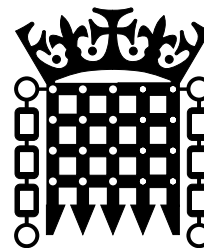




# Intelligence and Security Committee of Parliament

## Detainee Mistreatment and Rendition: Current Issues

Chair:  
The Rt Hon. Dominic Grieve QC MP



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Presented to Parliament pursuant to section 3  
of the Justice and Security Act 2013

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# THE INTELLIGENCE AND SECURITY COMMITTEE OF PARLIAMENT

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The Intelligence and Security Committee of Parliament (ISC) is a statutory committee of Parliament that has responsibility for oversight of the UK intelligence community. The Committee was originally established by the Intelligence Services Act 1994, and has recently been reformed, and its powers reinforced, by the Justice and Security Act 2013.

The Committee oversees the intelligence and security activities of the UK, including the policies, expenditure, administration and operations of the Security Service (MI5), the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ).<sup>†</sup> The Committee also scrutinises the work of other parts of the UK intelligence community, including the Joint Intelligence Organisation and the National Security Secretariat in the Cabinet Office; Defence Intelligence in the Ministry of Defence; and the Office for Security and Counter-Terrorism in the Home Office.

The Committee consists of nine Members drawn from both Houses of Parliament. The Chair is elected by its Members. The Members of the Committee are subject to section 1(1)(b) of the Official Secrets Act 1989 and are routinely given access to highly classified material in carrying out their duties.

The Committee sets its own agenda and work programme. It takes evidence from Government Ministers, the Heads of the Security and Intelligence Agencies, officials from the intelligence community and other witnesses as required. The Committee is supported in its work by a Secretariat. It also has access to legal, technical and financial expertise where necessary.

The Committee makes an annual report to Parliament on the discharge of its functions. The Committee may also produce reports on specific investigations. Prior to the Committee publishing its reports, sensitive material that would damage national security is blanked out ('redacted'). This is indicated by \*\*\* in the text. The Security and Intelligence Agencies may request the redaction of material in a report if its publication would damage their work, for example by revealing their targets, methods, sources or operational capabilities. The Committee considers these requests for redaction carefully. The Agencies have to demonstrate clearly how publication of the material in question would be damaging before the Committee agrees to redact it. The Committee aims to ensure that only the minimum of text is redacted from a report. The Committee believes that it is important that Parliament and the public should

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\* This Report reflects work largely undertaken by the previous Committee, which sat from September 2015 to May 2017, though it was initiated by the Committee chaired by the Right Hon. Sir Malcolm Rifkind, which sat from October 2010 to March 2015. Membership of the 2015–17 Committee included the Right Hon. Angus Robertson, the Right Hon. Gisela Stuart and (until July 2016) the Right Hon. Sir Alan Duncan KCMG MP. Membership of the 2010–15 Committee at the time it initiated the Inquiry included the Right Hon. Hazel Blears, the Right Hon. the Lord Butler of Brockwell KG GCB CVO, the Right Hon. the Lord Campbell of Pittenweem CH CBE QC, the Right Hon. Mark Field MP, and the Right Hon. Dr Julian Lewis MP. The Right Hon. Fiona Mactaggart (from May 2014) and the Right Hon. George Howarth MP (until October 2016) were members of both predecessor Committees.

† The Committee oversees operations subject to the criteria set out in section 2 of the Justice and Security Act 2013.

be able to see where information had to be redacted. This means that the published report is the same as the classified version sent to the Prime Minister (albeit with redactions). The Committee also prepares from time to time wholly confidential reports which it submits to the Prime Minister.

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### ***Most commonly used abbreviations***

‘C’	Chief of SIS
CBRN	Chemical, biological, radiological and nuclear
CIA	Central Intelligence Agency
CIDT	Cruel, inhuman or degrading treatment
FCO	Foreign and Commonwealth Office
GCHQ	Government Communications Headquarters
HMG	Her Majesty’s Government
MI5	The Security Service
MOD	Ministry of Defence
NCA	National Crime Agency
NGO	Non-governmental organisation
SIS	Secret Intelligence Service (MI6)
SO15	Specialist Operations (branch) 15 – the Metropolitan Police’s Counter-Terrorism Command
UN	United Nations

### ***Use of code words***

Throughout this Report, the names of detainees, geographic identifiers (such as nationality) and a small number of operational names have been substituted for our own code words in order to protect classified information. Code words replacing geographic indicators have not been used consistently throughout the Report for the same reason. Lists are provided at Annex D.

## EXECUTIVE SUMMARY

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In 2010, the Government published guidance on the interviewing of detainees overseas and the exchange of intelligence on detainees in order to ensure that our Security and Intelligence Agencies are not, and will not be, involved in torture or mistreatment in the name of the UK. That guidance has now been in operation for over seven years and the Committee therefore considered it essential to investigate how it is being used.

This Report considers the adequacy of the policy, guidance and structures currently in place – and whether similar guidance is needed on rendition. In terms of current practices, we also consider whether the Agencies are now in a position where they would be able to deal with events requiring an extensive and sudden change to their focus and working practices, such as happened after 9/11.

Together with this Report we are also publishing the Committee's March 2010 Report on the draft Consolidated Guidance, placing it in the public domain for the first time. While some of the recommendations have subsequently been overtaken, the report as a whole remains relevant to the continuing debate. We therefore regard it as essential that the Report is placed on the public record.

### **Use of the Consolidated Guidance**

- From the evidence we have seen, the Consolidated Guidance has now been applied by the Agencies and MOD on average 576 times per year, and in a total of 2,304 cases from 2013 to 2016.
- We sought to establish how many of the 2,304 cases where the Consolidated Guidance was applied were escalated to Ministers, i.e. in how many cases the Agencies and MOD considered there was a serious risk of mistreatment. It has proved difficult to establish any exact figures: this is a matter on which we would expect full information to be kept in future.
- The Committee reviewed a sample of cases from SIS and MI5. We found no instances where they had deliberately acted in violation of the Consolidated Guidance. The cases we examined all illustrated the challenges of implementing the Guidance – particularly when working through partners – and the considerations undertaken by the Agencies. We saw that officers actively monitored whether assurances were being adhered to, escalating concerns and suspending co-operation when needed, and that potential breaches are raised in real time and acted upon as a matter of urgency.

### ***Evaluation and review***

While the Guidance has now been in place for seven years, there appears to have been remarkably little attempt to evaluate or review its operation beyond ensuring compliance for oversight purposes. We have recommended that work is done by the organisations that operate under the Guidance to establish what the overall operational impact has been, such that they can inform any future changes, whether to ways of working or to the Guidance itself.



We are more concerned, however, 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. While the Investigatory Powers Commissioner considers compliance with the Guidance, it is not his responsibility to consider whether the Guidance is achieving its policy objectives. There is therefore a policy vacuum: no one is assessing the utility of the Guidance, whether it is achieving its aims or whether those aims remain the same. The Cabinet Office must take proper ownership of the Guidance: it is too important an issue to be left unattended.

## ***Proposals for change***

The Cabinet Office conducted a very ‘light touch’ review of the Guidance last year. In August 2017, this Committee was provided with a copy of the draft revised Guidance, and notified that “*the Prime Minister would like to seek the views of the new Committee on it, once appointed*”. Our Report addresses the proposed changes. While some are welcome and bring greater clarity to the Guidance, the revised draft does not address a number of areas that have been raised by either the Intelligence Services Commissioner or by this Committee. In our opinion, therefore, the review was insufficient and the revised draft does not go far enough.

A full review of the Consolidated Guidance is overdue. This should encompass the points raised by the Intelligence Services Commissioner and by this Committee since 2010. HMG should also proactively consult non-governmental organisations and the Equality and Human Rights Commission (EHRC). Further, the Cabinet Office should review the Guidance periodically to ensure that any issues raised by the Commissioner or those bodies covered by the Guidance are addressed, and revisions made where necessary, and also to take a more strategic view as to whether the Guidance is fit for purpose in that it is achieving its aims, and that those aims remain the same. These reviews should be published to improve transparency.

In terms of the current proposed changes, we would highlight here the following nine points:

- (i) Scope: The proposed revisions to include the NCA and SO15 under the Guidance appear entirely logical and should formalise what is a growing co-operation between them and the intelligence community. We remain concerned that there may be other bodies that are engaged in detainee issues and are not bound by the Consolidated Guidance. It is essential that this issue is kept under active review by the Cabinet Office, rather than when prompted by others. 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: otherwise there is a reputational risk to the UK.
- (ii) Emergencies: The extension to the Agencies of the ability to authorise action in an emergency situation, without reference to Ministers, is sensible. However, it should not extend to situations where an official believes there is a serious risk of torture. Furthermore, use of the provisions relating to time-sensitive operational decisions must be strictly monitored: they should only be used in real emergencies and a time limit of 48 hours should be set for retrospective escalation of any case to senior personnel and, where necessary, to Ministers.
- (iii) Joint units: The Consolidated Guidance must specifically address the question of joint units, and make clear that it applies to such units. Where HMG trains, funds and/or tasks a unit overseas, it must carry some responsibility for the actions of that

unit. If it does not, it leaves itself open to accusations that it is outsourcing action it cannot take itself.

- (iv) Rendition: While we recognise that the list of types of CIDT contained in the Consolidated Guidance is not intended to be exhaustive, rendition has been such a contentious issue that we believe it should be specifically mentioned in this list for clarity. Defining rendition has previously caused problems; however, this is not a reason to stop its inclusion – indeed it is precisely because of the uncertainty in the term that officers should be prompted to consider it. The same argument applies to non-State actors and joint units: HMG’s excuse that defining these terms is too difficult is not sufficient.
- (v) Serious risk: We recognise the ambiguity inherent in the term ‘serious risk’ and the burden this places on individual officers when assessing whether there is a ‘serious’ risk that detainees may be subjected to torture or CIDT. The Agencies have developed their own training on how to recognise ‘serious risk’, and they have all erred on the side of caution. However, the Agencies have not all addressed how the term ‘serious risk’ is to be interpreted in their working-level guidance, or provided their officers with examples of the threshold to be used. This must be addressed. Further, when submitting to Ministers on the Guidance, the organisation concerned should append its working definitions to ensure that all involved are working on the same understanding.
- (vi) Spirit: No guidance is comprehensive, and there will inevitably be instances which do not fall within the letter of the Consolidated Guidance when it is interpreted strictly. It is essential therefore that the Agencies and their personnel follow the Consolidated Guidance not just in letter but in spirit as well.
- (vii) Protection: The Consolidated Guidance does not offer legal protection to officers. This is clearly demonstrated by the fact that, when SIS or GCHQ submit to Ministers under the Guidance, they seek – in parallel – an authorisation under section 7 of the Intelligence Services Act 1994. We recognise the Agencies’ need to ensure that their officers are protected where they are acting in accordance with the Guidance and consider that the solution of seeking a section 7 authorisation to cover an action is a pragmatic one. However, we have previously recommended that there should be greater transparency around the use of section 7 authorisations and that the scope and purpose of section 7 authorisations should explicitly be addressed in the Consolidated Guidance, and we strongly urge the Government to reconsider this recommendation.
- (viii) Ministerial discretion: The Guidance is insufficiently clear as to the role of Ministers, and what (in broad terms) can and cannot be authorised. The Guidance should specifically refer to the prohibition on torture enshrined in domestic and international law to make clear that Ministers cannot lawfully authorise action which they know or believe would result in torture.
- (ix) Subjectivity: The public must be sure that all decisions are based on the same legal and policy advice and within the same parameters: and that subjectivity is kept to a minimum. We have found that there are dangerous ambiguities in the Guidance – individual Ministers have entirely different understandings of what they can and

cannot, and would and would not, authorise. This is a structural weakness in the Guidance and the recent proposed revisions to the Guidance have not addressed these issues. The Guidance must provide clarity on what information is to be provided to Ministers when asking them to make a decision.

While it is clear that we have a number of concerns relating to the Guidance, these should be read in the spirit of continuous improvement. Very few countries have attempted to set out their approach to these matters, and let themselves be held accountable in this manner. It is to the Agencies and MOD's credit that they have embedded these procedures. With that said, there is room for improvement by those who 'own' the policy, and we trust that our recommendations in this area will be addressed.

The Consolidated Guidance as a whole is not a set of hard and fast rules or directions for personnel to follow. Instead it provides a process, with judgements and assessments to be made. It contains very little in terms of concrete guidance and therefore does not stand alone but has to be supported by further documents which provide more explicit direction. We remain of the view that the public should be given as much information as possible about the underlying decision-making process in this area. While there are limits to the amount of information that can safely be made publicly available, we consider that there is more information which could be published about the way officers apply the guidance. This will increase transparency and hopefully improve confidence.

More generally, we are concerned that the Guidance itself does not appear to have achieved its aim of increasing public confidence in the Agencies. It does not provide guidance and it is misleading to present it as such. We also note that the current title is now outdated and therefore inaccurate. We recommend that the opportunity is now taken to rename it in such a way that its purpose as a framework which sets the boundaries within which the Agencies must operate is clearly apparent to the public, for example, 'UK standards for action relating to detention and rendition'.

## ***Rendition***

It is clear that there are a number of other concerns around policy and process on rendition that have still not been addressed since this Committee last reported on rendition in 2007. While there have been small improvements made since 2007, we remain unconvinced that the Government recognises the seriousness of rendition and the potential for the UK to be complicit in actions which may lead to torture, CIDT or other forms of mistreatment.

There is no clear policy and not even agreement as to who has responsibility for preventing UK complicity in unlawful rendition. We find it astonishing that, given the intense focus on this issue ten years ago, the Government has still failed to take action. Through this Report, we formally request that HMG should publish its policy on rendition, including the steps that will be taken to identify and prevent any UK complicity in unlawful rendition within three months of publication of this request.

We particularly note that HMG has failed to introduce any policy or process that will ensure that allies cannot use UK territory for rendition purposes without prior permission. Given the clear shift in focus signalled by the present US administration, reliance on retrospective assurances and the voluntary provision of passenger information – as at present – cannot be considered satisfactory. Further, we consider that the FCO position that the UK is absolved

from complicity in permitting transit or refuelling of a possible rendition flight, because it has no knowledge of what the aircraft has done or is doing, is not acceptable.

## *Agility*

The Agencies have recognised that they were not sufficiently agile in responding to events after 9/11. This failure to adapt quickly to significant changes in circumstances, and the pressure they were operating under as a result, has been cited by the Agencies as one of the key reasons why they failed to recognise the emerging signs of detainee mistreatment and the US rendition programme. In this context, we note that the Agencies are monitoring the actions of their US liaison partners in order to identify at an early stage any shift in policy on detainees. It is essential that this is taken seriously given the grave repercussions of their failure to detect the change in US working practices that occurred after 9/11.

We have examined whether the Agencies are alert to emerging matters of concern, and whether they are well placed to respond. This is not about identifying a specific threat and planning for it, but about the way the Agencies are resourced and structured, and whether those structures and resources are such that they will allow for a rapid change of approach and operating where necessary. All of the Agencies and Defence Intelligence have undergone substantial structural change since 9/11, with a number of reviews and changes being implemented over the last 10–12 years. Where further major incidents have taken place, the outcomes of the Agencies' responses to those incidents have informed post-event changes. The Committee is reassured that agility – the ability to respond quickly to an unexpected event – has been a focus in many of these change programmes and hopes that the lessons learned from the failures post 9/11 mean that the Agencies will not be caught unprepared in future.

# 1. THE INQUIRY

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1. In December 2013, the Intelligence and Security Committee of Parliament (ISC) was asked by the then Prime Minister (the Right Hon. David Cameron) to undertake an inquiry into the issues raised in Sir Peter Gibson’s scoping report regarding the possible involvement of the UK Security and Intelligence Agencies in torture or mistreatment.

2. Announcing this in the House of Commons on 19 December, the Minister without Portfolio (the Right Hon. Kenneth Clarke MP) said: “*Most of those problems related to a relatively short period of time in the early 2000s.*” The ISC has examined this period and we have reported our findings in our Report, *Detainee Mistreatment and Rendition: 2001–2010*.

3. One of the arguments put forward by the Government in defence of its actions after 2001 was that there was a lack of knowledge and understanding of the actions of others. While that may have some bearing on historical events, the same cannot be said now. It has been clear for some years how detainees were being treated by some detaining authorities and that that treatment was unacceptable from the UK’s legal, moral and ethical standpoint. In 2010, the Government published guidance as to how to deal with detainees held by other countries in order that there would be “*greater clarity about what is and what is not acceptable in the future*”.<sup>1</sup> That guidance has now been in operation for over seven years and the Committee therefore considered it essential to investigate how it was being used, what impact it has had and whether it is providing the surety that is needed that our Agencies are not, and will not be, involved in torture or mistreatment in the name of the UK.

4. This Report considers the adequacy of the policy, guidance and structures currently in place. Our starting point has been 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* published by the then Prime Minister on 6 July 2010.<sup>2</sup> The Government views the Consolidated Guidance as marking a watershed in terms of the handling of detainee issues, and certainly it was the first time the Government had sought to codify its position and provide the Agencies with clear guidance. However, it has not been without its critics – amongst them this Committee and the Intelligence Services Commissioner.<sup>3</sup> More importantly, there have been a number of cases brought against the Government alleging UK complicity in detention, mistreatment, torture and extraordinary rendition since the Guidance was introduced.<sup>4</sup> There are therefore questions as to whether the Consolidated Guidance is fit for purpose or whether it needs changing. We also consider whether similar guidance is needed on rendition.

5. There is one further aspect which we consider key to this Inquiry, and that is whether the Agencies are now in a position such that they would be able to deal with events requiring an extensive and sudden change to their focus and working practices. This was another argument put forward by HMG in defence of its actions in the 2001–2010 period: the Agencies were unable

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<sup>1</sup> Hansard, HC Deb, 6 July 2010, vol. 513, col. 175 (‘Treatment of Detainees’).

<sup>2</sup> HM Government, *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* (hereafter ‘Consolidated Guidance’), July 2010.

<sup>3</sup> The Intelligence Services Commissioner has generally concluded that the Consolidated Guidance is broadly fit for purpose; however, he recommended in his 2015 supplementary report that it should be reviewed and made a number of suggestions for change.

<sup>4</sup> Written evidence – Cabinet Office, 20 December 2017. Six cases have been confirmed by the Cabinet Office as falling within this category (claims from detainees alleging mistreatment since the Consolidated Guidance was introduced).

to cope with the seismic change required of them to respond to 9/11 and, under pressure, they therefore missed the key warning signs of torture and mistreatment. Their ability to respond to events in the future is therefore key to ensuring that the UK is viewed as the “*beacon of justice, human rights and the rule of law*” that the Government intends.<sup>5</sup>

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<sup>5</sup> Hansard, HC Deb, 19 December 2013, vol. 572, col. 914 (‘Detainee Inquiry’).

## 2. THE LEGAL FRAMEWORK

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6. It is necessary to consider the actions of the UK Government and the Security and Intelligence Agencies within the context of the legal framework. Set out below are the provisions that are relevant to torture and to cruel, inhuman or degrading treatment (CIDT).

### *Legal obligations*

7. The UK has signed and ratified the following relevant international instruments:

- the International Covenant on Civil and Political Rights (ICCPR), which states that no person shall be subjected to torture or to CIDT or punishment; and requires that “*persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*”;<sup>6</sup>
- the European Convention on Human Rights (ECHR), which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment;<sup>7</sup>
- the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which requires that States shall “*prevent acts of torture*” and provides that “*no exceptional circumstances whatsoever ... may be invoked as a justification of torture*”.<sup>8</sup> It also prohibits ‘complicity’ in torture and requires that States prevent “*other acts of CIDT and punishment*”.<sup>9</sup> Additionally, the UNCAT prohibition on torture and CIDT extends to acts committed “*at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*”;<sup>10</sup>
- the 1949 Geneva Conventions, which require humane treatment of detainees and specifically prohibit torture, and cruel and degrading treatment in the context of an armed conflict;<sup>11</sup>
- the Statute of the International Criminal Court, which includes as ‘war crimes’ torture, and inhuman and degrading treatment prohibited under the 1949 Geneva Conventions in the context of an armed conflict;<sup>12</sup> and

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<sup>6</sup> International Covenant on Civil and Political Rights (New York, 19 December 1966; Treaty Series No. 6 (1977); Cmnd 6702).

<sup>7</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; Treaty Series No. 71 (1953); Cmd 8969). The ECHR was implemented domestically by the Human Rights Act 1998.

<sup>8</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention Against Torture) (New York, 4 February 1985; Treaty Series No. 107 (1991); Cm 1775).

<sup>9</sup> CIDT, as well as being a breach of the human rights conventions if committed by public officials, may in some cases also constitute criminal offences under domestic law, for example, assault occasioning actual bodily harm under the Offences Against the Person Act 1861.

<sup>10</sup> ‘Acquiescence by a public official’ is limited (for the US) by a US reservation to UNCAT such as to require a public official to have prior awareness of the activity constituting torture and then to fail to intervene to prevent such activity.

<sup>11</sup> Conventions for the Protection of War Victims (Geneva, 12 August 1949; Treaty Series No. 39 (1958); Cmnd 550).

<sup>12</sup> Rome Statute of the International Criminal Court (Rome, 17 July 1998; Treaty Series No. 35 (2002); Cm 5590). The International Criminal Court Act 2001 gives effect to the ICC Statute in domestic law, including creating a ‘war crime’ offence.



- additionally, under Article 16 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (said to codify customary international law), a State has international responsibility where that State materially aids or assists another State in the commission of an internationally wrongful act, if it does so with intent and knowledge of the circumstances of that wrongful act and the act would be internationally wrongful if committed by that State.

8. Under domestic law, 'complicity' in torture or CIDT means any involvement in torture or CIDT. (Under domestic law relating to secondary liability and joint enterprise, an individual may be prosecuted – as if they were the principal offender – for an offence that is carried out by another if they aid, encourage, counsel or procure the commission of an offence.)<sup>13</sup> This is particularly relevant, as most allegations of UK involvement in mistreatment of detainees relate to facilitating, supporting or assisting others in that mistreatment. Complicity in torture or CIDT might result from, for example, sharing intelligence in the knowledge or belief that action might be taken on that intelligence with a real risk that torture or CIDT would result.

