

Consultation on the Consolidated Guidance

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1. Background

Introduction

In 2010, the Government published the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (the Consolidated Guidance).¹ The purpose of the Consolidated Guidance is to ensure, in accordance with the UK Government's core policy that UK personnel "do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose".²

Oversight of the use of the Consolidated Guidance was previously undertaken by the Intelligence Services Commissioner, Sir Mark Waller. In light of the Investigatory Powers Act 2016 (the Act), the Prime Minister directed that this oversight should, from 1 September 2017, be carried out by the Investigatory Powers Commissioner (IPC), Sir Adrian Fulford.

On 6 July 2010 an independent Inquiry chaired by Sir Peter Gibson was established by the Prime Minister.³ The role of the Inquiry was to examine whether, and if so to what extent, the UK Government and its intelligence agencies were involved in improper treatment of detainees held by other countries in counter-terrorism operations overseas, or were aware of improper treatment of detainees in operations in which the UK was involved.⁴ Due to other related police investigations, the Government took the decision to bring the Inquiry to an end in 2012, but affirmed its intention to reinstate an independent, judge-led Inquiry at a later stage.⁵ On 19 December 2013, it was announced that the Intelligence and Security Committee of Parliament (ISC) would continue with the investigation into the issues that were identified by Sir Peter in his interim report on his preparatory work.⁶

¹ *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* [2010]

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf> accessed on 30 July 2018;

² HC WS 22 March 2011 vol 525 <<https://hansard.parliament.uk/Commons/2011-03-22/debates/11032271000013/TortureAndMistreatmentReportingGuidance>> accessed on 30 July 2018;

³ HC 06 July 2010 vol 513 <<https://hansard.parliament.uk/commons/2010-07-06/debates/10070631000002/TreatmentOfDetainees>> accessed on 31 July 2018;

⁴ *UK involvement with detainees in overseas counter-terrorism operations* <<https://www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations>> accessed on 17 August 2018;

⁵ HC Deb 18 January 2012 cols 751-752

<<https://publications.parliament.uk/pa/cm201212/cmhansrd/cm120118/debtext/120118-0001.htm>>

⁶ HC Deb 19 December 2013, cols 913-916 accessed on 30 July 2018;

<<https://publications.parliament.uk/pa/cm201314/cmhansrd/cm131219/debtext/131219-0002.htm>> accessed on 30 July 2018;

On 28 June 2018, the ISC published its report on *Detainee Mistreatment and Rendition*. The report was published in two parts, the first concerning the period 2001 to 2010⁷ and the second on current issues.⁸ Taking into consideration the evidence that it had heard, the ISC made a number of suggestions as to how the Consolidated Guidance could further be clarified. The Committee's view was that the document needed to be reviewed, but affirmed that it was not for the ISC to "rewrite Government policy, or to provide endorsement".⁹

On the same day, the Prime Minister issued a written statement inviting the Investigatory Powers Commissioner "to make proposals to the Government about how the Guidance could be improved, taking account of the ISC's views and those of civil society".¹⁰

⁷ *Intelligence and Security Committee of Parliament 'Detainee Mistreatment and Rendition 2001-2010'* [2018]

<http://isc.independent.gov.uk/files/20180628_HC1113_Report_Detainee_Mistreatment_and_Rendition_2001_10.pdf> accessed on 30 July 2018;

⁸ *Intelligence and Security Committee of Parliament 'Detainee Mistreatment and Rendition: Current Issues'* [2018]

<http://isc.independent.gov.uk/files/20180628_HC1114_Report_Detainee_Mistreatment_and_Rendition-Current_Issues.pdf> accessed on 30 July 2018;

⁹ *Ibid*, *Detainee Mistreatment and Rendition: Current Issues*. p.158;

¹⁰ HC WS 28 June 2018 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-06-28/HCWS808/>> accessed on 30 July 2018;

2. Summary of existing recommendations

In addition to the comments made by the ISC, Sir Mark Waller had previously suggested that changes were required to the current version of the Consolidated Guidance.

Both sets of recommendations are summarised below.

Summary of recommendations made by the former Intelligence Services Commissioner

In the *Report of the Intelligence Services Commissioner; Supplementary to the Annual Report for 2015*,¹¹ Sir Mark Waller maintained that he did “not think that the Consolidated Guidance was fundamentally defective or not fit for purpose”. Rather, he expressed that it had been “in operation in its current form for some years and that there was room for improvement”.

