



Investigatory Powers
Commissioner's Office

PO Box 29105, London
SW1V 1ZU

Prime Minister
10 Downing Street
Westminster
SW1A 2AA

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Dear Prime Minister,

In a written statement to Parliament on 28 June 2018 you invited me to make proposals to the Government as to how the Consolidated Guidance could be improved, taking account of the views of the Intelligence and Security Committee of Parliament (“ISC”) and civil society. I was very pleased to accept your request, and this letter sets out my conclusions. I have attached a proposed revised version of the Guidance. I respectfully suggest the document should henceforth be called *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*. I explain below the reason for the proposed “rebranding”, and what I perceive to be the need for this rather long title.

Following your invitation, I instigated a formal consultation process in accordance with the IPCO Policy on Public Consultations to receive the views of civil society and others with an interest in this area. We received nine open responses, which were reviewed and placed on our website. I organised meetings with representatives from the relevant Government departments and the intelligence services and, in December 2018, we convened a meeting at Chatham House which included several NGOs, various interested academics and representatives from the Foreign and Commonwealth Office and Cabinet Office. I am grateful to Lord Anderson of Ipswich for chairing this latter event, at which he facilitated a full and frank discussion of the key issues arising from the consultation.

Since then, I have been grateful for the considerable assistance with which I have been provided by Her Majesty's Government in securing my objective of understanding whether the proposals I was developing would cause unforeseen difficulties for those ‘in the field’. This is a question which the Agencies are uniquely equipped to answer. I have been keenly aware of the need to maintain my independence when seeking the views of the officials in this way and this process has, understandably, taken some time. I would like to record my thanks for the entirely constructive way in which this consultation has been approached by one and all.

Background

The Consolidated Guidance was drafted and published in 2010. It can fairly be said to have led the field internationally in terms of providing guidance to personnel on intelligence sharing in a manner that protects human rights. When the ISC produced its two reports on Detainee Mistreatment and Rendition in June 2018, I observed publicly that our inspections have revealed a current high standard of compliance with the Guidance on the part of all those to whom it applies. It is, however, inevitable that experience in applying guidance of this kind will lead to the identification of areas for improvement.

Rather than set out in exhaustive detail the reasons for each proposed change to the Consolidated Guidance, in this letter I have identified the main changes and the reasons for them. Otherwise, wherever a proposed amendment does not involve a substantive change of policy and was agreed by all those involved in the process (such as the extension of the Principles to the National Crime Agency and SO15) I have not included the justification for the changes and instead I have simply submitted appropriately reformulated text.

I have additionally referred to various issues that were raised during the public consultation, which, although they fell strictly outside of the present exercise, you may nonetheless consider ought to be made the subject of future detailed consideration. If that should be the case, I, along with my staff, would be pleased to assist on these or indeed any other issues arising out of this review that you consider merit further attention.

The need for clarity

The Consolidated Guidance has three principal objectives. The first is to protect individuals abroad from harm because of actions by British officials when they are involved in sharing intelligence with foreign partners, in situations when the person is in detention or detention is sought or will occur. The second is to protect British officials from legal liability and to ensure that all conduct of British officials is lawful as a matter of both domestic and international law. The third is to ensure wide-ranging compliance in the context of intelligence sharing with the national policy in this field, and particularly the United Kingdom's refusal to be involved in unlawful killing, the use of torture or cruel, inhuman or degrading treatment, or extraordinary rendition.

In my view, these are entirely consistent objectives.

For the Principles to have utility, it is critical this document is clear, and that any avoidable ambiguity is removed. Many of the points raised in the consultation responses, and therefore the changes I have proposed, are simply intended to remove uncertainty and perceived obscurity. The key objective has been to clarify the core elements of the UK's policy for anyone who needs to apply the Principles in an operational setting.

Types of harm covered

The Consolidated Guidance currently refers to torture, cruel, inhuman and degrading treatment and arbitrary arrest and detention. It does not expressly cover unlawful killing, extraordinary rendition or rendition simpliciter. These omissions are significant, particularly given some of the examples set out by the ISC in the two reports referred to above. Nonetheless, my discussions with the agencies

have established that, despite the current drafting, the Consolidated Guidance is applied whenever there is a risk of extraordinary rendition, rendition or unlawful killing occurring in a detention context. As a result, I propose including these three possible outcomes in the new Principles.

