

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's response to the Investigatory Powers Commissioner's consultation on Consolidated Guidance**

**October 2018**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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## **KEY RECOMMENDATIONS**

### **Standard and assessment of risk:**

- The appropriate standard of risk to be applied under the Consolidated Guidance is 'real risk', not 'serious risk';
- The Consolidated Guidance ought to provide detailed criteria to assist those applying the Guidance when assessing risk;
- No operation ought to be permitted to proceed once there has been an assessment of risk of mistreatment surpassing 'serious' (preferably 'real');
- The Consolidated Guidance ought to state expressly that Ministers cannot lawfully authorise action which they know or believe would result in torture;
- The Consolidated Guidance ought to be clear about the decision-making process undertaken by Ministers, including objective criteria to be applied;
- The Consolidated Guidance ought to provide junior personnel and officers with greater assistance when making relevant decisions, including when considering an unmitigated risk of torture or cruel, inhuman or degrading treatment (CIDT);

### **Legal protection for personnel and officers within the UK and overseas:**

- It must be clear on the face of the Consolidated Guidance that it cannot provide a legal shield to personnel or officers for actions that violate domestic or international law;
- The Consolidated Guidance must deal expressly with s. 7 authorisations under the Intelligence Services Act 1994 and clearly state that such authorisations must not be used to authorise activity in breach of the UK's human rights obligations;

### **Definitions and distinctions:**

- The Consolidated Guidance must provide greater clarity, detail and legal accuracy in how it treats definitions of and distinctions drawn between torture, CIDT and standards of arrest, detention and treatment;

### **Adequacy of the 'assurance process':**

- The heavy reliance on assurances and caveats in the Consolidated Guidance is inappropriate and dangerous. Recourse to assurances and caveats must not be permitted where there is a serious risk of torture or CIDT;
- Where assurances or caveats are sought, they must be written, tailored and precise;

### **Scope of the Guidance:**

- Any UK body involved with those detained abroad, or the passing of information that may lead to detention, must fall within the scope of the policy. This must be kept under active review;

### **Other matters:**

- Rendition must be expressly included within the scope of the policy;
- Consideration ought to be had as to whether the Consolidated Guidance should be merged with the Overseas Security and Justice Assistance (OSJA) policy to create a new overarching human rights framework;
- The policy must be subject to meaningful periodic review;
- Oversight of the policy must be more robust to ensure transparency and accountability. The potential of mechanisms to improve access to redress, such as post-notification, ought to be explored in detail.

## Introduction

1. Liberty welcomes the opportunity to feed into the Investigatory Powers Commissioner's Office (IPCO) consultation on the *Consolidated Guidance on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (hereafter "the Consolidated Guidance").<sup>1</sup> This review is necessary and long overdue. As noted by Parliament's Intelligence and Security Committee (ISC) in its recently published 'Detention and Detainee Mistreatment: Current Issues' report (hereafter 'Current Issues' report):<sup>2</sup>

*"While the Guidance has now been in place for seven years, there has been remarkably little attempt to evaluate or review its operation ..."*

2. Liberty acknowledges that the UK is one of very few countries in the world to have attempted to set out their approach to the issues covered by the Consolidated Guidance. However we have significant concerns about the adequacy of the policy in its current form. In our view the policy is worryingly vague and leaves far too much discretion to personnel and officers on the ground, leading to inconsistent decision-making lacking in transparency and accountability. Liberty believes the policy is not fit for purpose and is in need of complete reform.
3. Liberty – along with many others – has been unyielding in our calls for the UK Government to establish an independent judicial inquiry into allegations of UK complicity in torture and rendition.<sup>3</sup> Such an inquiry is essential to establish the full extent of the UK's involvement in the US' post-9/11 programme of torture and rendition. Without the full story it is impossible to learn lessons. However an inquiry alone is not enough to prevent the UK from repeating the failures revealed by, among others, the recent pair of reports published by the ISC.<sup>4</sup>

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<sup>1</sup> Available from

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62632/Consolidated\\_Guidance\\_November\\_2011.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf) accessed 9 October 2018

<sup>2</sup> Intelligence and Security Committee of Parliament, 'Detainee Mistreatment and Rendition: Current Issues' (28 June 2018) available from <https://bit.ly/2RC6XY3> accessed 9 October 2018

<sup>3</sup> For recent comment see, G Bradley, 'Thirteen years after Liberty first called for a judge-led inquiry into UK complicity in post-9/11 torture and rendition, we're still waiting for the truth' (21 August 2018) available from <https://www.libertyhumanrights.org.uk/news/blog/thirteen-years-after-liberty-first-called-judge-led-inquiry-uk-complicity-post-911-torture> accessed 24 October 2018

<sup>4</sup> Intelligence and Security Committee of Parliament, 'Detainee Mistreatment and Rendition: 2001-2010' (28 June 2018) available from <https://bit.ly/2A00qzu> accessed 9 October 2018

4. Liberty is under no illusions about the difficulty of the operations undertaken by personnel and officers to whom the Consolidated Guidance applies. For this very reason it is essential that the policy is clear, sufficiently detailed and precise, easy to understand and apply. Both the public and those applying the policy need to be confident that it is consistent with domestic and international law. The policy needs to be transparent and promote accountability. There is no room for ambiguity and unchecked discretion.

