

Here is Why We Can Never Prioritise Government Guidance of Any Kind, Over The Law of The Land and The Rule of Law

Government guidance can be useful, persuasive and important. It can explain complicated legislation, recommend precautions and help public bodies apply their powers consistently. What it cannot do is place Government preference above the law which authorises and limits public power.

The essential question is not how confidently an instruction is expressed, or how prominently it appears on an official website. It is what legal authority supports it, whom it addresses and what consequences the law attaches to it. Clear advice and an enforceable legal obligation are different things.

The law supplies the authority and the limits

Acts of Parliament, valid delegated legislation and the common law form part of the legal framework within which Government operates. Different rules apply across the United Kingdom and the relevant jurisdiction must be identified. Within that framework, a public authority must exercise its powers lawfully and respect applicable rights and procedural safeguards.

Guidance may explain how an authority intends to exercise a discretion. It may describe how to comply with a legal duty. It does not acquire the power to amend legislation, remove an exception or create an offence merely because a Minister or department issues it.

Suppose a legal rule prohibits an activity unless there is a reasonable excuse. A guidance page lists three examples. If the legislation permits other reasonable excuses, the page cannot lawfully turn its examples into an exhaustive list. The legal question remains whether the actual circumstances satisfy the legal test.

The distinction matters most where a person faces a penalty, a restriction or the loss of an entitlement. An official ought to be able to explain the relevant power and the conditions governing its use. A reference to guidance may assist that explanation; it cannot supply a missing legal power.

The rule of law makes Government answerable to law. Its practical protection would be weakened if the same authority could enlarge its powers simply by publishing a more demanding account of what it wished the public to do.

Some guidance has legal significance

It would nevertheless be wrong to say that guidance can always be ignored. Legislation may require a decision-maker to have regard to specified guidance, or give a code or standard another defined legal role. A court may examine whether a relevant duty was properly discharged. The effect depends upon the particular statutory scheme.

In *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, paragraph 21, the House of Lords explained that the statutory code under consideration was guidance rather than binding legislative instruction, but carried substantial weight. Departure required cogent reasons. This illustrates why its source and legal context must be examined rather than assumed.

Giving such guidance its proper weight is obedience to the legal framework. Treating it as superior to that framework would be a different proposition. Even guidance with a statutory role derives its authority and limits from law.

Policies can protect fairness as well as threaten it

Lawful published policies can protect people against arbitrary or inconsistent treatment. In *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, paragraphs 29 - 31, the Supreme Court explained the public-law significance of policy, including the requirement to follow a published policy unless there are good reasons for departure. It also reiterated that policy must not rigidly fetter a decision-maker's discretion.

These principles work together. A person should receive the benefit of a lawful policy applicable to their case. An official should also remain able to consider circumstances which the governing law requires them to consider. Administrative consistency cannot justify closing a discretion which Parliament has left open.

Following guidance is therefore not an automatic defence to an unlawful decision. The authority remains responsible for applying the relevant law, considering the case properly and explaining a departure where an explanation is required. Equally, an unsupported personal disagreement with guidance does not establish that it is unlawful.

Advice may go beyond a minimum legal requirement

Government may recommend precautions which the law does not compel. People and organisations may choose to take them. A more cautious recommendation is not necessarily unlawful simply because it goes beyond a minimum legal requirement. The important distinction is whether it is presented and applied as advice or as an obligation supported by law. Nor does the absence of a specific prohibition mean that every action is legally consequence-free. Contracts, professional responsibilities and general legal duties may also apply. Each must be examined on its own terms; the words “Government *guidance*” do not settle their effect.

Good intentions cannot replace lawful authority

Urgency, expertise and a legitimate public objective may explain why guidance is issued. They do not themselves however, confer additional powers. The applicable legislation may provide emergency powers or permit restrictions, but those powers remain subject to their legal conditions.

The public should be able to distinguish a legal requirement, a recommendation and an institution’s own policy. When these are blurred, a person may comply because they believe refusal is unlawful, although the relevant law imposes no such obligation. Meaningful choice depends upon an accurate account of the position.

An official statement should therefore identify when it describes the law and when it recommends conduct. Where guidance summarises a complicated rule, it should direct readers to the underlying provision and preserve material qualifications. A

simplified explanation should make the law accessible without changing its substance.

Questioning the legal basis is legitimate

A person who asks where a power comes from is asking an ordinary constitutional question. A lawyer who examines whether guidance accurately reflects legislation is performing a necessary professional function. Neither enquiry becomes improper because the policy objective is popular or the circumstances are difficult.

Responsible scrutiny requires the actual wording, the version in force at the relevant time and the applicable jurisdiction. It also requires a willingness to accept that guidance may be sound or that legislation gives it greater significance than first appears. Legal disagreement should be resolved through reasoned interpretation and the appropriate review or court process.

In *R (UNISON) v Lord Chancellor* [2017] UKSC 51, paragraphs 66 - 69, the Supreme Court explained that access to courts is inherent in the rule of law. Courts enable the law to be applied and enforced, including against executive Government. The benefit extends beyond the parties to an individual dispute.

The practical principle

Before treating guidance as compulsory, establish the legal source of the obligation, the people it binds and the relevant exceptions. Before enforcing it, establish the power to do so. Where legislation gives guidance a particular status, apply that status faithfully.

Where the guidance misstates the law, the lawful answer is to correct the guidance.

Government guidance should help people understand and apply the law. It must never become a means of placing Government preference beyond the law's limits. The authority to govern is an authority exercised under law and the rule of law is what keeps that distinction real.

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Referenced Authorities

- R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58, paragraph 21
- Mandalia v Secretary of State for the Home Department [2015] UKSC 59, paragraphs 29 - 31; discussing R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12
- R (UNISON) v Lord Chancellor [2017] UKSC 51, paragraphs 66 - 69