

IPCO CONSULTATION ON THE CONSOLIDATED GUIDANCE

HM GOVERNMENT RESPONSE

The Prime Minister invited the Investigatory Powers Commissioner to make proposals to the government about how the Consolidated Guidance could be improved, taking account of the views of the Intelligence and Security Committee of Parliament (ISC) in their 2018 Detainee Mistreatment and Rendition reports and those of civil society. The government welcomes the Commissioner's public consultation. This document sets out relevant provisions in the Consolidated Guidance and existing government policy in response to the consultation questions.

1. Is the Consolidated Guidance consistent with applicable domestic and international legal principles?

The Consolidated Guidance sets out the principles, consistent with UK domestic law and international law obligations, which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees. It does not permit activity which would be in breach of those obligations.

The guidance defines torture under UK law and refers to the absolute prohibition of torture and cruel, inhuman and degrading treatment or punishment (CIDT) in international law. It also sets out the UK's policy on torture and CIDT: "we do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose. In no circumstance will UK personnel ever take action amounting to torture or CIDT" (para 6).

2. Does the Consolidated Guidance provide appropriate legal protection for personnel and officers within the UK and overseas?

The Consolidated Guidance is clear that "Personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future" (para 1). The guidance does not itself provide legal protection, but it sets out the principles, consistent with UK domestic and international law obligations, which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees.

3. The Consolidated Guidance provides a table for officers or service personnel to use when carrying out their duties in considering whether

or not to proceed with action when there is a risk of torture or CIDT occurring at the hands of a third party (see Annex A).

- a. Does the Consolidated Guidance sufficiently define and distinguish between:**
- i. Torture**
 - ii. CIDT; and**
 - iii. Standards of arrest, detention and treatment?**

The Consolidated Guidance provides a definition of torture: “An offence under UK law, torture is defined as a public official intentionally inflicting severe mental or physical pain or suffering in the performance or purported performance of his duties” (Annex). The guidance recognises that there is no agreed or exhaustive definition of what constitutes CIDT. Whether standards of arrest, detention and treatment are acceptable will depend on the circumstances of the particular case. The guidance Annex describes the issues which should be taken into account when considering whether standards of detention and treatment are acceptable. The guidance is clear that officers should consult senior personnel and/or legal advisers if they are in doubt about whether standards of detention and treatment are acceptable (para 10).

- b. Specifically in relation to paragraph 7 of the Consolidated Guidance, do you consider that the right balance is struck as to when a decision can be made to proceed in circumstances where a serious risk is identified in relation to:**
- i. Torture?**
 - ii. CIDT?**

According to the Consolidated Guidance, Ministers must be consulted where there is a serious risk of torture or CIDT that cannot be mitigated to below the threshold of a serious risk. Ministers need to be provided with full details, including the likelihood of torture or CIDT occurring, risks of inaction and causality of UK involvement. The guidance is clear that consulting Ministers does not imply that action will be authorised, but it enables Ministers to look at the full complexities of the case and its legality.

Further information on the role of Ministers is provided in the Note of Additional Information from the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary and Defence Secretary, which was published alongside the Consolidated Guidance in July 2010.

- 4. With reference to paragraph 10 and page 13 of the Consolidated Guidance, does the document sufficiently capture international standards of due process?**

The Consolidated Guidance Annex refers to the lawfulness of arrest (under local law), detention (under local and international law) and access to due process. It provides a list of relevant considerations in relation to the lawfulness of detention and access to due process rights:

- i. 'incommunicado detention' (denial of access to family or legal representation);
- ii. whether the detainee has been given the reasons for his arrest;
- iii. whether the detainee will be brought before a judge and when that will occur;
- iv. whether the detainee can challenge the lawfulness of their detention;
- v. the conditions of the detention; and
- vi. whether the detainee will receive a fair trial.

Whether standards of arrest, detention and treatment are acceptable will depend on the circumstances of the particular case. The guidance is clear that officers should consult senior personnel and/or legal advisers if they are in doubt about whether standards of detention and treatment are acceptable (para 10).

5. Does the Consolidated Guidance provide sufficient assurance when making relevant decisions including when considering an unmitigated risk of torture or CIDT?

See response to question 3 b.

6. Is the "assurance process" in the Consolidated Guidance adequate?

According to the Consolidated Guidance, personnel should consider obtaining assurances as to the standards that have been or will be applied in relation to the detainee before any action is taken. Where personnel believe that the assurances are reliable, they may continue with the proposed action, informing Ministers as appropriate. If, despite any assurances obtained, personnel believe there is a serious risk of torture or CIDT taking place, Ministers must be consulted. Further information on how the security and intelligence agencies seek assurances can be found in the ISC Detainee Inquiry "Current Issues" report and annual reports by the Intelligence Services Commissioner.