## **Standard and Assessment of Risk**

*[Consultation questions: 1, 3(b) and 5]*

### Standard of risk

5. The intention of the Consolidated Guidance is to set out the principles – in accordance with domestic and international law - which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees. The standard of risk is a crucial factor in applying the policy – the degree of risk assessed under the policy dictates whether or not an operation will normally proceed and whether a junior officer needs to escalate the matter to her/his superiors.
6. Liberty is of the view that the Consolidated Guidance applies the incorrect legal test for assessing levels of risk of torture or other ill-treatment. The failure of the policy to apply the appropriate standard of risk exposes detainees to an avoidable risk of torture or CIDT for which the UK is legally responsible.
7. The standard of ‘serious risk’ applied throughout the policy is legally ambiguous and places too much discretion in the hands of individual personnel and officers. The correct legal test – and therefore the appropriate test that ought to apply throughout the policy – is ‘real risk’. The distinction between these terms exists as a matter of law and of ordinary language. The standard of ‘real risk’ has received considerable judicial treatment by the Strasbourg Court in Article 3 cases as well as in deportation cases under UNCAT and cases decided by the UN Committee Against Torture.<sup>5</sup>
8. The Equality and Human Rights Commission unsuccessfully challenged the legality of the Consolidated Guidance on this basis in 2011.<sup>6</sup> Dismissing their claim the High

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<sup>5</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 [91]; *Karoui v Sweden* (CAT 185/2001); *Tala v Sweden* (CAT 43/1996); *Osman v United Kingdom* (1998) 29 EHRR

<sup>6</sup> *Equality and Human Rights Commission v The Prime Minister and others; Al Bazzouni v The Prime Minister* [2011] All ER (D) 12 October available from

Court held that there exists no material difference between the terms ‘real risk’ and ‘serious risk’ preferring to class the distinction as ‘elusive’ and ‘lawyer’s dialectic’. It is Liberty’s respectful view that the High Court erred in reaching this conclusion.<sup>7</sup>

9. Liberty believes that the argument presented by the Commission in that case remains sound. The standard of ‘serious risk’ is a higher threshold than ‘real risk’. As submitted by the Commission (and summarised by the Court):<sup>8</sup>

*“A ‘real risk’ is one that exists and is identifiable, in contrast with a risk that is fanciful or so improbable as not to be a risk at all. A ‘serious risk’, by contrast, refers to some (undefined) level of probability”.*

10. The concern that this distinction raises is twofold. Firstly, because it is a higher threshold as a matter of ordinary language, risks assessed to be ‘serious’ will not necessarily catch all risks that are ‘real’. Therefore it is conceivable that operations would be permitted to proceed under the Consolidated Guidance even though there may exist a ‘real risk’ of torture or CIDT. Secondly, the term ‘serious risk’ does not provide officers and personnel with sufficient clarity as to what they are assessing. Given the greater judicial treatment of ‘real risk’ there is a degree of legal objectivity which the subjective and unidentified term of ‘serious risk’ does not benefit from.

#### Lack of detailed guidance

11. The Consolidated Guidance in its current iteration fails to provide any definition of ‘serious risk’ nor does it particularise the assessment to be undertaken by personnel or officers. The justification offered is that the policy is not a complete code and is supplemented by working-level guidance.<sup>9</sup> Liberty does not consider this argument to hold much weight. As the ISC noted, “[g]iven the importance of the issues covered by the Consolidated Guidance ... it is essential that the Guidance offers clarity as to what is expected”.<sup>10</sup>

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<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.publicinterestlawyers.co.uk%2Fdownloadpdf.php%3Fdown%3D1%26file%3D8DMR5ZXP7MD.pdf&ei=CsZQVM38J6-S7AayhoAI&usg=AFQjCNEkdm0dHNeJ6JXCERYr5kDeKdfIKw> accessed 3 October 2018

<sup>7</sup> Ibid. para 20

<sup>8</sup> Ibid. para 49

<sup>9</sup> See page 15 of the Consolidated Guidance, ‘Note on the text’