9. Conspiracy to commit offences outside the UK (an agreement by two or more people to carry out such a criminal act) is also an offence under domestic law.<sup>14</sup> This might include, for example, prosecutions of pilots, aircrew or aircraft owners with knowledge of the fact that a flight carried a person likely to be subject to an offence in another jurisdiction (such as kidnapping, false imprisonment, assault or torture).

## Definitions

10. The definition of 'torture' given in UNCAT is:

*Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*<sup>15</sup>

11. The Criminal Justice Act 1988 defines a crime of 'torture' in domestic law. The Act defines it as an act by a public official in the performance or purported performance of their duties (or a person acting at the instigation or with the consent or acquiescence of such a public official) which intentionally inflicts severe mental or physical pain or suffering. The domestic definition is wider than UNCAT requires, as no purposive element is required (i.e. purposes such as obtaining a confession, given in the definition of torture under UNCAT); but a defence of lawful authority, justification or excuse is available (contrary to UNCAT

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<sup>13</sup> Section 8 of the Accessories and Abettors Act 1861, under which someone who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be tried as the principal offender; section 44 of the Magistrates' Courts Act, which provides the same in relation to summary and either-way offences; and the Serious Crime Act 2007, under which liability for encouraging and assisting may arise whether or not any anticipated primary offence is ever committed.

<sup>14</sup> Section 1A of the Criminal Law Act 1977, in England and Wales; and section 11A of the Criminal Procedure (Scotland) Act 1995, in Scotland.

<sup>15</sup> Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985; Treaty Series No. 107 (1991); Cm 1775).



Article 2(3) which states “*An order from a superior officer or a public authority may not be invoked as a justification for torture*”). However, it should be noted that the US has taken a different approach to the definition of torture – in 2002, the US Office of Legal Counsel developed a narrower definition of torture in that it said that the degree of pain inflicted needed to be “*equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death*”.<sup>16</sup>

12. By contrast, CIDT is not defined in any of the international instruments. The closest the UK has come to defining what constitutes CIDT was in 1972, when the then Prime Minister, the Right Hon. Edward Heath, stated in Parliament that certain interrogation techniques that had previously been authorised would not be used in future. These techniques (wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink) were those subsequently found, in 1978, to be in breach of the prohibition of CIDT in the ECHR by the European Court of Human Rights, thereby confirming that they constituted CIDT.<sup>17</sup> These techniques are now included in the list of examples of prohibited CIDT in the Consolidated Guidance published by HMG in July 2010.<sup>18</sup>

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<sup>16</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, US Department of Justice, to Alberto R. Gonzales, Counsel to the President, 1 August 2002, page 1 (published by *The Washington Post* in June 2004). When President Obama took office in 2009, he limited interrogation techniques to those authorised by the Army Field Manual and acknowledged that many of the measures authorised under the previous administration amounted to torture.

<sup>17</sup> *Ireland v. UK* (5310/71) [1978] ECHR 1. The techniques, at the time, were not found by the Court to amount to torture. However, following the definition of torture in UNCAT, which post-dates the Court decision, these techniques would be likely to amount to torture.

<sup>18</sup> The Consolidated Guidance also includes “*physical abuse or punishment of any sort*”, and “*degrading treatment (sexual embarrassment, religious taunting etc.)*” in the list of prohibited CIDT.

### 3. THE CONSOLIDATED GUIDANCE: BACKGROUND

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#### *Evolution of the Consolidated Guidance: 2010–2017*

13. On 17 March 2009, the ISC wrote to the then Prime Minister (the Right Hon. Gordon Brown) regarding the case of Binyam Mohamed and the issues it raised about the policies that the Security and Intelligence Agencies should be following in seeking to “*reconcile the need to obtain vital intelligence to protect the British public, with the need to ensure that an individual’s human rights are not infringed*”. The Committee concluded:

*This is a matter of Government policy ... we recommend that a statement is made by the Government which sets it out in simple terms. We believe that the Government should, indeed must, be explicit in setting out the position.*<sup>19</sup>

14. The following day, the Prime Minister announced to Parliament that:

*we will publish our guidance to intelligence officers and service personnel about the standards that we apply during the detention and interviewing of detainees overseas ... It is right that Parliament and the public should know what those involved in interviewing detainees can and cannot do. This will put beyond doubt the terms under which our agencies and service personnel operate.*<sup>20</sup>

The ISC was asked by the Prime Minister to review the guidance prior to publication.<sup>21</sup>

#### *The draft Consolidated Guidance (2009)*

15. The Government decided that, rather than publishing the existing guidance (which consisted at that time of a tri-Agency policy document, individual Agency guidance, and military doctrine and guidance), it would consolidate it into a single document to be used by the Agencies and the military. This took over eight months: apparently due to differences that emerged between Agencies and Government Departments. MOD was included in the process at a late stage and voiced concerns that it had been added to the list of bodies to be covered by the Guidance as an afterthought, and that the draft text created legal ambiguity, revealed too much operational detail and did not sufficiently take into account the special circumstances of Armed Forces personnel and MOD civilians<sup>22</sup> (these concerns were subsequently allayed).<sup>23</sup>

16. When the draft Consolidated Guidance was produced, in November 2009, it was clear that it was substantially different to the previous guidance. What was passed to the Committee for consideration was a relatively brief (13-page) document which the Government said was

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<sup>19</sup> Letter from the ISC Chair to the Prime Minister, 17 March 2009.

<sup>20</sup> Hansard, HC Deb, 18 March 2009, vol. 489, col. 55WS (‘Detainees’).

<sup>21</sup> Letter from the Prime Minister to the ISC Chair, 18 March 2009.

<sup>22</sup> MOD internal correspondence concerning the draft Consolidated Guidance, 16 July 2009.

<sup>23</sup> MOD told us that: “*In 2009/2010 DI [Defence Intelligence] had been particularly concerned about protecting its Interrogation and Tactical Questioning Tactics, Techniques and Procedures (TTPs) following a number of legal challenges to the MOD. This was at the height of operations in Iraq and Afghanistan where interrogation had been having some success in obtaining intelligence about the insurgents and other intelligence requirements. DI remains satisfied that, as a result of the proper application of public interest immunity in civil cases and the careful drafting of the Cabinet Office Consolidated Guidance (COCG), what was eventually achieved struck an appropriate balance between the need for openness in Public Inquiries and court cases and the protection of sensitive information.*” [Source: written evidence – MOD, 21 July 2017.]

*“consistent with the existing guidance but it has a wider scope and does not seek to reproduce or replace the administrative or procedural detail”.*

17. The Committee had significant concerns about the nature of the draft document. The Committee’s Report – which was sent to the Prime Minister on 5 March 2010 – made a number of specific recommendations for improvement; however, the primary conclusion was that:

*The document that we have been given provides a useful guide to the policy framework within which the UK security and intelligence Agencies and MOD personnel operate. We consider that it has the potential to provide a useful addition to the public debate on this matter.*

*However, the real detail is in the lower level guidance to staff, which the Government does not intend to publish. The title ‘Consolidated Guidance’ is therefore a misnomer. That being the case, we consider that the document should be published, but that it should be clearly presented as policy, not guidance.<sup>24</sup>*

18. The Committee’s Report was still being considered by the Government for redaction prior to publication at the time of the 2010 General Election. Following the election, the then new Prime Minister, the Right Hon. David Cameron, decided that it would be inappropriate for the incoming Government to publish the Committee’s Report since it commented on a previous administration. The new Committee believed that it was nevertheless a useful contribution to the public debate on such matters and sought to publish the Report as an Annex to its 2010–2011 Annual Report. This was overruled by the Government.

**A. While some of the recommendations in the Committee’s March 2010 Report on the draft Consolidated Guidance have subsequently been overtaken, the Report as a whole remains relevant to the continuing debate. We therefore regard it as essential that the Report is placed on the public record. Under the Justice and Security Act 2013, the Committee has the power to publish its own reports (previously it was reliant on the Prime Minister to publish them). We have therefore included the March 2010 Report as an Annex to this Report, placing it in the public domain for the first time.**

## ***The 2010 Consolidated Guidance***

19. Following this Committee’s Report on the draft Guidance in March 2010, the incoming Government revised the Guidance, publishing it two months after the Election. In his statement to Parliament on 6 July 2010, the Prime Minister said:

*today we are ... publishing the guidance issued to intelligence and military personnel on how to deal with detainees held by other countries ... It makes clear the following: first, our services must never take any action where they know or believe that torture will occur; secondly, if they become aware of abuses by other countries, they should report it to the UK Government so we can try to stop it; and thirdly, in cases where our services believe that there may be information crucial to saving lives but where there may also be a serious risk of mistreatment, it is for Ministers, rightly, to determine the action, if any, that our services should take.<sup>25</sup>*

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<sup>24</sup> Annex C, Summary.

<sup>25</sup> Hansard, HC Deb, 6 July 2010, vol. 513, col. 175 (‘Treatment of Detainees’).

### **The Consolidated Guidance: a summary**

#### **What is it?**

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*, published in 2010 (and amended in 2011), sets out the principles – consistent with the UK’s obligations under domestic and international law – which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees. It aims to provide clarity to those involved in this work – and transparency to the public – about the standards that UK intelligence officers and service personnel apply and the processes they follow.

#### **Who does it cover?**

The Guidance covers:

- officers of the UK’s Security and Intelligence Agencies (SIS, MI5, GCHQ);
- members of the UK’s Armed Forces; and
- employees of MOD.

#### **When is it invoked?**

It is invoked when engaging with foreign liaison services to:

- interview detainees in the custody of a liaison service;
- solicit, co-operate or participate in a detention by a liaison service;
- pass intelligence to a foreign liaison service about someone who it is known or believed will be detained;
- seek intelligence from a detainee in the custody of a liaison service; and
- receive unsolicited information obtained from a detainee.

#### **What aspects of the detention must be considered?**

Officers should consider whether the detainee has been, or might be, subject to:

- torture;
- cruel, inhuman or degrading treatment (CIDT); and/or
- arrest and/or detention lacking due process (considering both domestic and international law).

#### **How should serious risk be handled?**

Officers should consider whether the risk of mistreatment can be mitigated below the level of ‘serious risk’ by:

- only sharing selected intelligence, which is less likely to lead to an unacceptable outcome;
- seeking reliable assurances from the liaison service about detention conditions; and/or
- applying caveats to intelligence, which are reasonably expected to be respected, and requiring that no action will be taken based on the information shared.

**Who can make that judgement and what happens next?**

- Junior personnel may not themselves make any assessment of whether mitigating factors are sufficient to bring the risk below the ‘serious’ threshold.
- Junior personnel must consult senior officers if they judge that there is a serious risk of an unacceptable outcome.
- Senior personnel, in consultation with legal advisers, may authorise engagement if they judge that, after taking account of any mitigation put in place, the risk is not serious.
- But, the case must be referred to Ministers if the risk remains serious.

**Key principles to remember**

- Ministers must be informed if there is knowledge or belief that torture will occur.
- If there is any doubt about the assessment of risk, the issue must be referred to seniors and/or Ministers.

20. Whilst generally welcomed as an advance in transparency, the Guidance was not without its critics. A number of NGOs and interested parties, including the Equality and Human Rights Commission (EHRC), Amnesty International and the All-Party Parliamentary Group on Extraordinary Rendition, identified failings in the Guidance. Their criticisms were broadly similar to those made by the Committee in its previously unpublished March 2010 Report – including that the role of Ministers, liability of officers and systems of assurances all required far greater clarity and explanation.

21. In 2011, the EHRC brought a case against the Government on the grounds that the Consolidated Guidance was unlawful because it advises officers not to act (in the passing or receipt of intelligence relating to detainees) where there is a ‘serious risk’ of torture or CIDT, whereas the legal test is that officers should not act where there is a ‘real risk’ of torture or CIDT. The EHRC argued that ‘serious risk’ is a higher threshold than ‘real risk’.<sup>26</sup>

22. The High Court did not uphold the EHRC’s claim and ruled (on 3 October 2011) that there was no material difference between ‘serious risk’ and ‘real risk’, noting that:

*The context is that the document is intended to give practical guidance to intelligence officers on the ground. It is not a treatise on English criminal law. What matters is how the document would be read and applied by individual intelligence officers.*

The Court also ruled on a narrow point surrounding hooding where it said that as “*The Government’s policy is ... to prohibit hooding ... d(iii) of the Annex should be changed to omit hooding from the ambit of the exception.*”<sup>27</sup>

23. The Guidance was consequently amended and the revised version was published in November 2011. It is this version which remains in force today and which we consider in this Report. The Guidance is at Annex B.

<sup>26</sup> *Equality and Human Rights Commission v. the Prime Minister and others* [2011] EWHC 2401 (Admin). We consider whether the term ‘serious risk’ is understood in Chapter 7, ‘Interpreting and applying the Consolidated Guidance’.

<sup>27</sup> *Equality and Human Rights Commission v. the Prime Minister and others* [2011] EWHC 2401 (Admin), paragraphs 61, 94.

## *Working-level guidance*

24. In practical terms, the Consolidated Guidance does not stand alone. The Guidance itself says “*It is envisaged that each organisation will continue to provide more detailed advice to their officers and personnel where such material is necessary to prescribe precisely how the principles and requirements set out in this guidance should operate within their individual organisational structure.*”<sup>28</sup> This is perhaps a natural result of producing a document applicable to a range of organisations: what is produced is too high level to be of actual practical use and therefore each must develop its own detailed working-level guidance. The need for working-level guidance is covered in more detail in Chapter 4, ‘The Consolidated Guidance: is it guidance or something else?’

## *Use of the Consolidated Guidance since 2010*

25. The Consolidated Guidance has now been in operation for seven years. From the evidence we have seen, it has been applied by the Agencies and MOD on average 576 times per year, and in a total of 2,304 cases from 2013 to 2016.<sup>29</sup> The table below shows the number of cases in each year from 2013 to 2016.<sup>30</sup> As can be seen from the table, 2014 saw a watershed as detention operations in Afghanistan were handed over to the Afghan authorities and UK Armed Forces were disengaged.

### **Application of the Consolidated Guidance from 2013 to 2016**

	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
SIS	***	***	***	***
MI5	***	***	***	***
GCHQ	***	***	***	*** <sup>31</sup>
MOD <sup>32</sup>	***	***	***	***
<b>Total</b>	<b>418</b>	<b>516</b>	<b>442</b>	<b>928</b>

26. We sought to establish how many of the 2,304 cases where the Consolidated Guidance was applied were escalated to Ministers. This would indicate in how many cases the Agencies and MOD considered there was a serious risk of mistreatment (whether CIDT or denial of due process).

- GCHQ told the Committee that, from the introduction of the Consolidated Guidance up to and including 2016, it had only referred \*\*\* to Ministers, and in one case it

<sup>28</sup> HM Government, *Consolidated Guidance* (July 2010), page 15.

<sup>29</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2013*, 26 June 2014, HC 304 (2014–15) (and June 2014, SG/2014/103); Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2014*, 25 June 2015, HC 225 (2015–16) (and SG/2015/74); Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96).

<sup>30</sup> Figures are available from the Intelligence Services Commissioner from 2013 onwards.

<sup>31</sup> In relation to the steep increase of cases for 2016, GCHQ told us: \*\*\*. [Source: written evidence – GCHQ, 21 November 2017.]

<sup>32</sup> In relation to the figures for MOD, Sir Mark Waller has explained: “*When I began my oversight of the MOD’s use of the Guidance there were very few cases to consider because the majority were held in UK custody and oversight of detention operations carried out overseas by UK personnel does not fall within the scope of my remit. When responsibility for detention operations was handed over to the Afghan authorities this situation changed and in 2014 the MOD’s application of the Guidance was on a par with the intelligence services. As UK forces disengage from Afghanistan the MOD expect this number to decrease.*” [Source: unpublished confidential annex to the Report of the Intelligence Services Commissioner for 2014.]



believed that the serious risk of mistreatment had been mitigated but wished to have this view verified by Ministers.<sup>33</sup>

- MI5 told the Committee that, in most cases, it would be working jointly with SIS and SIS would make any necessary submission to the Foreign Secretary. MI5 said it was rare that it would separately seek Ministerial consideration via the Home Office, and the Home Office told us, by way of example, that only \*\*\* such submissions had been made to the Home Secretary in 2015.<sup>34</sup>
- SIS provided a figure of \*\*\* cases in 2015 and \*\*\* cases in 2016. It did not keep statistics on cases in this category prior to 2015. Of the \*\*\* cases in 2015, \*\*\* related to CIDT and the remaining were related to denial of due process. In 2016, the figures were \*\*\* (CIDT) and \*\*\* (denial of due process).<sup>35</sup>
- MOD said that, of \*\*\* instances in 2013 where the Consolidated Guidance was applied, \*\*\* were referred to Ministers.<sup>36</sup> In total \*\*\* cases have been referred to Ministers since the Consolidated Guidance was introduced.<sup>37</sup>

27. This data is not exhaustive – and it has proved difficult to establish any exact figures. This is a matter on which we would expect full information to be kept in future. However, extrapolating from what was provided, we can see that MI5 and GCHQ rarely refer a case to the Home Secretary (in the case of the former) or the Foreign Secretary (in the case of the latter).<sup>38</sup> MOD also rarely refers cases (with the exception of those in 2013). SIS, based on figures provided for 2015 and 2016, refers around 17–25 per cent of cases.<sup>39</sup>

28. The Ministerial role in applying and overseeing the Consolidated Guidance is explored further in Chapter 7, ‘Interpreting and applying the Consolidated Guidance’.

## ***Oversight of the Consolidated Guidance***

### ***The Intelligence Services Commissioner’s role***

29. When the production of the Consolidated Guidance was announced in 2009, the Intelligence Services Commissioner, then Sir Peter Gibson, was asked if he would agree “*to monitor compliance with [it] and report to the Prime Minister annually*”. This responsibility was added to his role as an extra-statutory function.<sup>40</sup>

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<sup>33</sup> Written evidence – GCHQ, 21 November 2017.

<sup>34</sup> Written evidence – MI5, 20 November 2017; written evidence – MI5, 20 November 2017; written evidence – Home Office, 6 April 2017.

<sup>35</sup> Written evidence – SIS, 17 January 2018.

<sup>36</sup> Written evidence – MOD, 21 July 2017.

<sup>37</sup> Written evidence – Cabinet Office, Home Office and FCO, 20 December 2017.

<sup>38</sup> Most MI5 submissions are joint submissions with SIS, and are included in the SIS figures.

<sup>39</sup> This is based on the figure of \*\*\* cases referred to above. We note, however, that some of these cases may have related to a renewal of authorisation under section 7 of the Intelligence Services Act 1994 and that a referral may have been made while mitigation work was still being conducted. The actual figure for the percentage of cases referred may therefore be lower and may also include cases where mitigation work was still being conducted, as well as those where previous mitigations had not (or not yet) been successful.

<sup>40</sup> At the time, the Commissioner’s primary role (as set out in the Regulation of Investigatory Powers Act 2000 (RIPA), section 59(2)) was to ensure that the Agencies, HM Armed Forces and MOD officials acted lawfully in relation to, and used appropriately, the intrusive surveillance and intelligence-gathering powers available to them (except for interception, which was covered by the Interception of Communications Commissioner).

30. The Commissioner developed a bespoke approach to this new area of oversight, which has been refined over successive years.<sup>41</sup> In 2013, the then Commissioner, Sir Mark Waller, suggested that the work might “*be placed on a statutory footing ... through a formal direction by the Prime Minister*”.<sup>42</sup> This was agreed and formalised on 28 November 2014.<sup>43</sup>

31. In September 2017, the statutory functions and responsibilities of the Intelligence Services Commissioner were transferred to the Investigatory Powers Commissioner.<sup>44</sup> Sir John Goldring, who was the Intelligence Services Commissioner up until that post was abolished, is now the Deputy Investigatory Powers Commissioner and usually leads on inspections covering the application of the Guidance.

## *The oversight process*

32. In his Annual Report covering 2015, the Intelligence Services Commissioner explained that he was seeking to monitor whether the Consolidated Guidance “*is being followed properly so that when a detainee held by a third party is involved staff know and understand immediately that the Guidance applies and that decisions are then taken at the correct level.*” He set out the activities to which the Consolidated Guidance applies as follows:

- (a) *When a detainee in the custody of a foreign liaison service is interviewed;*
- (b) *When information is sought from a detainee in the custody of a liaison service;*
- (c) *When detention is solicited;*
- (d) *When information is shared with a liaison service relating to a detainee; and*
- (e) *When unsolicited information is received from a liaison service relating to a detainee.*<sup>45</sup>

The Commissioner further commented:

*With regards to the first three it is normally quite easy to see that the Guidance applies and must be taken into consideration. I have made it clear to the agencies and to the MOD that when information is shared they must also consider if detention is the likely outcome and not just that it relates to a detainee. When unsolicited intelligence is received the agencies must consider if continued receipt*

<sup>41</sup> Sir Mark Waller provided an account of this development in his 2013 Annual Report – Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2013*, 26 June 2014, HC 304 (2014–15) (and June 2014, SG/2014/103), pages 39–42.

<sup>42</sup> Classified report (2014) by the Intelligence Services Commissioner on the issues raised in: Sir Peter Gibson, ‘The Report of the Detainee Inquiry’ (closed version) (2013). Under changes to RIPA introduced in the 2013 Justice and Security Act, the Prime Minister gained statutory powers to direct the Commissioner to take on additional review functions.

<sup>43</sup> Section 59A (‘Additional functions of the Intelligence Services Commissioner’) was inserted into RIPA by section 5 of the Justice and Security Act 2013. The Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014 was signed on 27 November 2014 by the then Prime Minister, the Right Hon. David Cameron, and came into force the following day.

<sup>44</sup> The Office of the Investigatory Powers Commissioner (IPCO) was created by section 227 of the Investigatory Powers Act 2016, which came into effect upon Royal Assent on 29 November 2016; the Act also made provision (section 240) for the abolition of the office of Intelligence Services Commissioner, which came into effect on 1 September 2017. The power to issue directions as to additional oversight functions for the Investigatory Powers Commissioner is contained in section 230, which came into effect on 13 February 2017. This follows a commitment made during the passage of the Investigatory Powers Bill that the Investigatory Powers Commissioner would take over the responsibility for oversight of the Consolidated Guidance. The Prime Minister issued a written direction to the IPCO on oversight of the Consolidated Guidance on 22 August 2017, which was published on 13 February 2018.

<sup>45</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 41.