A summary of Sir Mark’s recommendations is as follows:

- The Consolidated Guidance should include an emergency provision;
- Drafting of the Consolidated Guidance should clarify where cruel, inhumane and degrading treatment, torture (CIDT) and due process considerations are relevant;
- It should be made explicit when a Minister must be consulted;
- The Cabinet Office should invite views from interested groups;
- Assurances should be written, tailored, and precise. Where appropriate they should reflect the role of different domestic intelligence agencies and law enforcement bodies;
- Two scenarios should be reflected: case-specific intelligence sharing and ongoing working relationships;
- Foreign and Commonwealth Office policies on torture and mistreatment should be incorporated with the Consolidated Guidance to differentiate between these risks and the risk of denial of due process;

¹¹ *Report of the Intelligence Services Commissioner Supplementary to the Annual Report for 2015*, p.108 <http://intelligencecommissioner.com/docs/FPCM1042_HC_458_Accessible.pdf> accessed on 30 July 2018;

- A central hub should be set up to record and track allegations; and
- The Consolidated Guidance should apply to Counter Terrorism Command (SO15).

Sir Mark recommended that in the interests of transparency and accountability, the Cabinet Office should welcome and “consider contributions from others with an interest in this subject, e.g. the Equality and Human Rights Commission, Fair Trials Abroad, Prisoners Abroad, Redress and Reprieve”. Sir Mark expressed a willingness to contribute to this process.

Summary of recommendations made by the ISC

In its June 2018 report on *Detainee Mistreatment and Rendition: Current Issues*, the ISC made a number of relevant recommendations.¹²

These are summarised below:

- The IPC should establish a mechanism for identifying where cases which ought to have engaged the Consolidated Guidance are not being captured for oversight;¹³
- The operational impact of the Consolidated Guidance should be reviewed by the Agencies;¹⁴
- A full review should be carried out on the Consolidated Guidance and non-governmental organisations and the Equality and Human Rights Commission (EHRC) should be consulted;¹⁵
- The Cabinet Office should periodically review the Consolidated Guidance and ensure revisions are made where necessary;¹⁶
- The agencies should publish a version of their internal guidance on application of the Consolidated Guidance;¹⁷
- The Consolidated Guidance should be renamed to widen its application to other organisations and the document should be clear on its scope and purpose;¹⁸

¹² *Ibid, Detainee Mistreatment and Rendition: Current Issues*. London, p.99;

¹³ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p.99 (Recommendation D);

¹⁴ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 100 (Recommendation J);

¹⁵ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 100 (Recommendation L);

¹⁶ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 100 (Recommendation M);

¹⁷ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 100 (Recommendation N);

¹⁸ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 100 (Recommendation P);

- The *Overseas Security and Justice Assistance Guidance (OSJA)* and the Consolidated Guidance should be merged where both are applicable;¹⁹
- The Consolidated Guidance should clarify the level of responsibility that HMG has for overseas units working closely with HMG officials, and should provide guidance for working in joint units;²⁰
- The Cabinet Office should be proactive in reviewing whether additional agencies should be subject to the Consolidated Guidance;²¹
- Formal arrangements should be in place even when working with agencies that are not subject to the Consolidated Guidance;²²
- In the absence of written assurances, verbal assurances should be shared in writing;²³
- Statistics have previously not been collected on written and verbal assurances and the IPC aims to do this going forward;²⁴
- Emergency provisions should be set out in the Consolidated Guidance with a 48 hour requirement to raise any relevant risks to a Minister;²⁵
- Agencies should clearly and consistently apply the term “serious risk” and align staff training on the thresholds;²⁶
- Rendition should be listed as CIDT;²⁷
- Agencies should apply the spirit of the Consolidated Guidance;²⁸
- The Consolidated Guidance should refer to intelligence obtained by third parties;²⁹

¹⁹ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation Q);

²⁰ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation R);

²¹ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation T);

²² *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation U);

²³ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation V);

²⁴ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation W);

²⁵ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 101 (Recommendation X and Y);

²⁶ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation AA);

²⁷ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation BB);

²⁸ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation CC);

²⁹ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation DD);

- The Consolidated Guidance should apply to work conducted with non-state actors;³⁰
- It should be clear how Section 7 of the Intelligence Services Act 1994 may be used in combination with the Consolidated Guidance;³¹
- It must be clear that Ministers cannot lawfully authorise torture;³² and
- The public should be able to understand the basis on which Ministerial decisions are made.³³

³⁰ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation EE);

³¹ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 102 (Recommendation II);

³² *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 103 (Recommendation JJ);

³³ *Ibid, Detainee Mistreatment and Rendition: Current Issues*, p. 103 (Recommendation KK);

3. Consultation process

Following the Prime Minister's request, and in the spirit of Sir Mark Waller's earlier recommendations, the IPC considers the review of the Consolidated Guidance a matter of sufficient importance to require a public consultation. This will provide those with an interest in the area with the opportunity to share their views on how the Consolidated Guidance can be improved.