<sup>10</sup> ISC ‘Current Issues’ report, p. 65

12. Moreover, the ISC picked up on serious issues with respect to the interpretation of 'serious risk' in working-level guidance, citing inaccuracy and a lack of detail.<sup>11</sup> Worryingly, the ISC discovered that "SIS [Secret Intelligence Service] officers are instructed that 'serious risk' is not a legal term and that officers should use their common sense and judgement".<sup>12</sup> Liberty believes it is wholly inappropriate for a determination made under the policy to be a matter for an individual officer's 'common sense' judgement.
13. The risk inherent in such high levels of discretion cannot be overstated. It exposes detainees to the risk of gross violations of their fundamental rights; it puts individual personnel and officers at risk of complicity in the commission of a criminal offence; and it exposes the UK to the real risk of falling foul of its international obligations.
14. The lack of centralised guidance on assessments of 'serious risk' also causes inconsistency and discrepancy between Agencies. While the ISC found that Agencies tend to err on the side of caution, this does not displace the obvious problems arising from a lack of uniformity.<sup>13</sup> Consistency is important to both ensuring that the Agencies act in accordance with their legal obligations and in fostering public confidence in the system as a whole.<sup>14</sup>
15. A final point to be touched on is where there is an unmitigated risk of torture, CIDT or other mistreatment. Where the risk is assessed to be lower than serious, the Consolidated Guidance permits junior personnel and officers to proceed without consulting senior personnel and requiring only that the situation is "kept under review" (paragraph 11). It is unacceptable for such a burden to be placed on junior personnel. The policy must set out in unambiguous terms both the criteria to be applied when making decisions but also the process for monitoring a decision after it has been made.
16. It is therefore imperative that any revised version of the policy clearly particularise the risk assessment process at every stage. In situations where personnel are not required to consult their superiors, the policy must be even more robust. A clear system for review and monitoring must also be set out in the body of the policy. The policy should

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<sup>11</sup> Ibid. p. 67

<sup>12</sup> Ibid. p. 66 footnote 202

<sup>13</sup> Ibid. p. 67 at [Z]

<sup>14</sup> The ISC found that: "The Agencies have not all addressed how the term 'serious risk' is to be interpreted in their working-level guidance nor have they provided their officers with examples of the threshold to be used". See, 'Current Issues' report, p. 67 at [AA]

offer a robust central framework for assessment, which may then be supported by transparent and consistent operational guidance.<sup>15</sup>

#### Absolute prohibition where a serious risk is identified

17. Under the Consolidated Guidance, where there is assessed to be a serious risk of torture or CIDT which cannot be mitigated and the Agency still wants to proceed with an operation, the case must be referred to a Minister who will weigh the balance between the interests of national security and the risk of mistreatment to the detainee. At that point Ministers may also assess whether that risk can in fact be mitigated. When probing Ministers on whether they believed the policy permitted them to authorise operations where there was a 'serious risk' of torture or CIDT, the ISC discovered shocking discrepancies between the views of individual Ministers.<sup>16</sup> Amber Rudd, Phillip Hammond and Boris Johnson all offered markedly different answers to the question. Theresa May and Phillip Hammond went so far as to engage in a 'ticking time bomb' debate.<sup>17</sup>
18. Regarding Ministers' discretion under the policy, the ISC noted: "When it comes to making a decision, the Consolidated Guidance places no constraints on Ministers' discretion, although it is limited separately by the absolute prohibition on torture enshrined in domestic and international law which means that a Minister cannot lawfully authorise actions if they know or believe torture will take place".<sup>18</sup>
19. What this means in effect is that while Ministers are legally prohibited from authorising operations where they *know or believe* torture or CIDT will take place, the Consolidated Guidance does not expressly prohibit operations where there is a *serious risk* it may lead to torture or other ill-treatment. However even in the first instance, the policy does not expressly state the legal prohibition.
20. Liberty proposes that any revised policy clearly states on the face of it that Ministers cannot lawfully authorise action which they know or believe would result in torture. This is necessary for public reassurance and also to remove any ambiguity for those applying the policy.

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<sup>15</sup> Liberty shares the view of the ISC that there needs to be far greater levels of transparency around the details of the working-level guidance and that far more information about the underlying decision-making process ought to be published than at present. See, ISC 'Current Issues' report, p. 40

<sup>16</sup> Ibid. pp. 75-77

<sup>17</sup> Ibid. p. 75

<sup>18</sup> Ibid.

21. In addition, the revised policy should clearly proscribe ministerial authorisation of operations where there is a serious risk of torture or CIDT, supported by a clear definition of the test and detailed assessment criteria. An absolute prohibition on ministerial authorisation of operations where there is a serious risk of torture or CIDT would align the Consolidated Guidance with the UK's categorical position against torture in all circumstances by placing an appropriate constraint on ministerial discretion. Crucially, resolving the ambiguity in the current iteration of the policy would reduce the risk of UK actions contributing to torture or other ill-treatment.