*of intelligence might be perceived as encouragement to continue sharing or of the methods used to obtain it.*<sup>46</sup>

## Sampling

33. Each year, a list of all operational cases to which the Consolidated Guidance is considered to be applicable is prepared by each of the bodies covered by the Guidance. Those lists, referred to by Sir Mark Waller in his reports as the ‘detainee grid’, set out the date and details of when an assessment has been made that there may be a need to apply the Consolidated Guidance, or where the Guidance has been applied. (The details include the operation or linked group of operations, the risk assessment, referrals made to senior personnel, legal advisers or Ministers, and the level at which the decision was taken.)

34. The Commissioner selects a sample of cases which he then reviews in full together with all the underlying documents. Sir Mark Waller reported that, during his tenure as Commissioner (2011–2016), he tried to ensure that the cases selected encompassed a range of foreign liaison services and a range of authorising officers (in terms of the seniority of the officer who had made the decision).<sup>47</sup>

35. In 2016, the Committee asked Sir Mark Waller about the sample sizes for reviewing the Consolidated Guidance. Sir Mark explained:

*The answer is about 20 per cent ... it is not completely random. I am going to look at particular countries that I know there might be a problem with, and ... I maybe select more than one case from particular countries that you know there has been a problem. And then I try and make sure that I’ve got something from each and every country that’s mentioned on the grid so that I’ve got a broad overview. And even if, for example, you find that they’re considering the Consolidated Guidance in relation to handing some information to France, despite the fact that France is a member of the Convention on Human Rights, I still look at that – I say that’s interesting to see that somebody actually thought about it and looked to see exactly what it is that they said. And then I will look at the end of the day to see, having made sure in the broad scheme of things that I had got every country and that I had got a couple from countries that worried me, ... whether I’m something in the region of 20 per cent of the cases.*<sup>48</sup>

36. From the statistics provided by the Commissioner for the years 2013–2016, it appears that he sampled around 10–20 per cent of the cases from each Agency and MOD, with an average sampling rate across all four organisations over four years of 12 per cent.

37. The Committee questioned the Agencies and MOD as to whether they considered that the level of sampling was sufficient and whether it allowed for adequate consideration of the detail. SIS told the Committee:

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<sup>46</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 40.

<sup>47</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2014*, 25 June 2015, HC 225 (2015–16) (and SG/2015/74), pages 27–8.

<sup>48</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

*it is not for me to say whether he sees enough or he doesn't see enough but he sees a lot and my goodness he probes them very thoroughly and he takes it very seriously, and so do we ... we believe that he is very content with the level of detail and scrutiny that he is currently giving. He can look at absolutely anything, of course, without any hindrance whatsoever and we always respond to his recommendations and we are sometimes, as we are currently in fact, in a dialogue with him about the best way to interpret some things.*<sup>49</sup>

38. The Director General of MI5 said that “we show the Commissioner the full list of all the cases ... and he chooses from that which ... to look at ... twice a year”.<sup>50</sup> The Director of GCHQ told the Committee that “We do alert to the Commissioner quarterly all the cases that engage the Consolidated Guidance, ... – we draw attention to ones we think are particularly contentious and, given we are talking about 300 a year, he does get to see quite a lot. I don't get the sense that he is dissatisfied.”<sup>51</sup>

### *Cases outside of scope*

39. We noted, however, that it is only those cases in which the Consolidated Guidance has been considered which are presented in the ‘detainee grid’. The Commissioner is therefore unable to ascertain whether there were cases where the Guidance ought to have been considered but was not (for example in the Adebolajo case discussed below, SIS did not consider that the Guidance should have been applied but the ISC and the Intelligence Services Commissioner considered that it should have been – this case would not be presented in the ‘detainee grid’).<sup>52</sup> When pressed on whether there were cases that were being missed, all the Agencies said that this was unlikely as they were operating a ‘risk-averse’ approach. MI5 explained:

*I don't know of any cases, any at all, where we should have applied the guidance but didn't ... we err on the side of caution in this, so that if anything is even close to that threshold, the advice is that people should complete the form, do the consideration and then those cases would be flagged to the Commissioner as part of the inspection ... [if] a detention could be involved, either already or could happen ... the guidance is immediately engaged and forms have to be filled in – even if there is no risk at all of mistreatment, they nonetheless have to go through the process.*<sup>53</sup>

MOD told the Committee:

*Where there is a question over whether the [Consolidated Guidance] was not applied and should have been, the circumstances will then be drawn to the attention of the Commissioner either by letter or at his biannual inspections. The Commissioner will then provide his view on the case.*<sup>54</sup>

<sup>49</sup> Oral evidence – SIS, 4 February 2016.

<sup>50</sup> Oral evidence – MI5, 21 April 2016.

<sup>51</sup> Oral evidence – GCHQ, 24 November 2016. The figure of 300 cases per year was an estimate given by GCHQ in evidence in 2016, part-way through the year. It was aware that the number of cases in which the Guidance had been considered had risen in the previous year, and so believed that the end of year figure for 2016 would be approximately 300. [Source: written evidence – GCHQ, 1 March 2018.]

<sup>52</sup> Mr Adebolajo was detained and interviewed in Kenya by the Kenyan authorities. Both the Committee and the Commissioner concluded the Guidance applied (the Commissioner at the point of detention and the Committee at the point of interview). Further details on this case are presented in Chapter 5, ‘The Consolidated Guidance: scope’.

<sup>53</sup> Oral evidence – MI5, 21 April 2016.

<sup>54</sup> Written evidence – MOD, 21 July 2017.

Nevertheless, we know that there is still some ambiguity over the scope of the Guidance in certain areas (for example, whether it applies to joint units), and we consider the areas which require clarification later in this Report.

### *Level of confidence*

40. We asked Sir Mark Waller whether he was satisfied that all the relevant cases were being identified and if the way the cases had been selected was adequate. Sir Mark said that he was broadly content because:

*they're putting on the grid things that actually, when you look at it, ultimately, you find the Guidance actually doesn't apply. So they're putting things on because they are concerned to see that they are going to be protected.*<sup>55</sup>

41. Sir Mark also reassured the Committee that his oversight was not limited to those cases on the lists. He explained: "*As one visited SIS Stations and, as one became more and more involved with the way in which they were approaching the Consolidated Guidance, one became much more clearly involved, in making sure they were selecting.*" He said that, as a result:

*although [SIS] originally ... confined themselves to a grid, what they then did was to produce an email box where, if anything mentioning Consolidated Guidance came up, that came through to the top level, as it were, and then had to be considered as to whether it went into a grid. Can ... I be absolutely certain that every case that might come into the Consolidated Guidance is coming into the Consolidated Guidance grid? Well ... over the six years [I have been Commissioner], the seriousness with which that guidance is taken by SIS and by GCHQ and MOD and MI5, there is no question about it.*<sup>56</sup>

42. When we asked Sir Mark about the level of confidence he had, he said that because the Consolidated Guidance states that personnel following the Guidance will be protected from personal liability, he believed that they "*are acutely conscious of the fact that they have got to get it right and that's why I think that I can say with some confidence – though, obviously, nobody can absolutely say it's never happened, but I can be pretty confident – that anything that applies, they use it.*"<sup>57</sup>

43. SIS's evidence supported this analysis:

*the interaction that [the Commissioner] has with both our records and our people [is] hugely important. Everybody knows that, when they are engaged in an operation, it is not unlikely at all that they might be called to explain to the Commissioner not only why they did what they did but what actually eventuated.*<sup>58</sup>

44. The Commissioner also described how he works with the Agencies to resolve situations where there is uncertainty about whether the Consolidated Guidance ought to apply:

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<sup>55</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Oral evidence – SIS, 4 February 2016.

*My oversight is to try and make sure the Consolidated Guidance is applied and properly applied, and in this sort of situation it is absolutely vital that people don't start acting in the wrong way so that they are handing over information to countries who are mistreating people. We simply don't want that to be happening. So, if they've got a particularly difficult situation, they are likely to come to me in order to see, is this an area in which the Consolidated Guidance applies? I may say, "Well, actually, strictly not on its language but you've got to apply the principle of the Guidance," and then we try and work out a way in which I would say, "Yes, I think that does fulfil the spirit of the Guidance..."*

*That's an area where I'm going to be prepared to give them advice before they start acting and I'm also going to, obviously, once they do start acting, make sure that they are conforming with the view that I have expressed.<sup>59</sup>*

45. In his 2015 Annual Report, the Commissioner recommended that both GCHQ and SIS review their processes for identifying and recording cases where the Consolidated Guidance has been used. In 2016, he noted that significant improvements had been made.<sup>60</sup> GCHQ's review identified 35 instances where the Consolidated Guidance review process had not been followed. GCHQ told the Commissioner that it had no reason to believe that passing the intelligence would have made a material contribution to detention in these cases.<sup>61</sup>

### *Audit function versus policy reviews*

46. The Commissioner was concerned solely with whether the Guidance was applied correctly: he did not assess whether the decision to work on a particular operation or with a particular liaison service was correct – regarding these as operational or policy decisions for the Agency concerned or for HMG more widely. Sir Mark Waller explained that, when he was Commissioner, he applied the “*judicial review principle*” in his reviews so as “*not to second guess the decision to share or not to share intelligence or consider whether I would come to the same conclusion*”. He considered only whether the decision made was a reasonable one and whether the correct tests were applied under the Consolidated Guidance.<sup>62</sup>

47. Whilst the Commissioner did not see his role as considering whether the Guidance was fit for purpose, we were reassured that where Sir Mark had identified ‘grey areas’ in the Guidance – such as working with non-State actors, which we cover later in this Report – he had highlighted these to HMG through his annual reports. (We explore later the role of the Cabinet Office, as policy owner, in ensuring that the Guidance is fit for purpose.)

48. Similarly, the Commissioner did not consider the Minister's decision, where a case had been referred to a Minister. Sir Mark Waller explained: “*all one's actually looking at is the process ... I'm not concerned whether the minister gets that decision right as a matter of international law.*”<sup>63</sup> We consider the Minister's role later in the Report but note here that

<sup>59</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>60</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2016*, 20 December 2017, HC 298 (2017–19) (and SG/2017/78), pages 33–4.

<sup>61</sup> *Ibid.*, page 34.

<sup>62</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 41.

<sup>63</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016. This limitation has been retained under the new 2016 Act.

Ministerial decisions made under the Consolidated Guidance can be challenged through the Investigatory Powers Tribunal or through civil litigation.

### *Oversight resources*

49. Concerns have been raised since 2010 about the level of oversight the Intelligence Services Commissioner's office was able to undertake and, more recently, whether the work will be suitably resourced in the future. In 2014, during oral evidence to the Home Affairs Committee, Sir Mark Waller said that he undertook all the work himself with the support of "one person ... [who] ... is effectively my PA",<sup>64</sup> although he did have resourcing for two other Inspector posts (which were filled on 1 March 2017).<sup>65</sup> In evidence to this Committee in 2016, he stated that he was "not satisfied that the administration staff" he had been given had "been sufficient".<sup>66</sup>

50. As of 1 September 2017, the statutory functions and responsibilities of the Intelligence Services Commissioner were transferred to the Investigatory Powers Commissioner. Sir John Goldring, the Commissioner until September 2017 and now Deputy Investigatory Powers Commissioner, is a member of the management team overseeing the design of the new oversight model, and he assured the Committee in August 2017 that "There is no suggestion that the oversight of the Consolidated Guidance will be weakened by the transfer."<sup>67</sup> More recently, the Investigatory Powers Commissioner's Office told us:

*There has been a marked increase in resources since Sir Mark's time ... This is an improvement on the pre-IPCO [Investigatory Powers Commissioner's Office] situation, but we continue to make the case to the Home Office that further inspectors are required to bring IPCO's oversight of the UK intelligence agencies up to the level of oversight provided in other jurisdictions.*<sup>68</sup>

**B. The Committee is pleased to note that resources provided to enable the Investigatory Powers Commissioner to carry out the important task of oversight of the application of the Consolidated Guidance have increased. Any extension of the Guidance to cover other bodies must give rise to a further increase in resources to the Commissioner.**

**C. The approach and methodology for sampling and assessing detainee-related cases put in place by Sir Mark Waller during his time as the Intelligence Services Commissioner mean that there is a high level of confidence that the Investigatory Powers Commissioner will be informed about all cases in which the Consolidated Guidance has been applied.**

**D. We remain concerned that cases which ought to have engaged the Consolidated Guidance, but did not, might escape scrutiny and we suggest that this is an area which the Investigatory Powers Commissioner may wish to keep under review.**

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<sup>64</sup> Home Affairs Committee, *Counter-terrorism*, 9 May 2014, HC 231 (2013–14), Ev 109 (see response to Q724).

<sup>65</sup> The Investigatory Powers Commissioner's Office has confirmed that the Inspector roles were "to support the Commissioner on inspections and to draft reports, which [were to be] agreed by the Commissioner before being issued".

<sup>66</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>67</sup> Written evidence – Intelligence Services Commissioner, 3 August 2017.

<sup>68</sup> Written evidence – Investigatory Powers Commissioner, 13 February 2018.



**E. We commend the previous Commissioner’s approach in enabling the Agencies and MOD to discuss issues with him at an early stage. The Agencies are working with an increasing variety of overseas partners, whose standards may not be entirely clear, and scenarios may arise which are not covered by the Guidance.**

## *Allegations of mistreatment*

51. Perhaps the key test of whether the Consolidated Guidance is achieving its objective is whether there is any evidence that the UK Agencies and MOD have been involved in mistreatment since it was introduced in 2010. Individual allegations against the Agencies are a matter for the Investigatory Powers Tribunal to investigate and not this Committee;<sup>69</sup> however, we have considered the number of cases brought against the Government which engage Consolidated Guidance mistreatment issues:

- There have been six civil cases brought against HMG in respect of actions which have taken place since the Consolidated Guidance came into effect in 2010.<sup>70</sup>
- There are seven cases which span a period pre-dating 2010 and continuing through to 2011 or 2012.
- In these 13 sets of proceedings, the claimants have alleged that personnel from various UK Government bodies were complicit in treatment that they claim to have received at the hands of foreign detaining authorities.<sup>71</sup>
- These 13 cases do not include any cases brought against MOD where it was not the detaining authority. MOD has told the Committee that there are potentially seven cases in this category – i.e. allegations of mistreatment made against UK Armed Forces where the UK was not the detaining authority. MOD has said that these cases are at the pre-action stage of litigation and not yet fully pleaded and it is not clear whether they fall into this category.<sup>72</sup>

52. This relatively low number of cases over the past seven years might indicate that the Guidance has had an impact, although we must be careful to acknowledge that this may not represent the totality of allegations, given that some may not have resulted in a formal complaint. It should also be noted that the Agencies have been far less involved with detainee handling since 2010.<sup>73</sup>

53. In order to understand better the nature of the cases which engage the Consolidated Guidance, and to gain an insight into the basis of the allegations that have been raised in civil litigation, the Committee:

<sup>69</sup> The ISC does not investigate individual cases – any complaints about alleged misconduct by, or on behalf of, the Agencies are properly a matter for the Investigatory Powers Tribunal (IPT), which was established under section 65 of RIPA. We considered the number of cases recorded by the IPT; however, the IPT does not record whether or not each case relates to the Consolidated Guidance. We note, however, that of the cases upheld by the IPT since 2010, none of them relates to mistreatment issues as considered by this Committee.

<sup>70</sup> There is one further case brought since January 2010 on which the Cabinet Office is unable to provide sufficient detail to establish the period to which the claim related. [Source: written evidence – Cabinet Office, 13 March 2018.]

<sup>71</sup> All of these cases pre-date the ‘2014 Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction’; however, the Commissioner was asked to monitor compliance with the Guidance and report to the Prime Minister annually and this responsibility was added to his role as an extra-statutory function in 2010.

<sup>72</sup> Written evidence – MOD, 7 December 2017.

<sup>73</sup> Unlike MOD which continued to have significant interaction with detainees in Afghanistan due to its work with the Afghan military in undertaking detentions.

- (i) considered all cases where legal proceedings had been brought since July 2010 alleging mistreatment; and
- (ii) selected a small sample of SIS and MI5 cases to review.

### *(i) Recent litigation*

54. The Committee was provided with a list of all cases brought since July 2010, together with a copy of the case documentation to review. MI5 drew the Committee's attention to a case from 2011 where, despite applying the Consolidated Guidance correctly, mistreatment allegations were subsequently discovered.

**MOHAMED MOHAMED, CF AND SECRETARY OF STATE  
FOR THE HOME DEPARTMENT**

In 2011, two British citizens, Mohamed MOHAMED and 'CF' (the second party was anonymised in this way by the court), who were suspected of terrorism-related activity, were arrested in Somaliland and deported to the UK. They brought abuse of process proceedings against HMG after control orders, and subsequently TPIMs, were imposed on them upon their return to the UK.<sup>74</sup>

MI5 reported to the Committee that the Court had found no abuse of process but that some aspects of \*\*\*.<sup>75</sup> \*\*\*, and that, as a result: "*The issues raised by the judgment have informed HMG work on improving our understanding of relevant local law in countries in which operations are likely to be considered, for example by identifying and engaging with relevant experts. FCO now lead on bolstering HMG's understanding of foreign law.*"<sup>76</sup>

### *(ii) Sampling exercise*

55. The Committee was provided with a list of all MI5 and SIS cases in which the Consolidated Guidance had been engaged between 2012 and 2014. The Committee selected ten MI5 cases from 2012 and ten SIS cases from 2013 to 2014 in order to assess how the Consolidated Guidance was applied and explore the issues arising.

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<sup>74</sup> Control orders were orders issued by the Home Secretary under the Prevention of Terrorism Act 2005 and which allowed for restrictions to be placed on an individual's liberty where certain criteria were met. The sections of the 2005 Act enabling the issue of control orders were repealed by the Terrorism Prevention and Investigation Measures Act 2011, under which a similar regime was enacted allowing for time-limited restrictions on an individual's behaviour upon the issue of what is known as a 'TPIM' notice.

<sup>75</sup> Written evidence – MI5, 19 May 2015.

<sup>76</sup> Ibid.

### CASE-SAMPLING EXERCISE: PROCESSES NOT APPLIED AS THEY SHOULD HAVE BEEN

*Throughout this Report, the names of detainees, geographic identifiers (such as nationality) and a small number of staff and operational names have been substituted for our own code words in order to protect classified information. A list of these is provided at Annex D.*

#### NEWENT liaison service

In \*\*\* 2014, the SIS Head of Station in LEDBURY held a routine meeting with NEWENT liaison service officers. The SIS officer received unsolicited intelligence which had been obtained from interviews with five detainees who had connections to Syria. The officer asked three follow-up questions without first verifying that the conditions in which the detainees were being held were acceptable (a requirement of the Consolidated Guidance).

After the meeting, the Station Head realised that the Consolidated Guidance may have been breached and immediately informed SIS Head Office, requesting advice on how to proceed. The SIS compliance team instructed the Station in LEDBURY to avoid further interaction, pending further discussion.

SIS Head Office subsequently advised the Station Head in LEDBURY that they “*would write to the FCO explaining the circumstances of this engagement, and the mitigations e.g. the fact that [the NEWENT liaison service] did not undertake to put the SIS officer’s questions back to the detainees;*” and that “*although LEDBURY could receive a report that [the NEWENT liaison service] had said they would provide during the discussions (on the grounds that it would provide unsolicited, passive receipt that concluded unfinished business from the meeting), LEDBURY would ‘need to make clear to [the NEWENT liaison service] that given our clearly stated policy and red lines on detainee issues, we cannot engage further on the reports or the detainees referenced without additional authorisation’*”.

SIS notified the FCO and subsequently submitted to the Foreign Secretary “*seeking authority to conduct operational discussions and exchange intelligence with [the NEWENT liaison service] on the terrorism threat in Syria and the transiting of terrorists from NEWENT and BLACKPOOL to Syria. The submission made clear that this would include passing intelligence that might be put subsequently to [the NEWENT liaison service] detainees contrary to assurances that SIS would seek, and receiving intelligence where there was a serious risk that it might come in whole or in part from detainees that SIS assessed might have been unacceptably treated.*” This was approved, provided the Chief of SIS could personally obtain assurances from the Head of the NEWENT liaison service regarding the treatment of all detainees (not just UK nationals). As the Chief was absent at the time, the Head of Station at LEDBURY sought and received assurances. This was followed up directly by the Chief on his return a few days later when he spoke with the NEWENT liaison service and “*stressed the importance of each side using such intelligence in a way that respected our legal frameworks*”.

Three-monthly reviews of activity under the Ministerial authorisation were put in place. A subsequent assessment of engagement with the NEWENT liaison service on Syria found that there was no evidence of the NEWENT liaison service breaching its assurances, although this was caveated that “*SIS’s ability to monitor [the NEWENT liaison service’s] actions was limited*”.<sup>77</sup>

<sup>77</sup> Written evidence – SIS, 2 November 2015.



**F. The Committee notes that, in one of the cases we sampled, while the SIS officer did not correctly apply the Guidance initially, he realised his mistake immediately and correctly escalated the issue to Head Office, which referred the matter to Ministers and put in place the measures subsequently determined. It is reassuring that this demonstrates that potential breaches are raised in real time and acted upon as a matter of urgency.**

**CASE-SAMPLING EXERCISE: CASES WHERE ADEQUATE  
ASSURANCES WERE RECEIVED**

**MAIDENHEAD**

RAZORBILL, a British national, was an MI5 subject of interest believed to be travelling through MAIDENHEAD to Syria in \*\*\* 2014.

MI5 wanted him returned to the UK to face trial and, therefore, required the co-operation of MAIDENHEAD.

The SIS risk assessment noted that there was a risk that the activities RAZORBILL was involved in at the time were illegal under MAIDENHEAD law, and therefore any MAIDENHEAD operation to arrest him might lead to him being imprisoned in MAIDENHEAD with a risk of mistreatment. SIS sought, and received, verbal assurances from the MAIDENHEAD Government about RAZORBILL's treatment. As the deportation was managed by MAIDENHEAD, the British Embassy Counter Terrorism Extremism Liaison Officer (CTELO) also received written assurances from them on treatment standards.

RAZORBILL was arrested and deported to the UK where he was arrested under the 2006 Terrorism Act and subsequently convicted of terrorism offences in \*\*\*. On return to the UK, he made allegations of mistreatment by MAIDENHEAD – however, the Crown Prosecution Service believed the circumstances of his arrest and detention to be “*well documented*”.<sup>78</sup>

**MOLD**

In \*\*\* 2011, REDSHANK, a NAIRN national who was part of a UK-based network supporting extremists in NORTHAMPTON, was arrested in MOLD as part of an operation against individuals wanted by MONMOUTH on drugs charges.