Threshold of risk

The Consolidated Guidance, as presently drafted, asks officials to consider whether passing intelligence or soliciting detention will give rise to a “serious risk” of the specified harms occurring. I consider there are persuasive reasons for opting for the test of “real risk”, which is generally applied in equivalent contexts (e.g. whether there are substantial grounds for believing there to be a “real risk” of torture or cruel, inhuman and degrading treatment or punishment when an individual is faced with extradition). The Divisional Court when considering the Consolidated Guidance has stated that there is no material distinction between “serious risk” and “real risk” in the context of operational decisions “on the ground”, and therefore this suggested change – which in my view appropriately aligns the Principles with international law – will not require any substantive change to training when applying this new document in this respect. I would be willing to supply additional justification for this step if that would assist your consideration of these suggested changes.

IPCO has offered to assist in the training programme that will follow the publication of any new document, to provide reassurance that the test that needs to be applied “on the ground” is essentially unchanged from that set out in the Consolidated Guidance, albeit it should provide greater clarity by being consistent with international jurisprudence.

The scope of the Guidance/Principles

The question has been raised whether these Principles should extend to all cases when information is shared and there is a real risk that there will be a serious adverse outcome (e.g. unlawful killing), regardless of whether this will occur in the context of detention. I have determined that for the purposes of the present review the current link with detention ought to remain. As set out above, I and my office would be willing to assist on any other issues arising out of this review that you consider merit further attention.

The role of Ministers

In the responses to the consultation exercise, the majority of the non-government respondents argued that the revised guidance should include an absolute prohibition on Ministers authorising UK action when there is a real risk of unlawful killing, torture, extraordinary rendition, or cruel, inhuman or degrading treatment. After careful consideration, I have decided not to follow that course.

As set out in the Consolidated Guidance, the proposed Principles reaffirm the UK’s stance against the use of torture, cruel, inhuman and degrading treatment and, now, unlawful killing and extraordinary rendition. They rehearse, as before, the presumption that in such cases when there is a residual risk remaining (after mitigations have been put in place) of such activity Ministers will not authorise action to be taken. Particularly given that clear background, I consider it is not the proper function of this document to seek to limit the power of Ministers to act in such cases, or to dictate how they should approach these issues.

It is of note that the 2010 Consolidated Guidance did not provide for how Ministers should take decisions, albeit it was clearly anticipated that Ministers would consider the relevant facts, take legal advice and assess the degree to which any risk could be mitigated, including through assurances. In my view, it is critical to bear in mind that ministerial decisions are constrained by two key requirements, namely they should act in accordance with domestic and international law and they are expected follow the Ministerial Code. Indeed, paragraph 1.3 of the Ministerial Code specifically states that *'The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life.'* I trust the revised document will assist Ministers when considering cases in this context, but given they remain accountable to Parliament rather than to an oversight body such as IPCO, I have concluded that the Principles should not be used to create an additional framework that seeks to govern their activity.

Non-state actors and joint working

There may also be occasions when the work of UK personnel abroad requires them to work with non-state actors and groups, for example in parts of the world where stable and effective government has broken down. I understand why, in such circumstances, it might be difficult for all aspects of the Principles fully to be applied. However, it is right in principle that the same protections for human rights and the same protections for British officials from legal liability should apply to such relationships and I suggest, therefore, at paragraph 7 that they should be applied **insofar as is possible**.

I am also of the view that the Principles should apply explicitly to the activities of any unit of a foreign authority (which is wholly or partly funded or trained by the UK) which engages in overseas operations directly with and in support of the work of one of the UK bodies covered by the guidance and is acting under UK direction. This is set out in paragraph 6 of the Principles.

