +</b>	<b>High</b> <b>70% +</b>	<b>High</b>	<b>Amber/Red</b>
No respectable legal argument exists to justify the decision or policy. <i>Ministers to be advised on mitigations to remove unlawfulness, alongside escalation routes to relevant senior lawyers &amp; AGO.</i>	<b>Policy or decision <i>prima facie</i> unlawful.</b>			<b>Red</b>