The authorities in MONMOUTH were given access to REDSHANK by the MOLD authorities and offered to include SIS/MI5 questions as part of their interview process. MI5 assessed that this could provide valuable intelligence on the extremist network and help to identify others travelling to join it.

MI5 judged that feeding in questions should be done “*through the [authorities in MONMOUTH] rather than through the [MOLD authorities]. This is because we have a greater reassurance on how the [authorities in MONMOUTH] will conduct the interviews.*” SIS advised that, as MI5 was engaging via the authorities in MONMOUTH, SIS would not be able to seek assurances from the MOLD authorities directly. SIS was subsequently tasked to seek assurances from the authorities in MONMOUTH, which were received.

<sup>78</sup> Written evidence – SIS, 13 November 2015.

MI5 assessed the credibility of the assurances using SIS and FCO in-country experiences as well as open-source research on the MOLD authorities' compliance record (they had previously held a NORWICH national in similar circumstances with no reported concerns). The MI5 Investigative Senior Manager judged that the risk of unacceptable conduct by the authorities in MONMOUTH and MOLD authorities was low and that questions could be fed in.

MI5 passed questions and photographs to the authorities in MONMOUTH which were used during interviews with REDSHANK. They also continued to reassess the risk to check that no concerns had come to light whilst he was in detention.<sup>79</sup>

### **TOWCESTER**

In August 2012, GCHQ intelligence showed that two British nationals (ROCK PTARMIGAN and SPARROW) were going to meet members of a TOWCESTER-based terrorist network in NOTTINGHAM.

MI5 knew that the BRIGHTON authorities were also interested in the network. Given that the BRIGHTON authorities might ask the TOWCESTER authorities to detain the subjects, MI5 followed the Consolidated Guidance procedures. Before passing the intelligence to the BRIGHTON authorities, they requested – and received – verbal assurance that the BRIGHTON authorities would not take any action and would not ask the TOWCESTER authorities to detain the two individuals.

ROCK PTARMIGAN and SPARROW travelled to TOWCESTER and met their contacts on several occasions. No detention occurred.<sup>80</sup>

**G. Of the cases sampled, a number illustrate the considerations the Agencies make when seeking adequate assurances and the ongoing checks that are made to ensure that the assurances are complied with. Specifically, the REDSHANK case illustrates the challenges of working through partners and of not being able to approach the detaining authority directly for assurances.**

### **CASE-SAMPLING EXERCISE: CASE WHERE MISTREATMENT WAS CHALLENGED AND ACTION WAS TAKEN**

#### **LOCHGILPHEAD**

Following the kidnapping of SCARBOROUGH national QUAIL and LINLITHGOW national RAVEN in LOCHGILPHEAD in \*\*\*, the Foreign Secretary authorised MI5 and SIS to work with the LOCHGILPHEAD liaison service in an attempt to locate and secure the release of the hostages and, \*\*\*, to identify and detain those responsible. Monitoring of the LOCHGILPHEAD liaison service on the ground by MI5/SIS was also put in place. (They could not work with the LOCHGILPHEAD authorities due to treatment concerns.)

During the investigation, MI5 officers observed a number of incidents of unacceptable conduct by LOCHGILPHEAD as defined in the Consolidated Guidance (such as hooding and blindfolding). These were all correctly challenged and reported at the time, but a (separate) suspicious death in custody in \*\*\* led MI5 and SIS to suspend engagement

<sup>79</sup> Written evidence – MI5, 2 March 2016.

<sup>80</sup> Ibid.

with the LOCHGILPHEAD liaison service on detainee issues whilst an investigation took place. The Foreign Secretary subsequently agreed to a request from SIS to resume co-operation subject to additional conditions. The FCO noted that *“we have seen examples of possible mistreatment ... but we have not seen a systemic problem; and there is good evidence that (i) our assurances have largely been met; and (ii) that our scrutiny has in fact improved the quality of treatment.”*

On \*\*\*, MI5 officers on the ground raised concerns that the blindfolding of detainees by the LOCHGILPHEAD liaison service might be more systematic than had previously been admitted. MI5 and SIS officers met their LOCHGILPHEAD counterparts, who admitted that detainees were routinely blindfolded when *“[the LOCHGILPHEAD liaison service] judged them to pose a threat to the safety of their officers and where MI5/SIS were not observing”*. MI5 and SIS engagement was therefore again suspended the following day.

In a further update to the Foreign Secretary, an FCO official noted that SIS had assessed that *“assurances secured at senior level are sincere, as are efforts to comply at working level”*. The official commented that *“this argues for continued vigilance, but does not make our actions unlawful”*. Co-operation was resumed on \*\*\* and, despite continued monitoring, no further incidents of concern were observed.<sup>81</sup>

**H. The Committee notes that, in the case featuring the LOCHGILPHEAD liaison service, MI5 and SIS officers actively monitored whether assurances were being adhered to, escalating concerns and suspending co-operation when needed. This is an example of the Consolidated Guidance working as intended.**

56. From a review of the 20 cases sampled, we found that there were no cases in which SIS or MI5 had deliberately acted in violation of the Consolidated Guidance. The cases we examined all illustrated the challenges of implementing the Guidance and the considerations undertaken by the Agencies. One of the issues which came out most strongly was that of verbal assurances; in almost all of the sample cases, we found that only verbal assurances (as opposed to written) had been sought. We return to the issue of verbal assurances in Chapter 6, ‘Working with foreign liaison services: managing risks’.

57. The case-sampling exercise also demonstrated that assurances are followed up. However, there remains a question as to whether there is any monitoring conducted once the case is concluded, i.e. whether the Agencies monitored what had happened to the detainees in the longer term. Whether assurances were adhered to is not routinely tracked and we were told that it was not seen as the best use of resources to do so.<sup>82</sup>

**I. We are reassured that the cases we have examined show that the application of the Guidance is taken seriously by officers and there is an ongoing dialogue between Field Officers and their policy and compliance colleagues in Head Office. This dialogue means that, where officers have concerns about their actions, or the actions of others, these are escalated for advice rather than ignored.**

<sup>81</sup> Written evidence – MI5, 2 March 2016.

<sup>82</sup> Written evidence – SIS, 6 May 2015. SIS noted that it looks at the outcomes of cases as part of its more general work in ensuring that it is operating effectively and compliantly in any given country, but to evaluate Consolidated Guidance cases separately would place a burden on resources that would outweigh any benefits.

## ***Reviews of the Consolidated Guidance policy and processes***

58. While the Guidance has been in place for seven years now, there appears to have been remarkably little attempt to evaluate or review its operation beyond ensuring compliance for oversight purposes. The Committee considers that there are two aspects to robust evaluation in the context of the Consolidated Guidance:

- (i) Process: reviewing actual compliance with the letter of the Consolidated Guidance.
- (ii) Policy: following up on decisions made and actions subsequently taken in order to:
  - assess whether assurances received in mitigation and relied upon were upheld; and
  - thereby evaluate whether following the Guidance ensures that officers are not complicit in mistreatment, which involves considering whether the Guidance covers all relevant scenarios.

59. We have examined the work carried out by the operational organisations (the Agencies and MOD), as well as the policy owners (Government Departments), in both respects.

## ***The operational organisations***

### ***(i) Process review***

60. Evidence from the Agencies and from the Intelligence Services Commissioner shows that work is constantly being done within the operational organisations to review and amend processes to ensure compliance in terms of both how work is recorded and that the working-level guidance helps users to apply the Consolidated Guidance correctly.

### **Ensuring compliance**

SIS has a senior officer with responsibility for operational policy and compliance who, in 2012, carried out a review of the organisation's operational compliance. The findings of that review contributed to the introduction in July 2013 of a new policy for recording compliance with the Consolidated Guidance, including recording liaison assurances.<sup>83</sup>

In MI5, there is a specific role of 'senior policy owner', and the purpose of that role is to ensure that the underlying internal guidance for the Consolidated Guidance and Overseas Security and Justice Assistance (OSJA) Guidance is up to date.<sup>84</sup>

GCHQ said that it was still working with the Commissioner to ensure that it was complying with the Consolidated Guidance<sup>85</sup> and noted that "*The biannual inspection visits invariably generate actions to improve our process.*"<sup>86</sup>

Defence Intelligence noted that MOD has a biannual review of its policy (effectively MOD's working-level guidance) which is derived from the Consolidated Guidance.<sup>87</sup>

<sup>83</sup> Written evidence – SIS, 6 May 2015.

<sup>84</sup> Written evidence – MI5, 19 May 2015. For the Overseas Security and Justice Assistance Guidance, see pages 42–7.

<sup>85</sup> Written evidence – GCHQ, 2 August 2017.

<sup>86</sup> Ibid.

<sup>87</sup> Oral evidence – MOD, 30 June 2016.

(ii) Policy review

61. There is regular contact between the Agencies including discussion at policy meetings regarding current Consolidated Guidance issues, i.e. in connection with live cases. GCHQ told the Committee: *“There is a weekly meeting between GCHQ, SIS and MI5 legal and policy leads to review any current issues relating to the work in support of disruption operations. Any concerns about the Consolidated Guidance arise in this forum.”*<sup>88</sup> However, such review is in respect only of current or recently concluded cases. None of the Agencies has in place a system for retrospective evaluation in the longer term in order to help inform future decision-making – and none of them felt it was necessary. SIS said it believes that *“the resource burden of undertaking separate evaluations, on top of existing arrangements, would outweigh any limited benefits that might accrue”* – a view with which MI5 concurred.<sup>89</sup>

62. Some of the Agencies consider that the Guidance has changed the way they do business. However, there has been no attempt to evaluate that and there is no evidence base showing how many operations have not been able to go ahead as a result of the Guidance, what the consequence of that is and whether action is needed to minimise any such negative impact.

**Operational impact**

SIS said: *“In certain countries – for example, BANBURY, OAKHAM and BEACONSFIELD – there could be benefits to greater intelligence exchange but human rights concerns and the legal and policy implications as set out in the Guidance constrain what we can do. Applying the Guidance does occasionally lead to proposed operations being abandoned, but this could be at any stage from the first idea. Teams and Stations now have the necessary awareness and processes to enable SIS to work effectively against key targets within the legal and ethical framework which the Guidance (and where necessary ISA [Intelligence Services Act] section 7 authorisations) gives us. They are well-sensitised to the risks that can arise from some operational proposals (including where stations are asked to pass on requests or intelligence to a liaison service). With advice from the legal and compliance teams, it is usually possible to mitigate risks, to revise operational proposals or to submit for authorisation in light of Consolidated Guidance considerations, albeit that this can sometimes extend significantly the timescale of an operation.”*<sup>90</sup>

The Director General of MI5 said that it did not work as often with some countries but believed that this was how it should be: *“I would not want it any other way than that it is thoroughly managed, overseen and has a strong compliance framework around it and our staff can be absolutely confident they are not taking risks in the work they are doing. It is also true to say that the consequences of doing that is that, in some cases, we are doing less business with those countries than we would otherwise. Good. Because that is how it should be.”*<sup>91</sup>

Neither GCHQ nor MOD believed that the Consolidated Guidance had any operational impact on their work in terms of whom they worked with.

<sup>88</sup> Written evidence – GCHQ, 18 September 2017.

<sup>89</sup> Written evidence – MI5, 12 May 2015; written evidence – MI5, 12 May 2015.

<sup>90</sup> Written evidence – SIS, 6 May 2015.

<sup>91</sup> Oral evidence – MI5, 21 April 2016.



**J. The Committee is concerned that the Agencies and Defence Intelligence have not evaluated the overall operational impact of the Consolidated Guidance. The Committee recommends that work is done to establish what the operational impact has been, such that it can inform any future changes, whether to ways of working or to the Guidance itself.**

## *The policy owners*

### *(i) Process review*

63. The policy Departments have told us that they are not involved in considering the processes used to implement the Consolidated Guidance or assessing the Agencies' working-level guidance: it is left to the operational organisations to ensure that their processes are fit for purpose.

### *(ii) Policy review*

64. The Cabinet Office produced the Consolidated Guidance and as such can be regarded as the owner of the policy. Departments all pointed to the Cabinet Office as being responsible for any review of the Guidance. However, when we approached the Cabinet Office to ask what mechanisms it had in place to review the Guidance, it said that "*the Cabinet Office would consider any requests made by relevant policy departments or the SIA [Security and Intelligence Agencies] to review the Consolidated Guidance, in addition to the Intelligence Services Commissioner*".<sup>92</sup> This was of serious concern to the Committee in relation to the Commissioner's role. As we have set out, the Commissioner regarded his role as akin to judicial review of the application of the Guidance, and was not concerned with the broader policy issues around the Guidance. We have very recently been told by the Investigatory Powers Commissioner that, as part of his oversight, he will "*take into account the adequacy and lawfulness of the Guidance, and, under it, the decisions taken by a Minister, including within the context of international law*".<sup>93</sup> We fully support this broadening of the scope of the oversight and will be interested to see whether this development will address the concerns outlined in this Report. Otherwise the policy vacuum will continue: no one will be responsible for assessing the utility of the Guidance, whether it is achieving its aims or whether those aims remain the same. The Cabinet Office considers that, unless there is a fundamental change, such as the development of a legal definition of CIDT, there is no need for a fuller review to take place.<sup>94</sup> This illustrates the reactive, rather than proactive, approach taken by HMG.

65. Given that the FCO also plays a leading role, we asked whether it reviewed the policy on a regular basis. It was similarly of the opinion that it was the role of the Intelligence Services Commissioner to scrutinise the Consolidated Guidance and that it would consider any recommendations he made in this respect. Further, the FCO noted that it is the Cabinet Office which has the lead on this policy.<sup>95</sup>

66. In terms of the impact that the Consolidated Guidance has had or is having on operations, the evidence given to the Committee by Ministers was contradictory. The then Home Secretary, the Right Hon. Theresa May MP, said that she had not been alerted to any concerns that the

<sup>92</sup> Written evidence – Cabinet Office, 16 September 2017.

<sup>93</sup> Written evidence – Investigatory Powers Commissioner, 26 April 2018.

<sup>94</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>95</sup> Written evidence – Foreign and Commonwealth Office, 9 July 2015.

Consolidated Guidance was impacting on operational effectiveness.<sup>96</sup> When asked whether concerns had been expressed to her that MI5 was unable to operate relationships with foreign agencies or governments because of the Guidance, she responded:

*It's not a complaint that I am getting. I mean, sometimes it will be – might be remarked on that there is a limit to what we can do in relation to certain foreign agencies precisely because of the concerns that are held.*<sup>97</sup>

67. The then Foreign Secretary, the Right Hon. Philip Hammond MP, told the Committee that he had seen a change:

*I know 'C' told you in his evidence that the application of the Consolidated Guidance didn't impact on operational capability. I think, if I may from my perch, I have an impression that the organisation has become more risk averse and that at the margin it will have ... there is an element of self-censorship going on, there is a caution in the Agency and I urge the Agency, and I know 'C' said this to you, I urge the Agency not to self-censor but I expect overall they err on the side of caution with regard to the Consolidated Guidance.*<sup>98</sup>

However, his successor, the Right Hon. Boris Johnson MP, told the Committee:

*My feeling is, looking at the volume of work that is going on and the multiplicity of fields in which the Agencies are engaged, I don't think that they do feel constrained. I think it is laborious, I'll be honest with you – I think there is a lot of stuff to be done – but, on the other hand, we've seen the consequences of not having a proper legal framework. And the whole objective of the Consolidated Guidance and the warrentry system combined is to give our people assurance and certainty, and I think it gives them more confidence.*<sup>99</sup>

When questioned about this, the FCO stated:

*Although SIS always gives due weight to the issues addressed by the Guidance when deciding whether to submit to the Foreign Secretary to authorise operational activity, this does not mean that they are constrained from taking risks where legally and operationally justified. 'C' has informed the Foreign Secretary that the Guidance is extremely valuable to SIS and not a barrier to effective operations.*<sup>100</sup>

**K. The Committee is concerned 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. The Cabinet Office must take proper ownership of the Guidance. It is too important an issue to be left unattended.**

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<sup>96</sup> Oral evidence – Home Office, 5 May 2016.

<sup>97</sup> Ibid.

<sup>98</sup> Oral evidence – Foreign and Commonwealth Office, 9 June 2016.

<sup>99</sup> Oral evidence – Foreign and Commonwealth Office, 27 October 2016.

<sup>100</sup> Written evidence – Foreign and Commonwealth Office, 7 September 2017.

## ***Changes to the Consolidated Guidance: 2017***

68. In its November 2014 *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*,<sup>101</sup> this Committee expressed concerns about Michael Adebolajo's allegations of mistreatment at the hands of a joint HMG–Kenyan counter-terrorist unit. The then Prime Minister, the Right Hon. David Cameron, asked the Intelligence Services Commissioner to examine the questions raised by the Committee regarding the Government's responsibilities in relation to joint units.

69. The Commissioner's report was published in September 2016. He noted that the Consolidated Guidance does not directly address working with joint units. He considered that the Guidance should be reviewed by the Cabinet Office (in consultation with the ISC, the Agencies, MOD, the FCO and Home Office and also with SO15) and made the following recommendations:

- In order to improve transparency and accountability, the Cabinet Office invites and considers contributions from others with an interest in this subject.
- Thought is to be given to documentation of and language used in assurances, differentiation of liaison services involved in relevant operations, and recognition that separate assessments of risk and assurances may be appropriate where more than one overseas body is involved.
- The OSJA Guidance model should be followed, where a distinction is drawn between case-specific guidance on the one hand, and capacity-building/structural guidance for closer, ongoing relationships and partnerships, on the other.<sup>102</sup>
- Much clearer guidance should be provided on the appropriate approach to take respectively to concerns about torture and CIDT, on the one hand, and unlawful arrest or detention and procedural unfairness, on the other.
- Guidance should be incorporated akin to the Torture and Mistreatment Reporting Guidance and its differential application to concerns about torture and CIDT, on the one hand, and unlawful arrest or detention and procedural unfairness, on the other.<sup>103</sup>
- A central record-keeping hub should be established, capable of tracking and monitoring all relevant allegations of torture, CIDT, unlawful arrest or detention and procedural unfairness and the steps taken in response.
- The Consolidated Guidance should apply directly to SO15, particularly CTELOs working closely with the intelligence services.
- The Consolidated Guidance should expressly make clear that intelligence services should apply the spirit of the Guidance in cases where information about or from a detainee is disclosed directly by a liaison service that is not suspected of mistreatment but which obtained that information indirectly from a third party which is.

<sup>101</sup> ISC, *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, 25 November 2014, HC 795 (2014–15).

<sup>102</sup> For an explanation of the OSJA Guidance, see page 43.

<sup>103</sup> The Torture and Mistreatment Reporting Guidance is the FCO mistreatment reporting process for FCO officials.



70. As a result, the Cabinet Office began a review of the Consolidated Guidance in September 2016. The Agencies, MOD, Home Office and the FCO were involved in the review and the Intelligence Services Commissioner was consulted during final drafting. In August 2017, this Committee was provided with a copy of the draft revised Guidance, and notified that the Prime Minister would like to seek the views of the new Committee on it, once appointed.

71. We have considered the draft and found that the majority of the proposed changes are of a very minor nature (for example, abbreviating cruel, inhuman or degrading treatment to ‘CIDT’). There are, however, a small number of substantive changes. These include extending the Guidance to include:

- the National Crime Agency (NCA) and SO15;
- mention of OSJA Guidance as additional guidance to be referred to when considering a detainee-related activity;
- notification that Ministers must act in accordance with the Ministerial Code when taking decisions under the Guidance;
- new references to ‘threat to life’ intelligence;<sup>104</sup> and
- a new reference to unsolicited intelligence from third parties.<sup>105</sup>

72. These changes are welcome and bring greater clarity to the Guidance. However, the revised draft does not address a number of areas that have been raised by either the Intelligence Services Commissioner or by this Committee. In our opinion, therefore, the revised draft does not go far enough. We have set out in this Report the changes we consider necessary to ensure that the Consolidated Guidance is fit for purpose.

73. Furthermore, we are concerned that the review undertaken, the first since the Guidance was published in 2010, has been a ‘light touch’ review. When the Cabinet Office was questioned about this it told the Committee that, in its opinion, “*Sir Mark Waller’s overall view was that the Consolidated Guidance was in a good state but there were some procedural things that needed to be altered around it*”,<sup>106</sup> and that this indicated only a light touch review was necessary. The National Security Secretariat had therefore advised the Prime Minister that “*The SIA and relevant departments ... support a light touch Cabinet Office-led process being conducted this autumn to clarify the [Consolidated Guidance] where necessary.*”<sup>107</sup>

74. The Committee does not agree that the lengthy list of recommendations made by Sir Mark is merely procedural. We also note that the Cabinet Office decided not to follow Sir Mark’s recommendation, that “*In order to improve transparency and accountability, I would further suggest that the Cabinet Office invites and considers contributions from others with an interest in this subject, e.g. the Equality and Human Rights Commission, Fair Trials Abroad, Prisoners*

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<sup>104</sup> Currently, the Guidance makes an exception for the UK Armed Forces engaged in tactical questioning where time is of the essence and there is no opportunity to refer to senior personnel. The proposed amendment broadens the scope of this exception to include intelligence services personnel and adds the possession of ‘threat to life’ intelligence as a reason for relying on this exception. We explore this further in Chapter 6, ‘Working with foreign liaison services: managing risks’.

<sup>105</sup> A clarification of the possible scenarios in which the Consolidated Guidance would be applied where unsolicited information is received from a detaining authority.

<sup>106</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>107</sup> Written evidence – Cabinet Office, 20 December 2017.

*Abroad, Redress and Reprieve.*”<sup>108</sup> The Home Office’s comment that “*we did announce that we were doing this review so it would have been up to any NGOs to make any representations they wanted, and we received nothing in response*” is not acceptable.<sup>109</sup>

**L. The light touch review carried out in 2017 was insufficient. A full review of the Consolidated Guidance is overdue. This should encompass the points raised by the Intelligence Services Commissioner and by this Committee since 2010. HMG should also proactively consult non-governmental organisations and the EHRC.**

**M. The Cabinet Office should review the Guidance periodically (at least every five years) to ensure that issues raised by the Commissioner or those bodies covered by the Guidance are addressed, and revisions made where necessary. These reviews should be published to improve transparency.**

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<sup>108</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner: Supplementary to the Annual Report for 2015 – Concerns raised by the Intelligence and Security Committee of Parliament about the Government’s responsibilities in relation to partner counter-terrorism units overseas*, 15 September 2016, HC 458 (2016–17) (and SG/2016/95), page 108.