### **Legal protection for personnel and officers within the UK and overseas**

*[Consultation question: 2]*

22. Liberty appreciates that the operations undertaken by the officers and personnel to whom the Consolidated Guidance applies are challenging. The decisions which the Consolidated Guidance asks personnel and officers to make are difficult and highly sensitive. It is therefore our view that the UK Government has a duty to provide the highest quality guidance, which puts those applying it in the best position for making these challenging decisions.

23. The UK position when it comes to the absolute prohibition on torture is set out clearly in the Consolidated Guidance: "The United Kingdom Government's policy on such conduct is clear – we do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose" (paragraph 6). Logically therefore the policy cannot provide any legal protection to officers or personnel for such conduct by virtue of the absolute prohibition which gives rise to both individual and state responsibility.

24. However the Consolidated Guidance would benefit from being express in the fact that it cannot offer a legal shield to personnel and officers. While the importance of some reassurance to those applying the policy is recognised, the Consolidated Guidance is a policy document, not law – and that should be made clear.<sup>19</sup> Indeed, the concerns raised throughout this response beg the question whether an individual officer acting in compliance with it does in fact "have good reason to be confident that they will not risk personal liability in the future" (paragraph 1). Liberty shares the view of Amnesty International which, in evidence to the ISC, said:<sup>20</sup>

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<sup>19</sup> The ISC rightly queried whether or not the Consolidated Guidance can even be classed as guidance, correctly concluding that it framing it as guidance is misleading. See, 'Current Issues' report, p. 42 at [P]

<sup>20</sup> *Ibid.*, p. 71 [165]

*“The Guidance must be strengthened by expressly acknowledging and making agents clearly aware that where the elements of torture (or other relevant crimes) are established, international criminal responsibility can arise”.*

25. Further, in many of the circumstances envisaged by the Consolidated Guidance any reassurance to individual officers and personnel is unnecessary and meaningless, as liability would likely lie against the UK state not the individual. For example, where an officer exercised her discretion that there was a lower than serious risk of CIDT and so proceeded to question a detainee, and that detainee later brought legal proceedings arguing that there had been CIDT and the risk had been serious, the detainee would likely sue the UK not the individual officer. The claim lies against the Crown. Such a claim would almost certainly focus on the policy and whether it provided sufficiently clear guidelines to the officers applying it. It is therefore unquestionably in everyone’s interests for the Guidance to be as comprehensive and robust as possible.

26. Finally, it is important that any revised version of the Guidance addresses directly the use of authorisations under section 7 of the Intelligence Services Act 1994. Such authorisations shield intelligence officers from liability for unlawful activities overseas. The ISC concluded that they are generally submitted to Ministers in parallel with assessments under the Consolidated Guidance.<sup>21</sup> We share the ISC’s concerns around the lack of clarity on the use of s. 7 authorisations in this context and echo its recommendation that there needs to be greater transparency around the use of such authorisations and the scope of their use should be dealt with expressly in the Guidance. It must be made clear that s. 7 authorisations must not be used to authorise activity that would put the UK in breach of its human rights obligations.

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<sup>21</sup> Ibid., p. 73

## Definitions, distinctions and standards of due process

*[Consultation question: 3(a) and 4]*

27. Liberty is of the view that the definitions of and distinctions drawn between torture, CIDT and standards of arrest, detention and treatment in the Consolidated Guidance lack clarity and are ambiguous.
28. The Consolidated Guidance is clear as to the absolute nature of the torture prohibition in international law (paragraph 6) and the UK's policy of never engaging in such conduct (paragraph 7). It is acknowledged that some attempt has been made to provide a definition of torture in UK law in the annex to paragraph 10, however as the annex recognises this is not descriptive of the legal term.
29. Moreover the absolute nature of the torture prohibition is undermined in practice by paragraph 7 when it states that where "despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, [the] presumption would be ... not to proceed". This ought not to be a presumption but an absolute rule. The implication of a presumption is that it can be rebutted, that there can be exceptions. The egregious nature of torture and the absolute nature of the prohibition in international law demand that where a serious risk of abuse has been assessed there can be no room for exceptions.
30. Our concerns are more acute in the context of CIDT. Paragraph 7 contains no parallel presumption in the context of CIDT. While the policy acknowledges that the prohibition of CIDT is absolute, the policy later undermines this when it states: "this will cover a wide spectrum of conduct and different considerations and legal principles may apply depending on the circumstances and facts of each case" (with some examples offered in the annex to paragraph 10). This statement is suggestive of a far lower bar for an operation to proceed.<sup>22</sup> While a distinction between torture and CIDT has been drawn by international courts, this does not mean that CIDT ought to be approached as a lesser – and therefore more permissible – wrong. Indeed, the conditions that give rise to ill-treatment frequently facilitate torture.
31. Both torture and CIDT constitute a violation of Article 3 ECHR. In fact, "[u]nder the European Convention, there is no particular consequence to the distinction between torture and inhuman or degrading treatment or punishment. In either case, there is a

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<sup>22</sup> As is reflected in the oral evidence of various Ministers to the ISC, see 'Current Issues' report pp. 75-77

violation of Article 3 of the Convention”.<sup>23</sup> This must be clear on the face of the policy. The policy in its current form creates dangerous ambiguity and is suggestive of a more permissive standard in the context of ill-treatment as against torture.