The IPC is undertaking this review under the powers conferred on him under the Act (as directed by the Prime Minister) and the consultation process will be in accordance with the IPCO policy on consultations (published simultaneously with this document).

The consultation process is as follows:

Seeking submissions

1. Letters will be sent to key stakeholders requesting views on the questions at section 4 of this document.
2. An open statement will be published on the IPCO website and Twitter account alerting the public to the consultation and requesting views from all interested parties.
3. Responses must be submitted in writing by 29 October 2018.
4. Responses can be submitted as open or closed documents.
5. All open responses will be made public (published on the IPCO website) within 12 weeks of the end of the consultation, unless the author expressly indicates that the response is to be kept private.
6. Closed responses will be considered but not published.
7. The IPC may convene a panel to discuss certain key legal issues.

Consideration of submissions

1. All responses from the consultation will be collated and considered at the end of the relevant period.
2. The responses will be considered when drafting the proposal, which will be sent by the IPC to the Prime Minister. The extent to which the proposal can or should be made public will be addressed in due course.

4. Consultation questions

Consultees are invited to address their submissions to the questions below. When providing answers please give reasons and refer to the relevant authorities where possible.

1. Is the Consolidated Guidance consistent with applicable domestic and international legal principles?
2. Does the Consolidated Guidance provide appropriate legal protection for personnel and officers within the UK and overseas?
3. The Consolidated Guidance provides a table for officers or service personnel to use when carrying out their duties in considering whether 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:
 - 1) Torture;
 - 2) CIDT; and
 - 3) Standards of arrest, detention and treatment?
 - b. Specifically in relation to paragraph 7 of the Consolidated Guidance, do you consider 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:
 - 1) Torture?
 - 2) CIDT?
4. With reference to paragraph 10 and page 13 of the Consolidated Guidance, does the document sufficiently capture international standards of due process?
5. Does the Consolidated Guidance provide sufficient assistance when making relevant decisions including when considering an unmitigated risk of torture or CIDT?

6. Is the “assurance process” in the Consolidated Guidance adequate? (see particularly paragraphs 16, 17, 21, 23 – 26 and 28 of the Consolidated Guidance)

7. Is the scope of the Consolidated Guidance appropriate? In particular:
 - a. The Consolidated Guidance currently applies to the Intelligence Agencies, the Ministry Of Defence and 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?

 - 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?

 - 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?

 - 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?

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.³⁴ Should the Consolidated Guidance apply to rendition?

9. Is the relationship between the Consolidated Guidance and the OSJA³⁵ satisfactory?

³⁴ *Ibid*, *Detainee Mistreatment and Rendition: Current Issues*, p. 70;

³⁵ Overseas Security and Justice Assistance Guidance
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583304/OSJA_Guidance_2017.pdf> accessed on 01 August 2018;

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

11. Should the Consolidated Guidance be renamed?

5. How to respond

Further copies of this consultation can be downloaded from the Publications section of:

www.ipco.org.uk

Responses can be emailed to:

info@ipco.gsi.gov.uk

Responses can be posted to:

Investigatory Powers Commissioner's Office
PO Box 29105
London
SW1V 1ZU

Responses should be submitted by Monday 29 October 2018.

Annex A

Situation	Action
If you know or believe torture will take place	<ol style="list-style-type: none"> 1. You must not proceed and Ministers will need to be informed 2. You should raise concerns with liaison or detaining authority to try and prevent torture occurring unless in doing so you might make the situation worse.
In circumstances where you judge there is a lower than serious risk of CIDT taking place and standards of arrest and detention are lawful	You may proceed, keeping the situation under review.
In all other circumstances	<ol style="list-style-type: none"> 1. You must consult senior personnel. You must not proceed unless either: <ol style="list-style-type: none"> a) senior personnel and legal advisers conclude that there is no serious risk of torture or CIDT, or; b) you are able to effectively mitigate the risk of mistreatment to below the threshold of a serious risk through reliable caveats or assurances. 2. If neither of the two preceding approaches apply, Ministers must be consulted. <p>Ministers will need to be provided with full details, including the likelihood of torture or CIDT occurring, risks of inaction and causality of UK involvement.</p> <p>Ministers will consider whether it is possible to mitigate the risk of torture or CIDT occurring through requesting and evaluating assurances on detainee treatment; whether the caveats placed on information/questions would be respected by the detaining liaison partner; whether UK involvement in the case, in whatever form, would increase or decrease the likelihood of torture or CIDT occurring.</p> <p>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.</p>