<sup>109</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

## 4. THE CONSOLIDATED GUIDANCE: IS IT GUIDANCE OR SOMETHING ELSE?

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### *Is it a guidance document?*

75. When this Committee was asked to comment on the draft Consolidated Guidance in 2010, its primary concern – as previously noted – was that the Guidance did not actually provide guidance:

*The Consolidated Guidance does not provide detailed practical guidance to staff and must not be published under this guise.*

*As ‘Consolidated Policy’, however, it has real value in setting out the overarching strategic and policy framework relating to detainees within which individual organisations will operate and under which they can develop their own practical operational guidance.<sup>110</sup>*

76. The Consolidated Guidance is not a set of hard and fast rules or directions for personnel to follow but a process of judgements and assessments to be made. It provides very little in terms of concrete guidance and therefore does not stand alone but has to be supported by further documents which provide more explicit direction. The Agencies and MOD have each developed their own documents which underpin the Consolidated Guidance. In its previously unpublished 2010 Report, the Committee commented that what they had seen (at that time) of the SIS supporting guidance was what they had expected the Consolidated Guidance to look like. The working-level guidance provided flow charts to aid decision-making, practical examples of situations which might occur and offered useful direction to staff.

77. We put our concerns as to the utility of the Guidance to the Agencies. They were clear that the Guidance was useful in itself in setting out Government policy, as the Chief of SIS explained:

*the Consolidated Guidance is ... extremely important and valuable to us. [The Consolidated Guidance] ... now runs through everything that we do and, personally, speaking as an operational officer, we find it of great practical utility.<sup>111</sup>*

### *The working-level guidance*

78. Nevertheless, they admitted that they need more detailed working-level guidance tailored to the specific needs of their own officers in order to reflect the differing remits and areas of operation of each Agency.<sup>112</sup> GCHQ explained:

*[the Consolidated Guidance is] a very serious statement of Government policy but ... for an operational person making a particular ‘action-on’ on a particular country in the middle of the night, they need a bit more of a clear framework and detail ... the Consolidated Guidance ... is not enough and it would not be fair to*

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<sup>110</sup> See Annex C (conclusions and recommendations A and B following paragraph 36).

<sup>111</sup> Oral evidence – SIS, 4 February 2016.

<sup>112</sup> Written evidence – MI5, 1 May 2015; written evidence – SIS, 6 May 2015; written evidence – GCHQ, 1 May 2015.

*expect them to use that as a framework. So we take the Consolidated Guidance and then give them a whole range of documents, including what we call a sort of cheat-sheet – checklists, really – to help interpret that on a sort of case by case daily basis, and then of course we have the various procedures which they go through to refer upwards ... it is simply about making sure that staff actually understand in practice what they are being expected to do.*<sup>113</sup>

79. SIS, MI5, GCHQ and MOD all place their working-level guidance on their organisation's intranet. It is highlighted in introductory training courses and there are specific mandatory training courses for relevant officers (i.e. analysts, intelligence officers and agent runners who may be involved in detainee-related work). We have seen the working-level guidance and refer to it throughout the following sections of the Report.

80. The Agencies' working-level guidance has not been published, despite the Committee's recommendation some eight years ago that this was necessary if the Government was committed to transparency in this area. The Cabinet Office told the Committee that *"the recommendation from the Agencies, from the Departments, and the responsible Secretary of State is that [publication of the working-level guidance] is not a good idea ... because it is particular to secret organisations and the way in which they run. And it contains within it information, frankly, which would be useful to our adversaries and possibly harmful to our partnerships, and so you don't want to put that out."* Pressed on whether a précis could be provided, the response was: *"we think that's unwise because writing a précis of it, that is in some way different from what the Consolidated Guidance says, that is published, is going to be really quite difficult to cover the various agencies we've got, because it is about the functioning of those agencies in their detail, which is necessarily secret."*<sup>114</sup>

**N. We remain of the view that the public should be given as much information as possible about the underlying decision-making process in this area. Although we recognise that there are limits to the amount of information that can safely be made publicly available, we consider that there is more information which could be published about the way officers apply the Guidance: perhaps a précis of each of the Agencies' working-level guidance could be included as Annexes to an expanded Consolidated Guidance. This will increase transparency and hopefully improve confidence in the decision-making processes being followed.**

### ***Is it a tool for public reassurance?***

81. When the Consolidated Guidance was published, it was one of a number of steps designed to increase public confidence in the Agencies after damaging public allegations about their complicity in mistreatment of detainees. As such, the Guidance aimed to provide greater transparency about the processes followed. In giving evidence to the Committee in 2010, the Director General of MI5 commented: *"There is clearly and intentionally a degree to which the Guidance is aimed to provide public reassurance."*<sup>115</sup>

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<sup>113</sup> Oral evidence – GCHQ, 24 November 2016.

<sup>114</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>115</sup> Oral evidence – MI5, 8 December 2009.

82. If that is the case, then we should examine whether it is achieving that objective. In 2014, we issued a public call for evidence for this Inquiry. The Equality and Human Rights Commission (EHRC) responded, making a number of points. It said:

*our starting point is that the guidance needs to be very, very clear ... and it needs to be empowering in terms of supporting people to make very difficult decisions in very difficult circumstances.*<sup>116</sup>

However, in its opinion there were a number of gaps in the Guidance that meant it fell some way short of this:

*we note that if an officer is aware that there is risk but it isn't serious – and we don't know what that means – we can go straight ahead without escalation. In the event of there being serious risk, then we're in a place of escalating to a minister and relying on assurances, but there are quite a number of concerns that we have in relation to that. One is in relation to the evidential framework, if you like, around assurances. So there's nothing that provides for any particular recording mechanism of assurances, whether they should be written or whether there should be a note of a verbal assurance given; nothing that talks about formal diplomatic assurances; nothing that recognises some of the inherent difficulties around relying on assurances from, as you were saying, countries that are known to practise torture or other practices on a persistent basis; and nothing about monitoring compliance; and, as I said before, nothing about any concerns where there is risk but it's not serious. We are also concerned when we look at the Guidance in terms of what the Minister is supposed to do in terms of evaluating those assurances ... There is nothing to say how it could happen. Our only assumption is that there must be some facts that are available to the Minister but not to the officer on the ground that outweigh what the officer perceives as a serious risk, but there's no detail given, there's no understanding of what, if you like, the balance of the discretion needs to look like, and there's nothing very much about how that decision is then passed back to the officer on the ground ... who doesn't have access to whatever the Minister has access to, and who themselves will have no defence in relation to all of that context in the event of himself or herself facing criminal charges down the line.*<sup>117</sup>

83. It is clear then that, for those who take an interest in the Guidance, concerns remain and it has not achieved its aim of reassurance. We note that this Committee has previously highlighted this problem. In its previously unpublished 2010 Report (at Annex C), the Committee stated: “We believe it is misguided to try and combine this presentational aim with a practical purpose: neither aim is then met satisfactorily.”

84. When asked about public understanding of the Consolidated Guidance's purpose, the Cabinet Office noted:

*There has not, to our knowledge, been any analysis of public awareness or knowledge undertaken.*<sup>118</sup>

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<sup>116</sup> Oral evidence – Equality and Human Rights Commission, 20 October 2016.

<sup>117</sup> Ibid.

<sup>118</sup> Written evidence – Cabinet Office, 15 September 2017.

However, when asked whether the Guidance should be renamed as a Framework, the Deputy National Security Adviser said:

*I'm not sure we have public input that there is concern that the Consolidated Guidance is not a framework and isn't working.*<sup>119</sup>

Despite this, it still referred to the Guidance as “*quite a strong brand*”.<sup>120</sup>

85. While that certainly seems to be the case within Government, in our opinion the same cannot be said more widely – Parliamentarians and NGOs alike share the same concerns about the Guidance,<sup>121</sup> and it is this public audience which the Government is seeking to reassure.

**O. It is clear that the Consolidated Guidance does fulfil a function: it provides a public statement of HMG's position in regard to detainee issues, and it has been received positively by the Agencies as giving them a consistent frame of reference.**

**P. The Committee remains of the opinion that the Consolidated Guidance does not provide guidance and it is misleading to present it as such. The current review provides an opportunity to rectify this. Since some of the proposed changes will render the current title obsolete (for example, the addition of the NCA and SO15 will mean that the existing references to 'Consolidated' and 'Intelligence Officers and Service Personnel' are no longer appropriate), we recommend that it is renamed in such a way that its purpose as a framework which sets the boundaries within which the Agencies must operate is clearly apparent to the public, for example 'UK Standards for Action relating to Detention and Rendition'. The foreword should explain fully the nature of what the Framework is trying to achieve, with reference to the underlying working-level documents.**

### ***Overlap with other guidance: Overseas Security and Justice Assistance***

86. The Consolidated Guidance is not the only policy document which governs security and human rights aspects of engagement with overseas partners. The *Overseas Security and Justice Assistance* (OSJA) Guidance was introduced in 2011 to assist UK authorities in evaluating the risks of engagement with an overseas partner and applies to all UK-funded activity overseas relating to security and justice. The bodies covered by the Consolidated Guidance are also subject to the OSJA Guidance, and information gained by applying the Guidance will be relevant to OSJA decisions, so the degree of information-sharing and overlap are key.

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<sup>119</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>120</sup> Ibid.

<sup>121</sup> Letter from the Chair of the All-Party Parliamentary Group on Extraordinary Rendition to the Prime Minister, 6 October 2010 ('Re: Consolidated Guidance to Intelligence Officers') ([www.extraordinaryrendition.org/documents/send/21-other-correspondence/216-letter-to-the-pm-06-10-10.html](http://www.extraordinaryrendition.org/documents/send/21-other-correspondence/216-letter-to-the-pm-06-10-10.html)).



### Overseas Security and Justice Assistance Guidance

In 2011, the Government introduced the OSJA Guidance, as a practical tool to ensure that UK security and justice work reflects the UK's commitments to strengthen and uphold the record of the UK as a "*defender and promoter of human rights and democracy*".<sup>122</sup>

While UK assistance overseas can help to achieve both security and human rights objectives (e.g. effective investigation of a specific crime or fairness in criminal trials), this may give rise to legal, policy or reputational risks for the UK.

The OSJA Guidance applies to both case-specific assistance and to broader, often longer-term, capacity-building assistance.

The OSJA Guidance is designed to be self-standing: it does not require users to consult their own underlying guidance.<sup>123</sup> Checklists attached to the OSJA Guidance set out issues for officials to consider and the relevant approval processes. They also set out which human rights and international humanitarian law risks should be considered prior to providing justice or security sector assistance.

An assessment must be carried out of the potential impact of any proposed assistance prior to providing it. The guidance sets out examples of measures that may be taken to mitigate the risk of assistance where it is assessed that there is a serious risk that the assistance might directly or significantly contribute to a violation of human rights and/or international humanitarian law. It also sets out when the decision to provide assistance should be taken by senior personnel or Ministers.

87. The FCO is the policy owner responsible for the OSJA Guidance and it described its role as follows:

*individual Government Departments who wish to conduct a co-operative activity with a third country are responsible for their own OSJA assessment and they will draw on all sources of information, but a lot of that information will come from the FCO post in the country in question because they are the people on the ground and they're also the people that can monitor the assessment.*<sup>124</sup>

This relies heavily on the FCO post in-country having access to all the relevant and up-to-date intelligence from the Agencies; information on human rights practices in the country and the behaviours of specific police units and places of detention; and also information gathered by other UK bodies in the course of their work. However, the Committee was told that responsibility for the OSJA role is not always assigned to an individual FCO official: this is worrying.<sup>125</sup>

88. SIS told the Committee that SIS also had a part to play, feeding into OSJA assessments, and explained how the two organisations' responsibilities worked together:

<sup>122</sup> Foreign and Commonwealth Office, *Overseas Security and Justice Assistance Guidance*, January 2017, page 5.

<sup>123</sup> The OSJA Guidance is drafted in such a way that it provides more detailed instructions on how to implement it than can be found in the Consolidated Guidance. However, the OSJA Guidance also states that "*Departments or agencies may tailor the OSJA process to suit their own requirements, but this should in no way weaken or dilute the rigour of the OSJA process. Explanatory notes and annexes are preferred over alterations to the text*" (paragraph 5).

<sup>124</sup> Oral evidence – Foreign and Commonwealth Office, 27 October 2016.

<sup>125</sup> Ibid.



*So it is the Foreign Office's agreed responsibility to have the best understanding of, for example, local law. It is our responsibility to have the best understanding of liaison and how they operate currently, right now, and what therefore the risks might be. So you will see immediately it is extremely important that ... SIS and the Foreign Office are speaking all the time about both particular cases and particular places. ... The Head of Station is responsible for ensuring that we have the best possible understanding of how the liaison are likely to behave and have behaved in the past and we give our people some fairly clear... guidance about the things that they must be thinking about in any particular case to be able to assess the risk. ... We will get information from their track record. We will be having a regular dialogue with them, almost certainly ...*

*There may be other helpful colleagues in-country, the SO15 Counter-Terrorism Liaison Officers, who tend to have a good understanding of custody and the sort of consequent procedures; there may be the [Crown Prosecution Service]. ... and we will be looking at country reports produced, for example, by the US State Department, we will look at NGO records and reports and, in some cases, [and in certain places] we have ... bespoke monitoring arrangements.<sup>126</sup>*

89. While the FCO and SIS provide information, we note that formal responsibility for the final assessment rests firmly with the UK body undertaking the OSJA activity. This raises questions about the consistency of decisions being taken. When questioned about this, the FCO conceded:

*We have become conscious in the FCO that there may be a weakness [in individual departments holding ultimate responsibility for OSJA assessments], and I think this is possibly what you are getting at, that different departments may be applying, if you like, sort of different standards. We don't think that is a major weakness. Our posts, we would expect, would raise the issue to us, because in a way that's where these issues all come together in-country. And we would expect the post to know, to spot it, if there was a significant difference in the standards being applied, but it is something that we have become more conscious of and we are currently undertaking a review of the OSJA process in London to see if – are there ways in which we can, if you like, increase the consistency of the way they are applied?<sup>127</sup>*

90. The results of that review were seen in an updated version of the OSJA Guidance issued in January 2017. This version introduces the concept of an 'OSJA network' to share assessments in an effort to improve consistency:

*All Government Departments and agencies with any type of overseas security and justice role will now have an officer who leads on OSJA. They will gain expertise, advise colleagues and link up with others to form an OSJA support network.<sup>128</sup>*

Further, personnel are advised to:

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<sup>126</sup> Oral evidence – SIS, 4 February 2016.

<sup>127</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>128</sup> Written evidence – Foreign and Commonwealth Office, 31 January 2017.

#### 4. The Consolidated Guidance: is it guidance or something else?

*consider sharing their assessments using the OSJA network to support cross-Government consistency of assessment.*<sup>129</sup>

The FCO has set out how it sees its role contributing under the new arrangements:

*UK missions overseas are charged with completing Stage 1 of the Checklists – high-level strategic overviews of human rights in country – as they are naturally best-placed within the UK Government to understand the situation. This will mean that all OSJAs for a particular country will be based on the same FCO assessment of their human rights situation. This practice is designed to maintain cross-Government consistency and help those delivering security and justice assistance stay sighted on activity within their respective countries ... To strengthen this, the Guidance makes it incumbent on UK Missions to pool expertise, including those of UK Intelligence Agencies and civil society groups, to ensure their country assessments are as comprehensive and expert as possible.*<sup>130</sup>

91. When asked how the changes, introduced in January 2017, were bedding in and whether they had achieved the desired improvements in consistency and information-sharing, the FCO told the Committee:

*The FCO is confident that the new OSJA process has improved consistency and information sharing across Government for managing UK security and justice assistance. ... In countries where HMG is regularly engaged in security and justice assistance, the relevant diplomatic mission now maintains a 'Stage 1' in-country assessment and provides it to all interested departments or agencies to aid them and provide consistency in the OSJA process. ... The FCO has encouraged Government Departments and agencies that use the OSJA Guidance to appoint OSJA Leads. This network shares best practice on implementation of OSJA and facilitates consistent implementation of the guidance. A senior officials group has also met to share feedback and lessons learned and clarify roles and responsibilities for implementation of OSJA.*<sup>131</sup>

### *Interaction between the OSJA Guidance and the Consolidated Guidance*

92. The OSJA Guidance explicitly covers issues linked to detainees: “*The types of assistance envisaged [where the OSJA Guidance applies] may result in ... individuals being identified, investigated, ... detained, interviewed, interrogated, prosecuted, tried or sentenced by foreign authorities.*”<sup>132</sup> It therefore overlaps with the Consolidated Guidance. MI5 told the Committee that “*OSJA was drawn up with the explicit intent of not trying to replicate the territory that the Consolidated Guidance and our internal guidance covers, so was designed to be a complementary piece from the start. In practice you cannot completely and cleanly separate the two.*”<sup>133</sup>

93. In evidence to the Committee, the Intelligence Services Commissioner described this parallel system as “*very strange*” and told the Committee that there needed to be “*a proper*

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<sup>129</sup> Foreign and Commonwealth Office, *Overseas Security and Justice Assistance Guidance* (November 2017), paragraph 15.

<sup>130</sup> Written evidence – Foreign and Commonwealth Office, 31 January 2017.

<sup>131</sup> Written evidence – Foreign and Commonwealth Office, 20 November 2017.

<sup>132</sup> Foreign and Commonwealth Office, *Overseas Security and Justice Assistance Guidance* (November 2017), pages 5–6.

<sup>133</sup> Oral evidence – MI5, 21 April 2016.

joining up of OSJA and the Consolidated Guidance”.<sup>134</sup> The updated OSJA Guidance attempted to address this with the following brief instruction for personnel who are also ‘covered by’ the Consolidated Guidance:

*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 Consolidated Guidance.*<sup>135</sup>

The FCO explained that it was thought necessary to make this explicit because:

*Previous editions of the OSJA Guidance stipulated that OSJA checklists are not intended to cover situations already covered by the Consolidated Guidance (CG). Government officials felt this phrasing could be misinterpreted to mean that personnel could only apply one or the other in situations. This could risk officers or personnel not screening for broader human rights/IHL risks which may result from assistance but fall outside the scope of the CG ... The updated OSJA Guidance now clarifies differences in scope of the two sets of guidance and specifies that all overseas assistance activity, including by organisations covered by the CG, should be checked against OSJA.*<sup>136</sup>

Nevertheless, this does not solve the underlying problem that there are two sets of guidance operating in parallel: we fail to see how this makes sense.

### *Practical use of the OSJA Guidance and the Consolidated Guidance*

94. The Agencies and MOD undertake a variety of capacity-building activities. They have provided evidence on projects ranging from raising human rights awareness to sharing technical expertise and analytical training.<sup>137</sup> They have not raised concerns about instances where it was difficult to identify which guidance to use (the OSJA Guidance or the Consolidated Guidance): in practice both seem to be considered. SIS saw both sets of guidance as “*highly complementary and we have an agreement that, first of all, of course our people need to know about it and they do. We have incorporated it fully into our current compliance and legal processes ... it complements and in a way really overlaps with quite a bit of the Consolidated Guidance.*”<sup>138</sup>

95. MI5 has agreed with the Home Secretary that, where its capacity-building projects engage the OSJA Guidance, it would draw such cases to the Minister’s attention. Given the possibility that a case it was involved in could come under the OSJA Guidance but not engage the Consolidated Guidance, “*for example, working with a regime... [that has] capital punishment or that sort of thing, not about detainees specifically so much as about behaviour of the regime*”, in 2016 it put in place “*an internal process which is to have a more explicit*

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<sup>134</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>135</sup> Foreign and Commonwealth Office, *Overseas Security and Justice Assistance Guidance* (November 2017), page 7.

<sup>136</sup> Written evidence – Foreign and Commonwealth Office, 31 January 2017.

<sup>137</sup> Oral evidence – MOD, 30 June 2016; oral evidence – MI5, 21 April 2016; oral evidence – GCHQ, 24 November 2016.

<sup>138</sup> Oral evidence – SIS, 4 February 2016.

#### 4. The Consolidated Guidance: is it guidance or something else?

*compliance framework for the very, very rare cases when OSJA is engaged but CG is not”.*<sup>139</sup> MI5 explained that this situation has not happened to date.

**Q. The bodies covered by the Consolidated Guidance also have to comply with the *Overseas Security and Justice Assistance Guidance* and we welcome the clarification of the position in the updated OSJA Guidance. Nevertheless, we question whether the use of two parallel frameworks is a practical solution, and remain concerned that it could lead to duplication and inefficiency. We recommend that the Consolidated Guidance and the OSJA Guidance are merged for those bodies that are subject to both.**

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<sup>139</sup> Oral evidence – MI5, 21 April 2016.

## 5. THE CONSOLIDATED GUIDANCE: SCOPE

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96. The 2010 Consolidated Guidance (as amended in 2011) applies to MI5, SIS, GCHQ and MOD (including Defence Intelligence, the UK military and civilian MOD personnel).

97. Under the Government's current proposals to amend the Guidance, the National Crime Agency (NCA) and SO15 would also be brought within scope.

98. However, there are a number of questions as to how the Guidance applies around the periphery – for example, joint operations where the Agencies are working with a body not covered by the Guidance, or units run jointly by the Agencies with another body not covered by the Guidance.

### *Joint units (part-funded, trained or tasked)*

99. The Agencies (primarily SIS) maintain close relationships with overseas partners with whom they engage in joint counter-terrorism operations: \*\*\*.<sup>140</sup> In the counter-terrorism context, these may be referred to as 'partner counter-terrorism units overseas' but can be more commonly referred to as 'joint units'. The Consolidated Guidance does not explicitly refer to such joint units; however, it is arguable that if the Agencies are \*\*\*, then the obligations under which the Agency itself operates must then extend to that body. If those obligations are not carried over, then in effect the Agency could outsource action it is not allowed to take itself. Where HMG has financial and/or operational authority, it clearly must also carry ethical and moral responsibility.