32. While some considerations in relation to standards of arrest, detention and treatment are addressed in paragraph 10 and page 13, Liberty is of the view that the list does not offer enough detail to ensure that operations only proceed where international standards of due process are respected and upheld. In our view, the treatment of due process standards in the policy fails to go beyond the headlines. This is of concern given the Ministry of Defence (MOD) track record of failing to adhere to due process standards in detention. In a high profile judgment from 2017, the UK Supreme Court found that the MOD itself failed to afford adequate procedural protections to detainees in Afghanistan.<sup>24</sup> When UK Agencies cannot themselves uphold appropriate standards, it is unsatisfactory for the standards of liaison partners to be assessed based on such limited guidance. The policy ought to set out in clear, detailed and unambiguous terms the procedural protections that must be provided at a minimum before an operation can be authorised.

### **Adequacy of the ‘assurance process’**

*[Consultation question: 5]*

#### Deficiencies of assurances *per se*

33. Liberty believes assurances are inherently dangerous. It is a cause of great concern that the Consolidated Guidance relies so heavily on their use. This reliance wrongly suggests that assurances and caveats can provide effective mitigation against the risk of mistreatment at the hands of third parties. At their core, assurances and caveats are secretive, legally unenforceable agreements purporting to guarantee a person’s safety from gross abuse. That an assurance is assessed to be necessary in a given situation acknowledges the risk of abuse; a risk which an assurance offers no meaningful guarantee against. They undermine the absolute prohibition on torture in international law and can be used by states as a loophole to circumvent their international legal obligations.

34. A promise by a liaison partner – however reliable it is thought to be – may at the end of the day be empty. The pernicious nature of torture means that detecting abuse is very

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<sup>23</sup> W. A. Schabas, ‘The European Convention on Human Rights: A Commentary’ (Oxford: OUP, 2015), p. 169

<sup>24</sup> *Serdar Mohammed v Ministry of Defence & Al Waheed v Ministry of Defence* [2017] UKSC 2

difficult. Even where monitoring systems are in place they are limited and reliant on the liaison partner's good faith observance of the agreement.<sup>25</sup> Further, there is little to no incentive for states' to investigate alleged breaches and ensure that those responsible are held to account. To do so would risk damaging the reputation of both the sending and receiving state.

35. In high profile cases, such as the Abu Qatada case, it is arguable that assurances may add value.<sup>26</sup> Where the world is watching it is in the interests of both state parties to uphold their side of the bargain. However in the situations anticipated by the Consolidated Guidance there is no such spotlight. Such situations are inherently secretive. This undermines any potential offered by assurances and caveats as neither party faces much – if any – external political pressure.

36. In written evidence to the ISC, the Cabinet Office stated that if “assurances are breached, this would have serious consequences and cooperation would be suspended”.<sup>27</sup> However this statement fails to acknowledge that where a breach has occurred, some form of mistreatment has already taken place. The detainee in question will have suffered a violation of their human rights and the UK Government may have violated its legal obligations.

#### Inadequacy of the current system

37. The ISC concluded that despite its reservations about the value offered by assurances, it questioned “what alternatives there are in practice”.<sup>28</sup> Despite this challenge, considering the weakness of the current assurance process it cannot be endorsed simply by virtue of a lack of alternatives. Ideally the use of assurances should be severely circumscribed. Until then, the assurance process can and must be improved.

38. First, the assurance process endorses and promotes the idea that it is possible to “effectively mitigate the risk of mistreatment to below the threshold of serious risk

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<sup>25</sup> For commentary, see E Metcalfe, ‘The false promise of assurances against torture’, *JUSTICE journal*, available from <http://www.statewatch.org/news/2009/jun/The%20false%20promise%20of%20assurances%20against%20torture%20-%20uk-torture-assurances-eric-metcalfe-justice.pdf>; J Horowitz, ‘Fatally Flawed Anti-Torture Assurances’, *Just Security* (13 June 2017), available from <https://www.justsecurity.org/42009/fatally-flawed-anti-torture-assurances/>; Amnesty International, ‘Diplomatic Assurances Against Torture’ (2017), available from <https://www.amnesty.org/download/Documents/IOR4061452017ENGLISH.pdf> accessed 18 October 2018