7. Is the scope of the Consolidated Guidance appropriate? In particular:

- a. **The Consolidated Guidance applies to the Intelligence Agencies, the Ministry of Defence, and the UK Armed Forces. The National Crime**

Agency and SO15 are also expected to comply with it. Are there any other UK authorities to which it should apply?

In accordance with the recommendation of Sir Mark Waller, the former Intelligence Services Commissioner, the government intends to extend the scope of the Consolidated Guidance to apply to National Crime Agency and SO15 personnel. The government will keep the scope of the guidance under review in consultation with the Investigatory Powers Commissioner.

- b. The Consolidated Guidance applies to detention and mistreatment by foreign security and intelligence agencies (“liaison services”). It does not expressly apply to conduct by i) other agencies of foreign states, or ii) non-State actors. Should it do so?**

The security and intelligence agencies provided relevant evidence to the ISC’s Detainee Inquiry which answers this question:

“UKIC [UK Intelligence Community] would, as a matter of policy, apply the principles of the Consolidated Guidance to engagement with non-state actors on detainees and would approach Ministers where there is a serious risk of unacceptable treatment. MI5 does not consider that extra guidance regarding non-state actors is needed.” (MI5 evidence, para 162 of the ISC’s “Current Issues” report)

“We do not think that the Consolidated Guidance requires revision in this area for two reasons: firstly, while engagement with non-state actors on detainee matters [would raise] significant operational and policy challenges, the relevant legal principles set out in the Consolidated Guidance provide a robust framework against which risk assessments can be carried out. Secondly, it is difficult to conceive of substantive amendments to the Consolidated Guidance which could be made with sufficient clarity to provide useful, practical guidance to officers. For example, difficulties [could] arise in determining the precise due process standards that might apply to detentions by non-state actors”. (SIS evidence, para 162 of the ISC’s “Current Issues” report)

- c. The Consolidated Guidance applies where persons are in the detention of a foreign liaison service or where UK agencies solicit the detention of a person by such an agency. It does not expressly apply where intelligence will foreseeably result in a person’s detention, albeit our understanding is that it is engaged in this situation. Should it state that it covers this scenario?**

According to the Consolidated Guidance, “Before soliciting an individual’s detention by a liaison service, personnel must consider the standards to which the individual may be subject. Personnel should consider attaching conditions to any information to be passed governing the use to which it may

be put (where applicable) and/or to obtaining assurances from the relevant liaison service..." (para 25). As a matter of policy, the security and intelligence agencies apply the Consolidated Guidance when they know or believe that a detention will take place, or it is likely to take place.

- d. The Consolidated Guidance applies where UK agencies seek intelligence from a person detained by a foreign liaison service, or receives unsolicited intelligence, but not expressly where the UK merely provides intelligence, albeit our understanding is that it is engaged in this situation. Should it state that it covers this scenario?**

The Consolidated Guidance applies to both the passing and receipt of intelligence relating to detainees. See response to question 7c.

- 8. Although there is no universally agreed definition of rendition, the term is commonly used to cover the extra-judicial transfer of an individual from one state to another. Should the Consolidated Guidance apply to rendition?**

The government will consider this question in light of the ISC's recommendation to list rendition as a type of CIDT in the Annex to the Consolidated Guidance and any proposals by the Investigatory Powers Commissioner.

- 9. Is the relationship between the Consolidated Guidance and OSJA satisfactory?**

The Consolidated Guidance and the Overseas Security and Justice Assistance (OSJA) Guidance are two freestanding policies which serve complementary but different purposes. The OSJA guidance (revised in January 2017) now cross-refers to the Consolidated Guidance to clarify the relationship between the two documents:

"OSJA Guidance is based on the same principles, but covers a broader range of activity and screens for a wider range of risk at a lower level of detail. Personnel covered by the Consolidated Guidance should also refer to the OSJA Guidance prior to starting activity to ensure they have properly considered and mitigated broader human rights/ International Humanitarian Law risks which may result from assistance and which fall outside the scope of the Consolidated Guidance. Personnel should also consider sharing their assessments using the OSJA network to support cross-Government consistency of assessment."

The security and intelligence agencies provide training covering both the Consolidated Guidance and OSJA Guidance to ensure they are effectively applied. The ISC acknowledges that they “have not raised concerns about instances where it was difficult to identify which guidance to use” (Detainee Mistreatment and Rendition: Current Issues, p. 46).

10. Should the Consolidated Guidance regime be the subject of legislation rather than set out in a policy document?

The government does not consider that the Consolidated Guidance would benefit from being set out on a statutory footing. It is a risk assessment mechanism. The Consolidated Guidance is based upon and underpinned by UK domestic and international law.

11. Should the Consolidated Guidance be renamed?

The government will consider this question in light of the ISC’s recommendation to rename the Consolidated Guidance and any proposals by the Investigatory Powers Commissioner.

CABINET OFFICE
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