100. SIS told the Committee: *"In working with such units SIS has a responsibility for operations which are initiated and tasked by us. The level of control sought varies according to the nature of the operation and the compliance risk, but SIS cannot be responsible for operations carried out by a foreign service unit independently of SIS direction."*<sup>141</sup>

101. The Committee notes that the case of Michael Adebolajo emphasises that it is not always easy to draw the line between operations for which the Agencies should or should not carry some responsibility. In its November 2014 *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, the Committee reported that Mr Adebolajo had been arrested and held in Kenya and was subsequently interviewed by the Kenyan Anti-Terrorism Police Unit (ATPU) and ARCTIC, a Kenyan counter-terrorism unit which has a close working relationship with HMG. Mr Adebolajo alleged he was mistreated and that SIS was complicit in his mistreatment.<sup>142</sup>

102. SIS argued that the Consolidated Guidance did not apply because SIS had not itself been involved in Mr Adebolajo's arrest, did not interview him and was not involved in the passage or receipt of intelligence relating to him.<sup>143</sup> However, the Committee considered that, because SIS part-funded and part-tasked ARCTIC, SIS's responsibilities under the Guidance were engaged when ARCTIC interviewed Mr Adebolajo.

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<sup>140</sup> At the time of writing, SIS was working on \*\*\* such projects across \*\*\* countries. [Source: written evidence – Foreign and Commonwealth Office, 24 November 2017.]

<sup>141</sup> Written evidence – SIS, 13 September 2017.

<sup>142</sup> ISC, *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, 25 November 2014, HC 795 (2014–15), paragraphs 465–70.

<sup>143</sup> This is a position maintained in its most recent evidence to the Committee. [Source: written evidence – SIS, 13 September 2017.]

103. In its report, the Committee made a number of recommendations concerning joint units:

*ZZ: Where HMG has a close working relationship with counter terrorist units, they will share responsibility for those units' actions. HMG must therefore seek to ensure that the same legal and moral obligations to which HMG adheres, and guidance which they follow, also apply to such units. Where there is a possibility that an allegation of mistreatment might refer to a unit where HMG has such responsibility, then HMG must investigate as a matter of priority to establish whether the unit is involved.*

*AAA: There is clearly some uncertainty in SIS as to their obligations in relation to allegations of mistreatment. This lack of clarity must be resolved. ...*

*GGG: Adebolajo's allegations of mistreatment potentially related to a \*\*\*. It is essential that Ministers are informed immediately of any allegations made against an overseas organisation for which any part of HMG bears responsibility and which is \*\*\*.<sup>144</sup>*

104. The then Prime Minister, the Right Hon. David Cameron, asked the Intelligence Services Commissioner, Sir Mark Waller, to examine the concerns raised by the Committee in more detail.<sup>145</sup> Sir Mark produced his report in September 2016. He concluded that:

- the guidance does not directly address situations where HMG has a close and ongoing working relationship with joint units;
- a distinction should be drawn between case-specific guidance and structural guidance for ongoing relationships and partnerships;
- if an officer in a unit acting with the benefit of UK support mistreats a detainee, then “*there may be an issue as to whether this was in any way allowed or assisted by the contribution of HMG*”;
- in the specific case of Mr Adebolajo, the Guidance applied in relation to the detention of Mr Adebolajo as well as in relation to the interviews that were conducted;
- therefore, if SIS did not consider the risk that Mr Adebolajo would be the subject of unacceptable standards of detention or treatment and/or the need for related assurances “*this would have represented a failure properly to apply the Consolidated Guidance*”; and
- SIS's response to Mr Adebolajo's allegations of mistreatment “*fell short*” of what was required by the Consolidated Guidance.

The Commissioner recommended that the Cabinet Office review the Consolidated Guidance to clarify matters. We note, however, that the 2017 proposed revisions do not appear to have addressed Sir Mark's concerns on joint units.

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<sup>144</sup> ISC, 'Report on the Intelligence relating to the Murder of Fusilier Lee Rigby' (closed version) (2014), pages 169–70.

<sup>145</sup> In his capacity as the Commissioner responsible for overseeing HMG's compliance with the Consolidated Guidance. The Committee also received written evidence on the issue; however, we did not ask the Agencies about the Woolwich case during oral sessions due to Sir Mark's then ongoing investigation considering the same issue.



105. The Cabinet Office said:

*joint units are wonderful things of great variety. There isn't a single model for what a joint unit will look like and the extent of joint-ness and engagement with it. So that was one issue that came under consideration. The other one is that, often, joint units are the most sensitive work that a foreign partner will do with us and it enables the United Kingdom to have reach into other settings where it may not be popular with the local community that that work is going on. So there are several reasons not to try and define a specified joint unit and define the way in which the interaction with them takes place...*

*In terms of the broader interaction with a joint unit of any kind, or indeed any liaison official, as the SIS officer or other officer walks into the space and deals with the liaison official, they have in their mind the Consolidated Guidance; whether it is a room full of people who say they are working with you jointly, or it is an individual you go to meet, the same guidance applies. It isn't that, by having a joint unit, you suspend some aspect of the Consolidated Guidance. It applies.<sup>146</sup>*

However, this does not provide a solution to cases such as Mr Adebolajo's where SIS was (and still is) of the opinion that the Guidance did not apply, but both the Commissioner and this Committee concluded that it did. This difference of opinion is of serious concern.<sup>147</sup>

**R. Where HMG has a close working relationship with overseas partners, and \*\*\* a unit overseas, it must carry some responsibility for the actions of that unit. If it does not, it leaves itself open to accusations that it is outsourcing action it cannot take itself.**

**S. We reiterate the recommendations made in our *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, and by the Intelligence Services Commissioner: the Consolidated Guidance must specifically address the question of joint units and make clear that it applies to such units. The difference of opinion between SIS and the Commissioner and the Committee over the case of Mr Adebolajo clearly demonstrates that there is a serious problem in this area.**

### ***Other bodies which might be brought within scope***

#### ***National Crime Agency (NCA) and the Metropolitan Police Counter-Terrorism Command (SO15)***

106. A growing number of UK bodies increasingly work directly with foreign security, intelligence and law-enforcement agencies. For example, the NCA works directly with overseas authorities on counter-narcotics and people-trafficking, and local police forces liaise with overseas authorities when investigating an 'honour killing'. The Consolidated Guidance does not currently apply to such bodies, despite the fact that they may be dealing with detainee issues.

<sup>146</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>147</sup> The Commissioner concluded that the Guidance applied from the point of detention and the Committee from the point of interview.



107. The NCA and SO15 have both adopted working practices which comply with the Consolidated Guidance and were enthusiastic about being brought formally within the scope of the Guidance. SO15 told the Committee that it has developed training and guidance on the Consolidated Guidance in close liaison with SIS, and the NCA told the committee that it had acted as if bound by the Consolidated Guidance for several years and had developed a joint OSJA Guidance–Consolidated Guidance policy for its officers.<sup>148</sup> It is the expectation of both bodies that their compliance with the Guidance will be overseen by the Investigatory Powers Commissioner.

108. SO15 told the Committee:

*Following the initial publication of the Consolidated Guidance in 2010, SO15 undertook to follow the principles of the guidance although not formally included. The view was taken as SO15 or CTPLOs [Counter Terrorism Police Liaison Officers] were becoming increasingly involved in operations that led to detentions, or working with ‘mentored units’ on detainee operations with a UK interest.*

*SO15 engaged closely with the Cabinet Office review of the Consolidated Guidance ... It was the view of SO15 that due to the change in the nature of operational activity, together with SO15 following the principles of Consolidated Guidance, that formal inclusion of SO15 and CTPLOs was sensible.<sup>149</sup>*

The proposed revisions to include the NCA and SO15 appear entirely logical and should formalise what is a growing co-operation between them and the intelligence community.

## *Other bodies*

109. The Cabinet Office has not sought, however, to identify other UK authorities that may be engaging with foreign policing or security agencies and their detaining authorities, and which might therefore also be brought under the umbrella of the Guidance. It told the Committee that the NCA and SO15 had been brought under the Guidance “*On the Intelligence Services Commissioner’s recommendation*”, indicating that the Cabinet Office has not considered this matter outside of that recommendation.<sup>150</sup> The FCO explained:

*this was something that we were thinking about previously ... and the question did come up within our interdepartmental discussions, ‘Well, don’t the same considerations arise in respect of police force co-operation, if you’re seeking to get a criminal detained overseas with a view, quite possibly, to extradition or whatever?’ ... So it is something, you know, that one kept under review. If the development of co-operation between immigration personnel and overseas partners were to move into an area of detentions, I think it would be one where we would want to think seriously again.<sup>151</sup>*

110. It is essential that this issue is kept under active review by the Cabinet Office, rather than when prompted by others. Any UK body involved with those detained abroad, or the passing of

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<sup>148</sup> Written evidence – Metropolitan Police Service, 11 October 2017; written evidence – National Crime Agency, 16 November 2017.

<sup>149</sup> Written evidence – Metropolitan Police Service, 11 October 2017.

<sup>150</sup> Written evidence – Cabinet Office, 15 September 2017.

<sup>151</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

information that could lead to a detention, must operate in accordance with the Consolidated Guidance, otherwise there is a reputational risk to the UK. There is a further issue in that any body lying outside the Guidance may not have access to all of the information held by those with in-country knowledge (primarily the FCO and SIS) and will not therefore be in a position to make an informed decision as to whether or not to engage with an overseas partner. This reinforces the need for active, ongoing consideration of whether any further bodies should be brought within scope.

111. The Committee sought views as to whether the police as a whole should be brought under the Guidance. SO15 said:

*Consideration was given to whether the refresh of Consolidated Guidance referred to 'SO15' or the wider term of 'police'. As mentioned previously SO15 manages the CTPLO network and the CTPLOs are formally classed as SO15 officers, so reference to SO15 in Consolidated Guidance would capture CTPLOs. SO15 International Operations Unit is the dedicated police unit that has national responsibility for managing all international police counter terrorism enquiries. All intelligence exchanges on behalf of UK policing are routed through SO15's International Operations at which point, Consolidated Guidance, reputational and other risks of the proposed activity are assessed. Reference to SO15 in Consolidated Guidance would also capture this International Operations Unit. Limiting the reference to SO15 would capture all CTPLO and through International Operations all UK police counter-terrorism engagement. This would allow sufficient training on a complex issue to a targeted group of officers rather than the UK's 125,000 police officers, who would have little knowledge of, or need to engage with Consolidated Guidance. This decision is also in line with Sir Mark Waller's original recommendation for SO15 and CTPLO inclusion. It is envisaged that the majority of crime matters [other than counter-terrorism] in relation to detainees overseas, will be dealt with by the National Crime Agency, who are also to be included in Consolidated Guidance.<sup>152</sup>*

**T. We welcome the fact that both SO15 and the NCA have been brought within the scope of the Consolidated Guidance. We remain concerned that there may be other bodies that are engaged in detainee issues and are not bound by the Consolidated Guidance. We note that the Cabinet Office will be keeping this under review – this must be proactive and continuous however, as opposed to only when prompted.**

### ***Joint working***

112. One potential problem with the current scope is the difficulties it creates for those working under the Guidance when they are operating alongside those not covered: for example, MI5 working with the police. If it is a joint undertaking, is everyone brought within scope? And if not, and there is a 'breach' of the Guidance, where does the liability fall?

113. The Agencies do not appear to regard this as a problem, on the grounds that UK domestic law applies to all the organisations concerned. SIS told the Committee:

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<sup>152</sup> Written evidence – Metropolitan Police Service, 11 October 2017.

*with our British colleagues ... we do have a working assumption that the police do not operate outside of their own authorities, which of course is within the same domestic and international legal framework that HMG operates in the round.*

It went on to say:

*we work incredibly closely with, for example, SO15 and we have an experienced Senior Investigating Officer embedded in our Counter Terrorist Team in London and, if they are thinking of an operation that will involve us, then there is a huge amount of discussion about how that will be run and, likewise, if we need them internationally to become involved in one of our operations, then we will work with this officer and others to make sure that they are in line with the Consolidated Guidance.*<sup>153</sup>

It did not, therefore, consider that a formal memorandum of understanding was needed between bodies covered by the Guidance and those lying outside of it.

114. The Chief of SIS did recognise, however, that problems may arise when different UK bodies have different legal interpretations of a situation on which they are working in partnership:

*I believe that the thing that really makes us powerful is our capacity to combine our different logistic capabilities across the British Government against common objectives. The thing that stops that in its tracks is sort of different legal interpretations by different bodies, because no one is going to go ahead with anything ... unless they are satisfied on that point. One of the things I have been very keen to see is integration of legal advice and legal capability, as an enabler for our joint mission, and that of course sits in tension with every Agency's obvious desire to make sure that they have the best individual understanding of the risks they are undertaking. ... this is quite an active conversation but there is a real premium on us thinking and integrating as one on these conversations, because otherwise we will be slowed down in a way that will only help our opponents.*<sup>154</sup>

SIS went on to say that, as a result, “[internally] there is a huge debate going on about what is the right thing to do, but people understand each other's accountabilities and constraints.”<sup>155</sup>

115. GCHQ also recognised this to be an issue. It specifically checks that adequate assurances are in place when working with bodies it deals with less routinely: “like say the NCA, who use the OSJA primarily as their vehicle for addressing this. So often we will ask to see their OSJA for the liaison partner that they are requested to use their information with, and we may well ask some follow-up questions on the detail.”<sup>156</sup>

**U. Whilst the Agencies have said that they do not see the need for any formal memoranda of understanding when working with bodies that are not covered by the Consolidated Guidance, they recognise that this can cause difficulties. This should therefore form part of a wider and more detailed review of the Consolidated Guidance.**

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<sup>153</sup> Oral evidence – SIS, 4 February 2016.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Oral evidence – GCHQ, 24 November 2016.

## 6. WORKING WITH FOREIGN LIAISON SERVICES: MANAGING RISKS

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116. The Agencies and MOD must work closely with international partners, sharing intelligence and conducting joint operations, not only to gather intelligence of interest to the UK, but also to protect the UK from those who seek to do us harm. The importance of international co-operation between security and intelligence agencies was emphasised after 9/11 by UN Security Council Resolution 1373, which called on all States to work ever closer in the fight to combat terrorism. In particular, it said States should “*find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks*” and should co-operate more generally to “*prevent and suppress terrorist attacks and take action against perpetrators of such acts*”.<sup>157</sup>

117. This Committee has reported previously on the importance of intelligence-sharing due to the fragmentary nature of intelligence.<sup>158</sup> However, working with others who do not necessarily have the same approach to international human rights obligations as the UK is problematic, as the Committee described in its previously unpublished 2010 Report on the draft Consolidated Guidance:

*Working and sharing intelligence with foreign intelligence services inevitably carries risks that the UK will be indirectly involved in mistreatment. It is unfortunate, but inescapable, that those risks cannot be wholly eliminated. The challenge therefore is how to minimise the risk.*<sup>159</sup>

118. The Committee has seen that, in the past, the Agencies have made assumptions as to how detainees would be treated by liaison partners which were later found to be incorrect.<sup>160</sup>

119. In this Inquiry, MI5 and SIS told the Committee that their officers always considered the risks in engaging with foreign liaison bodies. MI5 assesses the reputational risk involved through the ORANGE assessment process, and senior managers oversee that process.<sup>161</sup> SIS also highlighted that there were risks associated with a failure to work with others: “*there would also be reputational risk associated with non-engagement with a foreign liaison if intelligence about potential threats to life were at stake.*”<sup>162</sup>

### **Assurances**

120. The Agencies cannot assume that an overseas partner – even a trusted one – will abide by international law, and they deal with this by seeking specific assurances. The Consolidated Guidance states:

*Before interviewing a detainee in the custody of a liaison service, personnel must consider the standards to which the detainee may have been or may be subject.*

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<sup>157</sup> UN Security Council Resolution 1373, 2001, Clauses 3(a) and 3(c).

<sup>158</sup> ISC, *Report into the London Terrorist Attacks on 7 July 2005* (Cm 6785, 2006), page 53.

<sup>159</sup> See Annex C to this Report.

<sup>160</sup> ISC, *Detainee Mistreatment and Rendition: 2001–2010*, 28 June 2018, HC 1113 (2017–19).

<sup>161</sup> Written evidence – MI5, 20 November 2017. ORANGE is MI5’s internal procedure for cases involving Consolidated Guidance issues whereby a detailed assessment is made as to the risks of working with a particular liaison partner and sharing/receiving information. (‘ORANGE’ is a code word we have substituted for the actual name of this internal procedure, which is \*\*\*.)

<sup>162</sup> Written evidence – SIS, 13 September 2017.

*Personnel should consider obtaining assurances from the relevant liaison service as to the standards that have been or will be applied to address any risk in this regard.*<sup>163</sup>

121. Nevertheless, some have questioned the use of assurances. In evidence to this Inquiry, Amnesty International said:

*The fact that the Guidance relies so heavily on assurances in so many areas seriously weakens its potential to ensure UK agents' actions are consistent with the UK's international human rights obligations.*<sup>164</sup>

While we fully recognise these concerns, we question what alternatives there are in practice. Our Agencies have to work with other liaison services, and require some means of assuring themselves that a partner will abide by international law.

122. The Committee has been told by SIS that assurances are sought from overseas partners on a case-by-case basis, depending on the country in question and the particular circumstances of the case. We asked the Agencies whether some countries – for example, a Five Eyes or EU country – were seen as more reliable to work with and effectively ‘pre-approved’.<sup>165</sup> The Agencies emphasised that every case was considered on an individual basis; however, they did agree that cases involving certain countries were more straightforward. GCHQ explained:

*in certain cases, it would be much more straightforward to come to a decision. So it doesn't take long to look at a case involving MAIDSTONE to come to a happy conclusion usually. But take countries in the European Union who are signatories to the European Convention; one would think that would be straightforward but nonetheless it proves necessary in practice to look on a case-by-case basis, because for example there might be an instance of sharing with, say, the MORECAMBE [liaison service] in a context like, say, LEAMINGTON where it is not immediately apparent what the detention pathway will be, so it usually does take a certain degree of due diligence to get to a point where we are satisfied.*<sup>166</sup>

MI5 said:

*It is axiomatic that we are able to assess the credibility of assurances with greater confidence when they come from services with which we have regular contact and whose legal framework is well understood and similar to our own. For example, the MORECAMBE [liaison service] is a service with which we have regular and longstanding interaction, its legal basis is well understood and close to our own, and is bound by ECHR and other treaties and conventions common to the UK. We can therefore judge the risks and the credibility of assurances given with greater confidence than for a less well-understood and less regular intelligence partner, but the considerations are the same, and each case is considered carefully.*<sup>167</sup>

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<sup>163</sup> The Consolidated Guidance is reproduced at Annex B to this Report.

<sup>164</sup> Written evidence – Amnesty International, 31 October 2014.

<sup>165</sup> ‘Five Eyes’ refers to the intelligence alliance comprising the UK, Australia, Canada, New Zealand and the US (the term has its origins as a shorthand for an ‘AUS/CAN/NZ/UK/US EYES ONLY’ classification level).

<sup>166</sup> Oral evidence – GCHQ, 24 November 2016.

<sup>167</sup> Written evidence – MI5, 1 May 2015.



123. The Committee questioned the Agencies on whether the views expressed by the new US Administration had changed their approach towards seeking assurances from the US. The Agencies said that they were monitoring developments, but that:

*At the time of writing, despite relatively frequent media speculation about potential imminent policy changes, we are not aware of any significant US policy shift that would make engagement with US partners problematic from a compliance perspective.*<sup>168</sup>

### *Assessing the need for assurances*

124. The FCO and SIS lead on collecting information about countries and liaison partners, in order to inform decisions to seek assurances. The FCO is responsible for understanding matters such as local law and policy, and SIS focuses on understanding the local liaison services, how they operate in practice and therefore what the risks of working with them might be. MI5 explained:

*[The SIS Heads of Station] take responsibility for, and have accountability through, the SIS chain for operational activity in the countries in which they are based. So they not only are the expert, they are also accountable for getting it right. So I think that is the right way to do it.*<sup>169</sup>

125. In 2010, this Committee had welcomed a proposal to develop FCO country assessments which would provide the first step in assessing the risk to a detainee of torture or cruel, inhuman or degrading treatment (CIDT) by a particular country. It seemed to us sensible that there should be a formal repository of such information, which could then be used to make assessments on cases. However, the FCO abandoned the programme later in 2010, saying that:

*whilst these provided a useful mechanism for recording background information about a particular country, they soon became out of date as new information was received. The Foreign Office was concerned this could cause assessments of risk to be made on the basis of out of date information.*<sup>170</sup>

126. Witnesses to this Inquiry have echoed that sentiment: the Intelligence Services Commissioner said, “you have to make up your mind what the position is on the day, and in almost every country where there is a problem, things alter by the day”.<sup>171</sup>

127. When we asked GCHQ about this more formal system of country assessments and why it had not been implemented, the Director noted:

*I think in the end, personally, I feel I would rather be quite close to the assessment of something I am responsible for, and I am therefore comfortable with the current arrangement. It is never going to be perfect because trying to assess what a country and its Agencies are doing is a blend of lots of different sources of*

<sup>168</sup> Written evidence – SIS, 13 September 2017. The SIS response pre-dates the 2018 State of the Union address confirming that Guantanamo Bay would remain open (the President had made clear his intention to do so previously – most notably in an address to supporters in Nevada in early 2016).

<sup>169</sup> Oral evidence – MI5, 21 April 2016.

<sup>170</sup> HM Government, *Government Response to the Report on the Intelligence relating to the Murder of Fusilier Lee Rigby* (Cm 9012, 2015), page 24.