<sup>26</sup> *Othman v United Kingdom* (2012) 55 EHRR 1, 189

<sup>27</sup> Citation available on p. 62 of the ISC ‘Current Issues’ report

<sup>28</sup> *Ibid.*, p. 56 [121]

through reliable caveats or assurances”.<sup>29</sup> Our position on cases of serious risk is clear. Where there is a serious risk of torture or CIDT or other mistreatment personnel and officers must not be permitted to seek assurances or caveats to ‘reduce’ that risk. This view is shared by the UN Committee Against Torture which in its 2013 concluding observations recommended that the UK Government “reword the guidance in order to avoid the possibility of having recourse to assurances where there is a serious risk of torture or ill-treatment...”<sup>30</sup> To permit anything else is to accept that the UK knowingly and willingly risks violating its international legal obligations through complicity in torture and other ill-treatment on a routine basis.

39. Second, the form of assurances and caveats sought under the Consolidated Guidance lack transparency and undermine accountability. The ISC ‘Current Issues’ report revealed that assurances sought are hardly ever in the form of formal written agreements.<sup>31</sup> The ISC also noted that in the latest versions of the Agency and MOD working-level guidance there is no instruction to officers to either attempt to obtain assurances in writing or, where that is not possible, to make a written record of verbal assurances and send them to the liaison partner.<sup>32</sup> This is as shocking as it is concerning.

40. In oral evidence before the ISC, both the Chief of the SIS and the Director General of MI5 expressed strong reservations about the need for written assurances.<sup>33</sup> Liberty finds their view untenable. While it is recognised that a formal, written memorandum of understanding may be difficult to obtain from liaison partners that does not mean that efforts to obtain one should be abandoned in favour of verbal assurances which cannot be evidenced. The use of verbal assurances for no other apparent reason than convenience undermines any hope of transparency and accountability.

41. Liberty shares the view of former Intelligence Services Commissioner Sir Mark Weller as to the appropriate form of assurances, that they be written, tailored and precise.<sup>34</sup> As he recommended in 2015:<sup>35</sup>

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<sup>29</sup> Consolidated Guidance, paras 17-21

<sup>30</sup> UN Committee Against Torture, Concluding Observations for the United Kingdom, May 2013, paragraph 11, available from <http://www.crae.org.uk/media/63835/cat-concluding-observations-may-2013.pdf>

<sup>31</sup> ISC ‘Current Issues’ report, p. 59 [133]

<sup>32</sup> Ibid. p. 61 [138]

<sup>33</sup> Ibid. pp. 59-60

<sup>34</sup> *Report of the Intelligence Services Commissioner; Supplementary to the Annual Report for 2015*, p. 108

<sup>35</sup> Sir Mark Weller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016-17) (and 7 September 2016, SG/2016/96), p. 43

*“...best practice is to obtain them in writing wherever possible. If it is not possible to obtain written assurances from a liaison partner then a written record of oral assurances should be sent to the liaison partner. At a very minimum there must be a written record of any oral assurances”.*

This recommendation ought to be taken up and included in any revised version of the policy as a minimum to ensuring that insofar as is possible the assurance process is transparent and accountable.

42. Third, there is no framework within the Consolidated Guidance to ensure that assurances and caveats are monitored after they have been given, nor are statistics routinely collected.<sup>36</sup> This further undermines any value offered by assurances and raises serious concerns about the effectiveness and reliability of assurances and caveats sought under the Guidance. It is very difficult indeed for the Agencies to whom the policy applies to convincingly argue that assurances offer a robust form of mitigation, when there is no process in place to monitor whether or not they are complied with in individual cases.

43. Finally, as noted by the ISC, seeking and obtaining assurances is not even a prerequisite to an operation proceeding where it is considered vital to national security.<sup>37</sup> Where there is a ‘serious risk’ of torture or CIDT and assurances cannot or have not been sought, the implication of the table at paragraph 11 of the policy is that Ministers have the discretion to authorise the operation to proceed. This scenario must be expressly prohibited in any revised version of the policy.