The Title

I have received representations from HMG to the effect that the document should not be renamed, including the suggestion that the words "Consolidated Guidance" should be retained. It is argued that the current title is well understood by officials in the UK and abroad. However, as the ISC persuasively set out, the Consolidated Guidance did not provide guidance. Instead, it set out principles that are to be applied in a range of differing circumstances. Furthermore, the title "Consolidated Guidance" will henceforth be significantly misleading, given this new draft cannot sensibly be viewed as a "consolidation" of other documents, which in any event are largely now forgotten. In my view, this text – at its core – sets out principles which are to be applied in the context of "detention". As a result, although it is somewhat "wordy", to avoid any misunderstanding, I recommend that the document is entitled *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*.

Additional matters raised during the consultation

During the consultation process substantive representations were made on a number of issues of principle and practice. I would like to explain how they have been addressed.

Enhanced oversight and whistleblowing

Oversight is at the heart of compliance and the maintenance of effective standards. IPCO, and its predecessor bodies, have had formal oversight of the Consolidated Guidance since 28 November 2014 and we have conducted regular inspections to ensure that the obligations under the Consolidated Guidance were being met. One area of oversight that has been used to very good effect in other areas, which is notably absent from the current Consolidated Guidance, is a formal error-reporting process. This obligation which has been placed on public authorities in other contexts and which triggers specific attention by IPCO has led to significant improvements in the use of investigatory powers. I have sought to rectify this omission in the revised guidance/principles. Following a recommendation from the All Party Parliamentary Group on Rendition and others, I have included a whistleblowing provision (which mirrors my statutory responsibilities under the information gateway at s.237 of the Investigatory Powers Act 2016).

A post-notification framework

It was argued in number of responses to the consultation that there should be a post-notification process for individuals who have been mistreated following a failure properly to apply any new guidance or principles. This would enable them to seek redress. Reprieve and Freedom from Torture, in a joint submission, made substantive representations regarding the UK's international obligations in this regard, suggesting that any revised document ought to include an equivalent notification process to that presently contained in the Investigatory Powers Act 2016, and that this process should be managed by IPCO.

Although I have concluded that, absent a change in primary legislation, it is not within my current statutory powers to operate such a process, I have included at paragraph 33 a separate process placing a duty on public authorities who become aware of abuses to notify my office as soon as possible. This will facilitate early oversight by IPCO. It does not, however, deal directly with the contentions set out above and you may wish to include a post-notification process as part of future amendments to the Investigatory Powers Act 2016.

The publication of public authorities' internal guidance

It was also argued in a number of responses to the consultation, including by Reprieve, Freedom from Torture and Privacy International, that the internal/working guidance used by public authorities alongside the Consolidated Guidance ought to be published. It is suggested this would enable a proper understanding of whether the Government and the Agencies provide sufficient assistance to the personnel in the field when making decisions in this context. This would secure the implementation of the ISC's recommendation that "the public should be given as much information as possible about the underlying decision-making process in this area" and, their recommendation "N", that "there is more information which could be published about the way officers apply the Guidance."

Although I am strongly supportive of transparency and I encourage public bodies to make as much information available as they are able, in order to reveal how they make decisions in this overall context, I consider that this should be achieved voluntarily rather than by way of a formal requirement. I recognise that there are significant operational sensitivities that make a blanket obligation in this area undesirable and possibly unworkable. However, as part of my oversight

function I will be encouraging the publication of these documents, or the main elements of them, and I will comment on this in future annual reports.

Merger of the Overseas Security and Justice Assistance Human Rights Guidance (OSJA) with the Consolidated Guidance

The present Consolidated Guidance is not the only policy document governing the security and human rights elements of involvement with overseas bodies. It was argued in a number of responses to the consultation, and particularly by academics from Sheffield and Westminster Universities, that the existence of two parallel framework documents could lead to confusion and that OSJA and any new Consolidated Guidance/Principles should be merged to create a single overarching human rights policy, overseen by an independent regulator. I am of the view that while there are areas of cross-over, it remains strongly arguable that there is a place for separate policies, given particularly the breadth of the activity covered by the OSJA. I have instead indicated that personnel must give separate consideration, whenever relevant, to OSJA.

Against the background of those explanatory remarks, I enclose these suggested revised Principles for your consideration, to replace the Consolidated Guidance.

I remain yours sincerely,



The Rt Hon. Lord Justice Fulford
The Investigatory Powers Commissioner