<sup>171</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

*information, including diplomatic and open source, journalism, and all the rest. So bureaucratising it essentially is not necessarily the answer, but we have now pretty established mechanisms for making sure we all know what each of us knows about these countries and their services.*

128. When pressed by the Committee as to whether he was confident that all the Agencies have the same understanding, he responded: “*Certainly all of the relevant information is shared around all of the Agencies with an interest.*”<sup>172</sup>

129. The Cabinet Office has told the Committee that the Agencies agreed to establish PURPLE in early 2018:

*The purpose of the team will be to create a central SIA reference point collating risk assessments, submissions, assurances, mistreatment reporting, OSJAs, and open source assessments, to ensure that SIA risk assessments are made on a consistent basis, or at least with a consistent reference base. ...*

*[PURPLE] will maintain a database of HMG assessments, mistreatment reporting, assurances, submissions, ‘positive evidence’ of compliance behaviour, and act as a cross-SIA first point of contact. The SIA hope that higher quality risk assessments would be derived from the [PURPLE’s] co-location with SIS policy and compliance teams, and close contact with liaison sections, Stations and Regional Networks, GCHQ and MI5 policy sections and FCO, MOD and police.*<sup>173</sup>

### *Negotiating assurances*

130. SIS generally takes the lead on negotiation of assurances, given that its in-country Head of Station has the local expertise. For example, if MI5 wished to conduct an operation with a foreign liaison service in a particular country, it would ask SIS to approach that liaison service to obtain an assurance. Nevertheless, it remains for the Agency seeking the assurance to make their own assessment of the reliability of any assurance received. The Director General of MI5 said:

*We get the view from [SIS] but we apply our own process, so we nonetheless go through the [MI5 working-level] guidance and process and we take responsibility for the judgements that we make in that.*<sup>174</sup>

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<sup>172</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>173</sup> Written evidence – Cabinet Office, 20 December 2017. ‘PURPLE’ is a code word we have substituted for the actual name for this team, which is \*\*\*.

<sup>174</sup> Oral evidence – MI5, 21 April 2016.



### MI5 AND SIS WORKING TOGETHER

SWALLOW, an ex-BOURNEMOUTH national was detained in OMAGH on the basis of intelligence provided by SIS to the OMAGH authorities. During the time SWALLOW was detained in OMAGH, MI5 exchanged information with OMAGH to inform his questioning.

In order for MI5 to work with OMAGH, it applied its own ORANGE decision-making process at each stage of the case as it developed, which involves escalation to senior managers and input from MI5 legal advisers. The MI5 officers needed to assess the assurances received by SIS and the decisions made by SIS on whether or not to continue to engage as the detention progressed.

The Committee notes that MI5 was copied into numerous SIS internal updates throughout, from pre-detention until SWALLOW was transferred to PERSHORE. This included information regarding concerns about the length of detention, inadequate responses from the OMAGH Ministry of Justice on OMAGH law and minutes of meetings with the PERSHORE authorities. MI5 was kept informed of any difficulties as they arose, and was able to assure its continued participation in the operation.

For the initial assessment, MI5 was in possession of copies of agreements between OMAGH, OXFORD and the UK on capacity-building and working together on counter-terrorism issues, and the assurances contained therein, plus its own historical knowledge of dealing with those States on this and other cases. There is evidence of senior MI5 officers contacting SIS counterparts to question their intent and conclusions in relation to their work on this matter, and use of a wide variety of sources in reaching conclusions. The Committee was reassured that there was no evidence of one Agency simply rubber-stamping the assurances provided by another.<sup>175</sup>

131. This approach ensures ownership by the relevant Agency rather than simply relying on SIS. However, we do caution that the more parties there are involved, the greater the risk there is of something being lost in translation: for example, the nuances of an assurance given verbally to SIS may be difficult to convey accurately to the Agency seeking the assurance.

132. More recently, the Committee was told that MI5 and SIS instigated a pilot scheme in June 2017 whereby, if MI5 shares intelligence via an SIS Station, SIS will conduct the Consolidated Guidance assessment and MI5 will not complete its own separate assessment form. The purpose of this pilot was “*to try to reduce duplication of effort in work across MI5 and SIS, whilst maintaining the Agencies’ commitment to operate compliantly*”. The pilot was successful and this system has now been introduced.<sup>176</sup>

### *The value of assurances*

133. From the way in which assurances are referred to in the Consolidated Guidance, it might reasonably be assumed that these are formal written agreements. However, SIS told us that this is hardly ever the case.<sup>177</sup> This led us to question the point of assurances. However, the Chief of SIS was clear that:

<sup>175</sup> Written evidence – MI5, 13 November 2015.

<sup>176</sup> Written evidence – MI5, 23 October 2017.

<sup>177</sup> We sought statistics from the Intelligence Services Commissioner on how many written and verbal assurances had been sought and received in 2016 but the Investigatory Powers Commissioner’s Office advised that these statistics had not been collected. We were advised by the Office that they would start doing this in 2018.

*It absolutely matters. It is about being absolutely explicit with our partners that there will be a cost in terms of our relationship if they don't do what we want. That is quite a fundamental conversation. ... we are trying to use our relationship with another service to make them behave in our image and make them behave better. So an assurance is making that explicit. In other words it is trying to apply a cost in terms of our willingness to work with them ... We are trying, essentially to incentivise them to behave ... I think I would be very, very, very unhappy if this Committee felt that was not an area we should pursue. I think it is very, very important.*

134. He explained that there are a number of reasons why a liaison partner may not wish to provide a written assurance:

*I would not want you to put too much store by the issue of written assurances. ... There are a whole set of reasons why a liaison is not going to want to put something in writing. At the sort of cultural, philosophical end, it is essentially formalising what they often see as a lack of confidence in them and their values and they are going to be reluctant to do that. It may be individuals just not wanting to put themselves, as they see it, in some kind of legal jeopardy on the liaison side and, of course, ... there are often liaisons who \*\*\*. So we are forced into a position where we need to be practical about this. As you know, we have an assurance conversation and we send that back to them in writing, and, you know, we have to go with the art of possible.<sup>178</sup>*

135. The Director General of MI5 told the Committee:

*There is a sort of superficial attractiveness about wanting MOUs ... In practice of course, ... it is not a practical thing to pursue in many instances because it is not achievable. But the same effect is achievable by, ... agreement, explanation, negotiation and a clear eye-to-eye understanding with the liaison in question and us holding them to what they say, and, if they in any way depart from it, making sure there are consequences where we break off and the intelligence relationship is suspended.<sup>179</sup>*

136. The Intelligence Services Commissioner, then Sir Mark Waller, has previously drawn attention to the form in which assurances are given, commenting in his 2014 Annual Report that he had “*emphasised the importance of obtaining signed written assurances from the foreign liaison but failing that to provide liaison with a written record of the assurances provided verbally*”.<sup>180</sup> In 2015, he similarly commented:

*I have continued to re-iterate that, when obtaining assurances to mitigate against CIDT by liaison partners, best practice is to obtain them in writing wherever possible. If it is not possible to obtain written assurances from the 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.<sup>181</sup>*

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<sup>178</sup> Oral evidence – SIS, 4 February 2016.

<sup>179</sup> Oral evidence – MI5, 21 April 2016.

<sup>180</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2014*, 25 June 2015, HC 225 (2014–15) (and 25 June 2015, SG/2015/74).

<sup>181</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 43.

137. Sir Mark did recognise that “*obtaining written assurances signed by a liaison partner can be difficult and has to be delicately and diplomatically handled*”<sup>182</sup> and he had advised SIS that it should “*reconsider their form of words used when they seek assurances and tailor them to each situation so that liaison services would be more likely to sign them*”. Sir Mark told the Committee that he had seen improvements as a result of his recommendations. However, the Committee notes that in his most recent and final Annual Report, Sir Mark makes exactly the same recommendations about best practice in requesting written assurances and tailoring the form of words. This would indicate that progress in this area is at best slow. He further recommended that:

*SIS ... should obtain renewed assurances from the liaison partners at least annually during periods of ongoing cooperation. ... [and] ensure that any liaison interlocutors or assurance providers are aware of the assurances, and that assurances should remain up to date.*<sup>183</sup>

138. We note that, in the latest versions of the Agency and MOD working-level guidance (and in that produced by the NCA and SO15, which are to be brought under the 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 that to the liaison partner, other than a single reference in the MI5 guidance which instructs officers that assurances should ideally be in writing and signed by a senior member of the liaison partner.<sup>184</sup>

139. Sir Mark had also recommended that where in a single operation the Agencies are dealing with more than one overseas body – for example a counter-terrorism unit and a local policing unit – then there should be “*differentiation of different liaison services involved in relevant operations and recognition that separate assessments of risk and assurances may be appropriate*”.<sup>185</sup> This has not been addressed in the current proposed revisions to the Guidance.

140. It is worth noting that assurances are not a prerequisite: even if the Agencies do not receive an assurance, an operation could still go ahead if it is considered vital to national security concerns. However, the Cabinet Office told the Committee: “*When the SIA seeks authority to become involved in a detention case, the existence or absence of assurances is an important factor in assessing risk, which is always drawn to the attention of the Secretary of State.*”<sup>186</sup>

141. Assurances offer no guarantee, since there can never be complete confidence that they will be honoured; however, the Agencies have advised the Committee that they have “*processes in place for recording and considering allegations of unacceptable conduct in foreign countries when there is a potential nexus between a mistreatment allegation and UKIC [UK Intelligence Community] activity in a jurisdiction*”.<sup>187</sup> The Cabinet Office said:

<sup>182</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 43.

<sup>183</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2016*, 20 December 2017, HC 298 (2017–19) (and SG/2017/78), page 36.

<sup>184</sup> Written evidence – MI5, 23 October 2017.

<sup>185</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner: Supplementary to the Annual Report for 2015 – Concerns raised by the Intelligence and Security Committee of Parliament about the Government’s responsibilities in relation to partner counter-terrorism units overseas*, 15 September 2016, HC 458 (2016–17) (and SG/2016/95).

<sup>186</sup> Written evidence – Cabinet Office, 16 September 2017.

<sup>187</sup> Written evidence – MI5, 23 October 2017.

*“If assurances are breached, this would have serious consequences and cooperation would be suspended.”*<sup>188</sup>

**V. The Committee recognises that securing a formal, binding, written agreement from liaison partners on standards of behaviour may not always be easy, given that it can be taken to imply suspicion, and therefore to insist on a written agreement could undermine trust and jeopardise future co-operation. We agree with the stance taken by the former Intelligence Services Commissioner that, where it is not possible to obtain a written assurance from a liaison partner, a written record of the oral assurance should be produced and sent to the liaison partner so that there is a shared understanding of expectations.**

**W. We note that statistics have not previously been collected on the number of written assurances obtained or the number of verbal assurances recorded, and we have therefore been unable to make as thorough an assessment of assurances as we would have wished. We welcome the Investigatory Powers Commissioner’s intention to begin collecting this data in 2018.**

## ***Caveats***

142. In addition to assurances, the Agencies can also mitigate the risks of engaging with foreign liaison services through the use of caveats. Caveats are applied to intelligence when it is shared in order to set conditions on how the intelligence may be used by the receiving party. The standard caveat employed by SIS and MI5 states:

*This information has been communicated in confidence to the recipient government and should not be released without the agreement of the British Government. It is for research and analysis purposes only and may not be used as the basis for overt, covert or executive action.*

143. The caveat system is understood by security and intelligence agencies globally: they all impose conditions to ensure that one agency does not endanger another agency’s sources (since taking action on intelligence might reveal the source of that intelligence). However, caveats are primarily about source protection, are not legally binding and do not offer a guarantee. We therefore questioned the Agencies on how useful caveats actually are in relation to detainee mistreatment. The Director General of MI5 told us that *“It is very rare that they are breached and broken.”* He explained that if a foreign partner breached a caveat that would jeopardise the relationship and in most cases it would lead to the withdrawal of co-operation. He said:

*We are not some sort of powerless small agency on this landscape. The UK is a massive player in the intelligence world and what we say has a lot of sway, including with big partners, because the UK matters to all the countries we work with in a really serious way and they do listen to us.*<sup>189</sup>

144. The Agencies check that caveats are being followed in the same way as they monitor broader information on a country’s human rights compliance, by combining the knowledge

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<sup>188</sup> Written evidence – Cabinet Office, 16 September 2017.

<sup>189</sup> Oral evidence – MI5, 21 April 2016.

from FCO Desk Officers, the experiences of other UK agencies, open source information and dialogue with their liaison partners.

145. We note that, since 2010, the Agencies do not consider that there have been any cases where the Agencies have placed caveats on material which a liaison service has then ignored.<sup>190</sup> Nevertheless, the Agencies must not be complacent: there is always a risk involved – as we learned from US actions after 9/11. An assessment should still therefore be made as to whether the liaison service concerned is likely to honour the caveat, taking into account the track record of the liaison service concerned. SIS commented:

*It is about our credibility and, you know, we may decide to say that we are not going to co-operate with these people, but the issue for us ... is that in each circumstance we have to be able to balance the risks and the reward. Of course a clear factor in this conversation will be the credibility we have with that liaison, our ability to make this stuff stick.*<sup>191</sup>

146. GCHQ uses a similar system to caveats, called ‘Action On’, whereby if a partner wants to take action based on the content of a GCHQ product, they must request permission from GCHQ to do so. This Action On process applies to product shared with MI5 and SIS, as well as with foreign liaison services. GCHQ keeps detailed records on the Action On process. It told us that it receives approximately 10,000 Action On requests each year. With regard to those requests that are potentially connected to a detention or detainee, GCHQ has noted only one breach since 2010 (which was due to a process error rather than disregard for the caveat).<sup>192</sup>

## Emergencies

147. The Consolidated Guidance covers operations where MOD, acting in coalition with others, needs to take part in ‘time-sensitive’ tactical questioning of a detainee held by another State, and MOD is not able to refer to a senior officer or Minister for guidance. The Guidance says that MOD officers must “as far as it is practicable” continue to observe the Guidance and “report all the circumstances to senior personnel at the earliest opportunity”.<sup>193</sup> The Guidance does not, however, say that such cases (which would under normal circumstances meet the threshold for escalation to Ministers) should subsequently be sent to Ministers for retrospective approval.

148. None of the Agencies is presently permitted to operate in this manner. In his 2014 report, the Intelligence Services Commissioner suggested that this was an oversight and that the Consolidated Guidance should be “amended to allow for in extremis sharing of intelligence”.<sup>194</sup> The draft 2017 revised Consolidated Guidance contains an amendment to this effect:

*Where UK Armed Forces or other personnel are operating in a coalition with others and are under time-sensitive operational conditions, they may find themselves engaged in tactical questioning of detainees held by other nations or in possession of threat to life intelligence with no opportunity to refer to senior personnel or*

<sup>190</sup> Written evidence – SIS, 28 January 2016; written evidence – SIS, 4 March 2016; oral evidence – MI5, 21 April 2016.

<sup>191</sup> Oral evidence – SIS, 4 February 2016.

<sup>192</sup> Written evidence – GCHQ, 13 July 2016.

<sup>193</sup> The Consolidated Guidance is reproduced at Annex B to this Report.

<sup>194</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2014*, 25 June 2015, HC 225 (2014–15) (and 25 June 2015, SG/2015/74).

*Ministers for guidance on any concerns over standards of detention or treatment. If such a situation arises, all personnel should continue to observe this guidance so far as it is practicable and report all the circumstances to senior personnel at the earliest opportunity.*

The Cabinet Office told the Committee it had implemented this recommendation because:

*there's a shift in balance of overseas deployments. So where we were in 2010 in terms of the scale of military deployments and the footprint meant ... if you were operating in Afghanistan, for instance, the people likely to be engaged in detention operations would be the military and therefore it made sense to have that provision. That is not the case to the same extent in 2017. We don't have the same military footprint, we have a – not least with the advent of Daesh and other developments, particularly in the Middle East – we have a different range of deployments, where it is more likely that others covered by the Consolidated Guidance will be in the frame and, therefore, we extended it to them on this occasion.*<sup>195</sup>

However, we note that the Intelligence Services Commissioner thought that the Agencies were not wholly in favour of the extension, saying: “*I think they don't want to leave people, as it were, free to make a decision.*”<sup>196</sup>

**X. The extension to the Agencies of the ability to authorise action in an emergency situation, without reference to Ministers, is sensible. However, it should not extend to situations where an official believes there is a serious risk of torture. No public official should be able to authorise torture.**

**Y. Furthermore, use of the provisions relating to time-sensitive operational decisions must be strictly monitored: they should only be used in real emergencies. In addition, a time limit of 48 hours should be set for retrospective escalation of any case to senior personnel and, where necessary, to Ministers.**

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<sup>195</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>196</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.



## 7. INTERPRETING AND APPLYING THE CONSOLIDATED GUIDANCE

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149. Given the importance of the issues covered by the Consolidated Guidance – and the potential implications for officers using the Guidance (which we consider later in this chapter) – it is essential that the Guidance provides clarity as to what is expected. However, there are a number of issues which, in the Committee’s opinion, and that of the majority of those who responded to our call for evidence, are worryingly vague.

### *Is the terminology/intent clear?*

#### *Definition of ‘serious risk’*

150. The 2010 Guidance (as amended in 2011) sets out:

*In applying the Guidance, officers are required to assess whether:*

- *There is no serious risk of torture or of CIDT [cruel, inhuman or degrading treatment] taking place – in which case officers may proceed;*
- *There is a serious risk of torture or CIDT which can be mitigated such that it ceases to be a serious risk – in which case officers may proceed with the agreement of senior personnel; or*
- *There is a serious risk of torture or CIDT which cannot be sufficiently mitigated – in which case it must be referred to Ministers; or*
- *Where officers know or believe torture will take place, then they must not proceed and Ministers must be informed.*<sup>197</sup>

151. The key, therefore, is that officers must consider whether there is a serious risk that detainees may be subjected to torture or CIDT. Ministers involved in the initial development of the Guidance have told the Committee that it uses the threshold of serious risk to ensure that safeguards are triggered before the legal threshold for complicity – which is knowing or believing that torture or mistreatment of a detainee will occur – is reached.<sup>198</sup>

152. This raises the question as to what ‘serious risk’ means.<sup>199</sup> Given the ambiguity of the term, the Committee was concerned at the burden this places on officers to use their judgement and questioned how they could be confident that their understanding of the term was correct, or in line with the understanding of Ministers or, potentially, the courts. In 2010, the Committee had raised exactly these concerns with the draft Guidance, saying:

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<sup>197</sup> The Consolidated Guidance is reproduced at Annex B to this Report.

<sup>198</sup> Oral evidence – Home Office, 1 December 2009.

<sup>199</sup> As previously noted, in 2011, the Equality and Human Rights Commission (EHRC) sought a judicial review of the Guidance, arguing that the Guidance “does not fully reflect the UK’s obligations in international law, particularly under the United Nations Convention Against Torture”. The EHRC argued that the Guidance should be amended to ensure that any ambiguities “which could lead to intelligence gathering proceeding where there is a real risk of torture” are eradicated, namely by changing ‘serious risk’ to ‘real risk’. However, the High Court ruled that there was no material difference between a serious risk and a real risk. In evidence to the Committee, the EHRC made clear that “our view is that the correct approach is simply that any involvement with torture or CIDT needs to be a clear prohibition and shouldn’t be about looking at different legal definitions in order to ensure compliance with the letter of the law” [Source: written evidence – Equality and Human Rights Commission, 31 October 2014].



*Leaving individuals to determine what constitutes a serious risk of torture or mistreatment places an unacceptable burden on the individual officer. We believe that both the Consolidated Policy and the lower level guidance should offer further clarification, perhaps by drawing on other phrases.*<sup>200</sup>

153. We asked each of the Agencies about this ambiguity. The Director General of MI5 said, *“The serious risk term is something which, in practice is well understood by our officers and the way we get it embedded with people in our systems is through cases’ advice and day to day practice.”* MOD told the Committee that its personnel receive training to be able to make risk assessments in challenging operational circumstances.<sup>201</sup> In terms of the working-level guidance available to officers there is very little by way of instruction.<sup>202</sup>

The Director of GCHQ commented:

*I think ‘serious’ was the right word to choose for the Guidance, partly because I think, if you didn’t have ‘serious’, well there is always risk of something, so you could end up doing absolutely nothing and paralysing the system if you didn’t have the word ‘serious’ there, but I think you are right that we have interpreted it in a pretty broad way.*<sup>203</sup>

SIS explained:

*in the field, a person’s judgement as to whether this is serious or not comes, first of, all [from the fact that] they are intelligent human beings. They do have lots of experience, they are trained. But, if they are thinking this is in the serious realm, potentially, they will always be discussing that with their senior in the field and that conversation will always involve Head Office and undoubtedly the lawyers, the compliance teams and a Director, a Deputy Director or Director-level person will finally agree whether or not it is. So there is a lot of support and advice available to people.*<sup>204</sup>

154. A further complicating factor is that the view arrived at by an Agency may not be the same as the view taken by the relevant Minister. The Director of GCHQ said:

*Ultimately, it is a personal judgement for them about what is a serious risk and whether this particular case constitutes one. All we can do is set out the risks as we see them, and the mitigations that we think are in place or possible and that ultimately, as I think the Consolidated Guidance fairly sets out, there is always going to be a judgement call, which is why it should be Ministers and not us. ...*

*We flag the risks. We flag everything. We flag the mitigations. It is not as though we are not giving all the information that the Minister needs.*<sup>205</sup>

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<sup>200</sup> See Annex C (Recommendation K following paragraph 77).

<sup>201</sup> Written evidence – MOD, 18 December 2017.

<sup>202</sup> SIS officers are instructed that ‘serious risk’ is not a legal term and officers should use their common sense and judgement. The MOD guidance provided the most comprehensive detail on how to assess risk, and the factors that should be taken into account, but caveats that with a note to officers that *“There will inevitably be a degree of judgement in deciding whether the risk is serious.”* [Sources: written evidence – SIS, 7 September 2017; written evidence – MOD, 21 July 2017.]

<sup>203</sup> Oral evidence – GCHQ, 24 November 2016.

<sup>204</sup> Oral evidence – SIS, 4 February 2016.

<sup>205</sup> Oral evidence – GCHQ, 24 November 2016.

In practice, this appears to have resulted in the Agencies adopting a far lower threshold for putting cases to Ministers. MI5 said:

*if you were asking Ministers, the Home Secretary or the Foreign Secretary I am sure would say to you actually, we get submissions on cases that do not necessarily involve serious risk of mistreatment because the Agencies err on the side of caution.*<sup>206</sup>

155. The Cabinet Office told the Committee that it was confident that all concerned were sufficiently clear on the matter:

*The Cabinet Office is satisfied that the Consolidated Guidance brings clarity to issues relating to the detention and interviewing of detainees overseas and how that relates to the passing and receipt of intelligence ... When differentiating between a “serious risk” and a “less than serious risk”, the Government’s position is that, consistent with OSJA, the usual dictionary definition is applied so that a serious risk is one that is not just theoretical and fanciful ... in line with the view of the Divisional Court in EHRC v the Prime Minister & others ... Each agency provides additional guidance to its staff on applying this test. Personnel receive training to be able to make risk assessments in a variety of challenging circumstances. What the Guidance makes clear is that if personnel are in any situation where they are unsure about levels of risk, including the difference between a “serious risk” and a “less than serious risk”, they should consult senior personnel and if necessary Ministers (who are accountable).*<sup>207</sup>

This reinforces our concern that in practice a far lower threshold will be adopted.