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<sup>36</sup> ISC ‘Current Issues’ report, p. 59 footnote 177

<sup>37</sup> Ibid., p. 61 [140]

## Scope of the Consolidated Guidance

[Consultation question: 7]

44. The purpose of the Consolidated Guidance is to ensure that UK Security and Intelligence Agencies are not, and will not be, involved in torture or mistreatment in the name of the UK. UK complicity in the US' post-9/11 torture programme is a shameful stain on the UK's reputation as a country which promotes human rights globally. Throughout this response, we have raised concerns as to whether the current iteration of the Consolidated Guidance is fit for purpose. These concerns have been primarily substantive. However just as important is that the policy applies to all relevant actors and that all relevant decisions fall within its scope.
45. Liberty is of the view – shared by the ISC – that: “any UK body involved with those detained abroad, or the passing of information that could lead to a detention, must operate in accordance with the Consolidated Guidance”.<sup>38</sup> It is the duty of the Cabinet Office to actively assess and review whether there are any other bodies that are involved in detainee issues and that are not currently bound by it. Where this is assessed to be the case, such bodies must be expressly brought within scope.
46. The purpose of the policy is to ensure that UK Agencies are not involved in torture or other ill-treatment. At present, the Guidance applies to detention and mistreatment by foreign security and intelligence agencies. By logical extension, the policy ought also to apply to conduct by (i) other agencies of foreign States and (ii) non-State actors where they are engaged by UK Agencies. However in the context of non-State actors, the concerns raised earlier in this response around the assurance process are even more acute. Should conduct by non-State actors be brought within scope, additional safeguards must be clearly articulated taking into account the special considerations at play when working with non-State actors.
47. The importance of the Consolidated Guidance as a tool for public reassurance requires that where an actor or a situation falls within its scope in practice, that this is made clear. As such, the scenarios raised in questions 7(c) and 7(d) of this Consultation ought to be expressly stated on the face of the policy.

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<sup>38</sup> *Ibid.*, pp. 52-53 [110]

## Rendition

[Consultation question: 8]

48. Liberty first raised concerns about UK knowledge and involvement in extraordinary rendition in 2005, calling on the police to open an investigation into UK complicity.<sup>39</sup> Thirteen years later it is shocking that the ISC found that there is still “no clear policy on, and not even an agreement as to who has responsibility for, preventing UK complicity in unlawful rendition”.<sup>40</sup> We share the astonishment expressed by the ISC and agree with the Committee’s conclusion that the Government fails to recognise the seriousness of rendition and the potential for the UK to be complicit in actions which may lead to torture, CIDT or other mistreatment.<sup>41</sup>

49. Liberty supports the recommendation of the ISC that any revised policy must expressly bring rendition within its scope and make this clear on its face.<sup>42</sup> Difficulties in defining the term are no excuse for the complete failure of the Consolidated Guidance to make reference to rendition or its inherent risks of exposing detainees to torture or CIDT.

## Relationship with OSJA

[Consultation question: 9]

50. In its ‘Current Issues’ report, the ISC clearly articulated the overlap between the Consolidated Guidance and the Overseas Security and Justice Assistance (OSJA) policy and ‘very strange’ outcomes the overlap can produce.<sup>43</sup> Liberty echoes the concerns raised by the ISC around the risk of duplication and inefficiency arising from the use of two parallel frameworks. In addition to the findings of the ISC, we wish to highlight serious concerns about OSJA. In 2016, the Home Affairs Select Committee questioned whether OSJA was fit for purpose.<sup>44</sup> The leader of the opposition has called for an independent review of the policy.<sup>45</sup>

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<sup>39</sup> For discussion see Liberty webpage on ‘Extraordinary rendition’ available from <https://www.libertyhumanrights.org.uk/human-rights/no-torture/extraordinary-rendition> accessed 9 October 2018

<sup>40</sup> ISC ‘Current Issues’ report, p. 87

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. p. 3 at (iv)

<sup>43</sup> Ibid. pp. 42-47

<sup>44</sup> House of Commons Home Affairs Select Committee, ‘College of Policing: three years on’, Fourth Report of Session 2016-17 available from [https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/23/23.pdf?utm\\_source=23&utm\\_medium=module&utm\\_campaign=modulereports](https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/23/23.pdf?utm_source=23&utm_medium=module&utm_campaign=modulereports) accessed 24 October 2018

<sup>45</sup> <https://twitter.com/jeremycorbyn/status/655706064336371712>

51. Given the clear overlap between the Consolidated Guidance and OSJA, and the widely acknowledged flaws of both policies, it is in our view logical to explore whether both policies should be completely overhauled and merged into one single human rights policy.

52. Liberty has benefitted from prior sight of Reprieve's response to the Consolidated Guidance consultation. We are of the view that the proposal made by Reprieve in relation to merging the Consolidated Guidance and OSJA is an important one which should be given due consideration. It should be emphasised however that any merging of the two policies must only take place after the major and fundamental concerns about each are addressed. A single policy will only serve the desired purpose if it is robust, clear and unambiguous in its scope and its content.

## **Other matters of concern**

### Oversight

53. Effective oversight is essential to the transparent and accountable operation of Government policy. The scenarios envisaged by the Consolidated Guidance are inherently secretive. The human rights abuses which the Consolidated Guidance seeks to prevent are severe. Torture, CIDT and other ill-treatment are scourges around which it is right for there to be a special stigma. In order to ensure that the Consolidated Guidance does what it is supposed to, and to make sure that those applying the policy do so in good faith, it is critical that the policy is subject to a robust oversight regime.

54. While the ISC was reasonably satisfied with the oversight regime as operated by the Intelligence Services Commissioner, Liberty does not consider that the regime as described in the 'Current Issues' report is sufficient to guarantee an effective, transparent and accountable system under the Consolidated Guidance. To improve the oversight regime, we would like to see an increase in the sample size looked at as part of the oversight process.<sup>46</sup> Ideally, all cases should be looked at by the Investigatory Powers Commissioner (IPC). This has clear resource implications which the Government must make provision for. We also echo the concern of the ISC regarding cases that were wrongfully deemed to fall outside the scope of the

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<sup>46</sup> The ISC found that the Intelligence Services Commissioner sampled an average of 12% across four agencies from 2013-2016. See, 'Current Issues' report, p. 20 [36]

Consolidated Guidance.<sup>47</sup> The IPC ought to consider how such cases can be subject to scrutiny moving forward.

55. Further, it is critical that the Agencies improve their record keeping. The ISC found shocking deficiencies in MI5 and SIS record keeping.<sup>48</sup> Rigorous and detailed record keeping is essential to ensuring both that the Agencies themselves have a decision-making trail to look back on, but more importantly it is essential to ensuring that the oversight undertaken by the IPC is robust and based on complete information.

56. Liberty has had prior sight of Reprieve’s recommendation that a system of post-notification be established, using the ‘serious error’ model under the Investigatory Powers Act as a loose model. We are of the view that this recommendation ought to be explored further as a possible avenue of redress for those affected by cases of non-compliance with the policy. While the specifics of such a model would require considerable thought, the principle of post-notification as a means through which individuals can access the information needed to seek redress for harms caused by UK Agencies is a valuable one.

#### Periodic review

57. No guidance document can expect to be perfect and no policy will remain up-to-date in perpetuity. The fact that the Consolidated Guidance has been in place for over seven years with such remarkably little consideration of its operational impact and such superficial review and revision is startling. We share the concerns of the ISC that the Cabinet Office – which owns the Consolidated Guidance – “does not seem to regard it as important to evaluate or review the Guidance on an ongoing basis”.<sup>49</sup> The ISC further notes that: “no one is assessing the utility of the Guidance, whether it is achieving its aims or whether those aims remain the same”.<sup>50</sup>

58. Moving forward, it is critical that there is meaningful ownership over the policy and a proactive approach to assessing its operational effectiveness. This should be the case whether the Cabinet Office remains the policy owner or it is merged with OSJA and a new single human rights policy is created. It is all well and good to have a policy document, but if there is no active consideration of whether it is working then we

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<sup>47</sup> Ibid., p. 24 [D]

<sup>48</sup> Ibid., p. 92 [224]

<sup>49</sup> Ibid., p. 2

<sup>50</sup> Ibid.

cannot know whether it is achieving its aims nor can the public have confidence in the Agencies who apply it.

59. It is imperative that the policy is kept under periodic review. Liberty considers the ISC recommendation of full review at least once every five years to be reasonable.<sup>51</sup> That review process should be open and transparent. Relevant stakeholders including the Equality and Human Rights Commission and human rights organisations should be actively engaged by the policy owner. Any review must at a minimum assess the utility of the policy; compliance with the policy; developments in international and domestic law; whether additional conduct needs to fall within scope; and whether additional Agencies need to fall within scope.

## **Conclusion**

60. The Consolidated Guidance is broken and not fit for purpose. This is unacceptable given the importance of the subject matter. As demonstrated by the failings of UK treatment of detainees in the wake of 9/11, it is abundantly clear that a robust framework for decision-making in the scenarios envisaged by the policy is required.<sup>52</sup> It is imperative that the Cabinet Office take the present review by IPCO seriously. Criticisms of the Consolidated Guidance have come from all sides and it is vital that the Government take note and make the meaningful changes that are desperately needed.

61. The prohibition against torture and other forms of ill-treatment is well established as one of the few absolute rights which must be respected without any restriction. There are no exceptional circumstances in which such treatment can be justified. To ensure that the UK does not again fall foul of its obligations in this respect, it is essential that the Agencies have a world-class human rights framework to operate from. This is to everyone's benefit: individual detainees, personnel and officers and the UK itself.

**Nadia O'Mara**

**Policy and Campaigns Officer**

**October 2018**

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<sup>51</sup> Ibid. p. 37

<sup>52</sup> As detailed by the ISC in its report on 'Detainee Mistreatment and Rendition: 2001-2010'