**Z. We recognise the ambiguity inherent in the term ‘serious risk’ and the burden this places on individual officers. The Agencies have developed their own training on how to recognise serious risk, and they have all erred on the side of caution.**

**AA. 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. This must be addressed. Further, when submitting to Ministers on the Guidance, the organisation concerned should append its working definitions to ensure that all involved are working on the same understanding.**

### *The list of examples of CIDT contained in the Consolidated Guidance*

156. We set out in our Report, *Detainee Mistreatment and Rendition: 2001–2010*, that rendition – the term most commonly used to cover the extra-judicial transfer of an individual from one jurisdiction or State to another (as opposed to legally authorised methods of transfer such as extradition, deportation or removal that are subject to legal process or right of appeal) – may constitute a form of mistreatment if it involves, for example, detention, transfer and/or

<sup>206</sup> Oral evidence – MI5, 21 April 2016.

<sup>207</sup> Written evidence – Cabinet Office, 16 September 2017.

interrogation in contravention of legal rules.<sup>208</sup> However, it is not included in the examples of unacceptable treatment referenced in the Consolidated Guidance.<sup>209</sup>

157. The Committee was concerned that this omission might mean that HMG does not recognise rendition as a form of CIDT. The All-Party Parliamentary Group on Extraordinary Rendition (APPGER) raised the same point in its letter of 6 October 2010 to the Prime Minister stating:

*the guidance is incomplete. Most of the protections that the guidance offers from torture should also apply to unlawful detention and rendition. It is true that the guidance and its annex refer to standards of detention, but this is far from adequate. Clearer guidance is needed for officers. They should have clear procedures to follow in circumstances where they know, or believe that a detainee is being held or transferred unlawfully.*<sup>210</sup>

158. When asked, the Agencies argued that no specific reference to rendition was needed in the Consolidated Guidance and that CIDT was understood by their officers. MI5 – which covers rendition explicitly in its underpinning internal training – stated:<sup>211</sup>

*the combination of guidance we have today, of Consolidated Guidance, LOSIS [its internal guidance]<sup>212</sup> and the OSJA Guidance, which amount to, by the way, 62 A4 pages in all that we drop on each of our individual staff to learn and operate by, I don't think the situation would be materially assisted by us inserting another 15 pages on rendition. ... It is a serious point about the effectiveness of guidance. If we overload it, it actually becomes less effective because we cannot expect our staff to retain it all.*<sup>213</sup>

**BB. The list of types of CIDT contained in the Consolidated Guidance is not intended to be exhaustive. However, rendition has been such a contentious issue that we believe it should be specifically mentioned in this list for clarity. We recognise that defining rendition has previously caused problems; however, this is not a reason to stop its inclusion – indeed, it is precisely because of the uncertainty in the term that officers should be prompted to consider it.**

### *The letter or the spirit of the Guidance*

159. No guidance is comprehensive, and there will inevitably be instances that do not fall within the letter of the Consolidated Guidance when it is interpreted strictly: we have already explored issues such as joint units, for example. The Intelligence Services Commissioner, in his role in considering how the Agencies apply the Guidance, has been clear that the Agencies should seek to apply the principles behind, or spirit of, the Guidance rather than sticking to a narrow interpretation. In evidence to this Inquiry, Sir Mark Waller emphasised the importance of this:

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<sup>208</sup> A rendition for the purposes of detention and interrogation outside the normal legal system and where there is a real risk of torture or other cruel, inhuman or degrading treatment is usually referred to as 'extraordinary rendition'.

<sup>209</sup> Wider issues on rendition are covered in the following chapter.

<sup>210</sup> Available at [www.extraordinaryrendition.org](http://www.extraordinaryrendition.org)

<sup>211</sup> Rendition is also covered in the MOD working-level guidance to the Consolidated Guidance.

<sup>212</sup> LOSIS was replaced by LOSIA (Liaison with Overseas Security and Intelligence Agencies) in 2016.

<sup>213</sup> Oral evidence – MI5, 21 April 2016.

*My oversight is to try and make sure the Consolidated Guidance is applied and properly applied ... if they've [the Agencies] got a particularly difficult situation, they are likely to come to me in order to see, is this an area in which the Consolidated Guidance applies? I may say, "Well, actually, strictly not on its language but you've got to apply the principle of the Guidance," and then we try and work out a way in which I would say, "Yes, I think that does fulfil the spirit of the Guidance." But there will be areas where you still will be saying, "Well, actually, it isn't really the Guidance," but it's just trying to make sure that we keep ourselves in the situation where people are not liable for encouraging mistreatment.<sup>214</sup>*

160. The Commissioner also identified a specific instance in the case of 'third-party reporting'. This is where a UK Agency receives information via an intermediary liaison service about or from a detainee. This scenario is not explicitly covered by the Guidance. In 2015, the Commissioner considered that this lacuna should be addressed:

*If there were a review of the Consolidated Guidance, I would also suggest that it address one somewhat extraneous matter. In this regard, I have for some time advised the intelligence services that they should apply the spirit of the Consolidated Guidance in cases where information about or from a detainee is disclosed to them directly by a liaison service which is not suspected of mistreatment but which obtained that information indirectly from a third party which is. In my view the Consolidated Guidance should expressly deal with cases of this type.<sup>215</sup>*

The Committee is reassured that the 2017 proposed amendments to the Guidance address this point.

161. A further issue on which there is currently a lack of clarity in terms of the letter of the Consolidated Guidance, but where the spirit of the Guidance may help, is how the Guidance relates to the Agencies working with non-State actors, or failed States (the 2008 National Security Strategy defined a failed State as "*one whose government is not effective or legitimate enough to maintain the rule of law, protect itself, its citizens and its borders, or provide the most basic services*").<sup>216</sup> This is increasingly relevant to the Agencies' work countering terrorism. In his 2015 report, the former Intelligence Services Commissioner wrote:

*The Guidance ... does not apply in relation to non-state armed groups. ... Although the Guidance does not apply I again encourage the agencies to apply the principles of the Guidance as far as they practically can. There are situations where not engaging with these groups would be difficult to defend ... Again Ministers should be informed and that should include action taken to mitigate against risk of mistreatment.<sup>217</sup>*

<sup>214</sup> Oral evidence – Intelligence Services Commissioner, 15 December 2016.

<sup>215</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner: Supplementary to the Annual Report for 2015 – Concerns raised by the Intelligence and Security Committee of Parliament about the Government's responsibilities in relation to partner counter-terrorism units overseas*, 15 September 2016, HC 458 (2016–17) (and SG/2016/95), page 108.

<sup>216</sup> Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an interdependent world* (Cm 7291, 2008), page 14. The use of the term 'failed State' is now less common and, in the most recent National Security Strategy (2015), references are made only to 'fragile States', which are not defined. [Source: HM Government, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom* (Cm 9161, 2015).]

<sup>217</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 44.

Sir Mark Waller's successor as Intelligence Services Commissioner, Sir John Goldring, said that he was similarly concerned that the redrafted Guidance "*omits to address interactions with non-state actors*".<sup>218</sup>

162. MI5 told the Committee:

*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.*<sup>219</sup>

SIS concurred, adding:

*We do not think that the Consolidated Guidance requires revision in this area for two reasons: firstly, while engaging with non-state actors on detainee matters [would raise] significant operational and policy challenges, the relevant 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.*<sup>220</sup>

163. Definitions can be difficult; however, this should not be taken as a reason to do nothing. This is particularly important given the 'public reassurance' role of the Consolidated Guidance.

**CC. It is essential that the Agencies and their personnel follow the Consolidated Guidance not just in letter but in spirit as well. We welcome the previous Intelligence Services Commissioner's proactive approach on this matter and urge the Agencies to continue to seek the advice of the Investigatory Powers Commissioner in situations which might appear to be on the periphery of the Guidance.**

**DD. The Cabinet Office has proposed an amendment to the Guidance to refer to intelligence received from third parties. The Committee welcomes this proposed revision, which addresses the concerns of the Intelligence Services Commissioner raised in 2015.**

**EE. We recommend that the Guidance should also explicitly apply to non-State actors and failed States. These relationships are likely to be an increasing feature of UK intelligence work. The Agencies should endeavour to obtain assurances in such situations but Ministers should then make the final decision.**

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<sup>218</sup> Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015*, 8 September 2016, HC 459 (2016–17) (and 7 September 2016, SG/2016/96), page 15.

<sup>219</sup> Written evidence – MI5, 23 October 2017.

<sup>220</sup> Written evidence – SIS, 13 September 2017.

**FF.** The Committee notes that, in response to a number of recommendations from the Committee and the Commissioner that the Consolidated Guidance be amended to address three important and contentious areas (non-State actors, rendition and joint units), HMG has said that defining these terms is too difficult. This is not an acceptable reason not to include them: if anything, it demonstrates why it is so important to reference them.

### ***Are users of the Consolidated Guidance legally culpable for actions taken under it?***

164. The Consolidated Guidance states 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.*”<sup>221</sup> However, the extent to which it has any ability to protect officers is unclear.

165. This lack of clarity around legal liability is a concern that has been raised by others. In evidence to the Committee, Amnesty International said:

*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.*<sup>222</sup>

166. The Guidance is Government policy and as such does not hold any legal status. Giving evidence on the draft Guidance in 2010, the Home Office clearly stated: “*This is guidance. It doesn’t give exemption from the criminal and civil law.*”<sup>223</sup> Compliance with the Guidance merely demonstrates that an officer is acting in accordance with instruction. If an officer were found to have acted illegally, compliance with the Guidance does not provide a defence in itself.<sup>224</sup> The Cabinet Office told the Committee:

*Whilst compliance with the Consolidated Guidance demonstrates that officials and Ministers are acting in accordance with their duties and thereby gives indirect protection to them, it is not, nor is it meant to be, the means by which officials might be permitted to do acts which would otherwise constitute offences.*<sup>225</sup>

167. Nevertheless, MI5 and SIS both consider that the Guidance provides reassurance to their staff. SIS said:

*Feedback from staff has indicated that they are satisfied with the assurance provided. And there has been no occasion on which an individual has been held to be liable for conduct consistent with the Guidance.*<sup>226</sup>

<sup>221</sup> The Consolidated Guidance is reproduced in Annex B to this Report.

<sup>222</sup> Written evidence – Amnesty International, 31 October 2014. The relevant international law is set out in Chapter 2, ‘The legal framework’.

<sup>223</sup> Written evidence – SIS, 6 May 2015; oral evidence – Home Office, 8 December 2009.

<sup>224</sup> Although it might form the basis of a defence to a charge of torture under domestic law on the basis of lawful authority under section 134(4) of the Criminal Justice Act 1988.

<sup>225</sup> Written evidence – Cabinet Office, 16 September 2017.

<sup>226</sup> Written evidence – SIS, 6 May 2015.



GCHQ agreed:

*I think they take confidence from the Consolidated Guidance ... I think it was very helpful that Government as a whole came out with this document for the whole of the intelligence community and others too. I think we can take real confidence from that.*<sup>227</sup>

168. This confidence may, in part, be due to the way in which the Agencies use section 7 of the Intelligence Services Act 1994 in conjunction with the Guidance.<sup>228</sup>

### Section 7 of the Intelligence Services Act 1994

The Committee's Report, *Privacy and Security: A modern and transparent legal framework* (published in March 2015), explained section 7 authorisations as follows:

*In order to fulfil their statutory functions, SIS and GCHQ may be justified in undertaking certain activities abroad that might (without specific authorisations) lead to criminal and civil liability under UK law. For example, SIS may need to take, without consent, documents such as foreign government papers, which could be considered theft under UK law. A further example would be GCHQ's operations which might involve infiltrating computers or networks that might fall foul of UK laws relating to computer security and misuse.*

*The Agencies would be unable to fulfil many of their statutory functions without carrying out such activities. Therefore, Section 7 of the Intelligence Services Act 1994 allows for a Secretary of State to sign an authorisation which removes civil and criminal liability for activity undertaken outside the British Isles which may otherwise be unlawful under UK law. In signing the authorisation, the legislation specifies that the Secretary of State must be convinced that the proposed action relates to the Agencies' statutory functions, and that it is 'necessary' and 'reasonable'. All Section 7 Authorisations last up to six months, after which they must be cancelled or renewed.*<sup>229</sup>

169. We have found that, when SIS or GCHQ refer a Consolidated Guidance case to Ministers, they routinely seek, in parallel, an authorisation under section 7 of the Intelligence Services Act 1994, which can provide protection for their officers from domestic civil and criminal liability as set out above.<sup>230</sup> This reliance on section 7 indicates that the protection of the Guidance alone is not considered sufficient. SIS confirmed this:

*we are ... always going to go for a section 7 authorisation. Because, you know, why should my officers carry the risks on behalf of the Government personally? Why should they? So, you know, as we have already discussed, serious risk is ultimately a subjective judgement. So we will go for belt and braces on this.*<sup>231</sup>

<sup>227</sup> Oral evidence – GCHQ, 24 November 2016.

<sup>228</sup> Only SIS or GCHQ can apply for authorisation of an operation under section 7 but if MI5 (or indeed any other UK body) is involved in actions overseas with SIS and/or GCHQ, in which it is carrying out GCHQ/SIS statutory functions (as defined by the 1994 Act), then its personnel involved in that operation will be covered by the section 7 authorisation obtained by SIS or GCHQ.

<sup>229</sup> ISC, *Privacy and Security: A modern and transparent legal framework*, 12 March 2015, HC 1075 (2014–15), page 87.

<sup>230</sup> Although GCHQ has not up to now had cause to apply for a section 7 authorisation in the context of the Consolidated Guidance, it is common for the relevant SIS section 7 authorisation also to cover related GCHQ conduct.

<sup>231</sup> Oral evidence – SIS, 4 February 2016.



170. Given this clear connection between the Guidance and section 7 authorisations, we questioned whether the link should be made explicit. However, SIS expressed concern at the prospect:

*If you were to refer explicitly to section 7 authorisation in the Consolidated Guidance, it would raise the misguided understanding that section 7 authorises SIS to carry out CIDT and torture.<sup>232</sup>*

**GG. The Consolidated Guidance does not offer legal protection to officers. This is clearly demonstrated by the fact that, when SIS or GCHQ submit to Ministers under the Guidance, they seek – in parallel – an authorisation under section 7 of the Intelligence Services Act 1994.**

**HH. We recognise the Agencies’ need to ensure that their officers are protected where they are acting in accordance with the Guidance and consider that the solution of seeking a section 7 authorisation to cover an action is a pragmatic one.**

**II. However, we have previously recommended that there should be greater transparency around the use of section 7 authorisations and that the scope and purpose of section 7 authorisations should explicitly be addressed in the Consolidated Guidance, and we strongly urge the Government to reconsider this recommendation.<sup>233</sup>**

## *The role of Ministers*

171. We have concentrated thus far on the role of the Agencies in operating the Guidance. However, the role of Ministers is perhaps more critical since it is Ministers who will make the final decision about whether to proceed with an operation. The Guidance sets out that, where the Agencies consider that there is a serious risk of torture or of CIDT, and they are unable to mitigate this below the level of serious risk, but they still wish to proceed with an operation, they should refer the case to Ministers, and ask the Minister to weigh the balance between national security and the risks of mistreatment to a detainee. Ministers may also assess at this point whether the risks can be mitigated.<sup>234</sup>

172. However, while the Consolidated Guidance offers some help to officers in assessing such matters, it is silent on the process that Ministers should follow in reaching a decision.<sup>235</sup> In its previously unpublished 2010 Report on the draft Consolidated Guidance, the Committee said:

*If the Consolidated Policy is aimed at informing public debate on this issue then it must contain more information about how, ultimately, decisions will be made. This is even more essential, given that, in light of recent cases and allegations against personnel, there will inevitably be a tendency in the future to refer more cases to Ministers.*

<sup>232</sup> Oral evidence – SIS, 1 December 2009.

<sup>233</sup> See Annex C (Recommendation P following paragraph 95).

<sup>234</sup> HM Government, *Note of Additional Information from the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary and Defence Secretary: 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* (July 2010), page 3.

<sup>235</sup> With the exception of the following comments in the *Note of Additional Information* (July 2010): “We will consider a number of factors, including but not limited to: the credible and mitigating steps that can be taken, if necessary through our personal involvement, to reduce the risk of mistreatment; the range of UK action proposed and whether it would increase or decrease the likelihood of mistreatment taking place; whether there is an overwhelming imperative for the UK to take action of some sort, e.g. to save life; and, above all, whether there is a legal basis for taking action.”

*The Consolidated Policy should also make clear how Ministers, in taking such decisions, must balance all the circumstances of the case. These will include: the risks to the detainee of taking action; the risks to national security of inaction; the laws, practices and track record of the detaining country; and the UK's obligations under domestic and international law.*<sup>236</sup>

173. We questioned Ministers and the Agencies as to what information Ministers are given on which to base their decision. SIS told us that, in relation to the Foreign Secretary:

*we will talk to him about stuff that we want to do, very much in terms of risk versus reward ... There is the intelligence benefit and then there is risk. His job ... as a Minister is, on behalf of the public, to weigh up the balance between the two. Now, he will receive legal advice, of course, and there will be an SIS legal paragraph there as well. My experience of this is this is nearly always about legal risk rather than absolute black and white, and he will need to take that into account. ... But we will not put our officers in legal harm's way. ... It is not their job to take that risk on behalf of the Government. This process is essentially about transferring the risk to the right level, so that it is held by the Government rather than the individual in question, ... These risks have to be held at the right level and that is what this process is for.*<sup>237</sup>

174. The Cabinet Office told the Committee:

*you've got the framing of the actual language, you have got the legal advice, but you've also got a step-through operational proposal that leads them to think about actually the practice of managing the serious risk.*<sup>238</sup>

175. The then Foreign Secretary, the Right Hon. Philip Hammond MP, said:

*In most cases the advice that I receive in the submission is sufficient for me to make a decision. I should think in 90 to 95 per cent of cases all the information I need is there. In a small number I send the submission back for further information or clarification and, if necessary, that will either be done in the Department or, if necessary, the National Security Director will go back to the Agencies to clarify the point in question. ... I don't always get a single piece of consolidated advice. Sometimes one official will recommend a more cautious approach or an additional step and a second official will say that they think that is unnecessary and will place an unreasonable burden at the operational level and I'll make the judgement but I'll have read both the arguments. Sometimes I add additional requirements myself or, more likely, rather than just add them, I will go back and enquire as to whether it would be appropriate to ask for the following additional safeguards and then the officials will discuss with SIS what the practical impact of those would be, typically, and I'll get a resubmission on that basis.*<sup>239</sup>

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<sup>236</sup> See Annex C (Recommendation O following paragraph 92).

<sup>237</sup> Oral evidence – SIS, 4 February 2016.

<sup>238</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

<sup>239</sup> Oral evidence – Foreign and Commonwealth Office, 9 June 2016.

## Authorising torture

176. 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>240</sup>

177. This prohibition only applies to situations where it is known or believed torture will take place. It does not apply to situations where there is a serious risk of torture. Amnesty International raised concern at this possibility: "*the Guidance implies unbounded discretion at the Ministerial level to instruct officials to proceed with action ... in the face of evidence that there is a serious risk that UK action will result in torture.*"<sup>241</sup> This was echoed by the EHRC in its oral evidence to the Inquiry: "*So what the Guidance suggests to me is that it is possible that the Minister could consider that there was a serious threat of torture, but in fact agree to continue whatever was going on.*"<sup>242</sup>

178. In theory this is correct. We therefore questioned how this operated in practice – i.e. how many cases Ministers had authorised where there was a serious risk of torture. SIS's response was: "*on torture, none. And we would not ask for it, so it would not have got anywhere near them.*"<sup>243</sup> We were reassured by this response. However, when we probed Ministers on this issue we found their responses to be more equivocal.

179. The Foreign Secretary, the Right Hon. Boris Johnson MP, said:

*Well, I think the Consolidated Guidance makes it pretty clear that torture, that the risk of torture in the handling of detainees is an absolute prohibition. There can be no quibbling over that. If torture is a possibility, then the Consolidated Guidance offers a very firm prohibition.*<sup>244</sup>

However, the then Home Secretary, the Right Hon. Theresa May MP, was less clear that the prohibition was absolute (for example in a 'ticking bomb' scenario):

*I think my instinct is that one should always start from the process that one does not authorise when you have a serious risk of torture and of CIDT, but what I am saying is that you're always balancing risks and that's why the circumstances in which something occurs in that sense is – it's a difficult judgement. It's a difficult balance.*<sup>245</sup>

The then Foreign Secretary, the Right Hon. Philip Hammond MP, similarly recognised that possibility:

*No such case has ever crossed my desk but I can construct a ticking time bomb scenario where that might happen. For example, if I became aware of the presence of a weapon of mass destruction in the capital city of a power that is known to*

<sup>240</sup> Under the Guidance, an officer cannot proceed where they know or believe torture will take place and, therefore, such cases should not reach a Minister's desk.

<sup>241</sup> Written evidence – Amnesty International, 31 October 2014.

<sup>242</sup> Oral evidence – Equality and Human Rights Commission, 20 October 2016.

<sup>243</sup> Oral evidence – SIS, 4 February 2016.

<sup>244</sup> Oral evidence – Foreign and Commonwealth Office, 27 October 2016.

<sup>245</sup> Oral evidence – Home Office, 5 May 2016.

*regularly use torture and have reason to believe that it's about to detonate and can disclose to that power the location, whereabouts of the individuals, clearly I'd have to make a judgement about whether the protection of their human rights outweighed the human rights of the possibly thousands of people that could be killed or injured as a consequence of the explosion occurring.*<sup>246</sup>

The Right Hon. Amber Rudd MP, when she was Home Secretary, went further still. The Committee suggested to her that, under the terms of the Consolidated Guidance, she would have been able to authorise action where there was a serious risk of torture. She was asked whether she thought that was appropriate:

*I think it is the right balance, yes. Where there is a serious risk ... you know, we need to consider each case individually; and these numbers are very small, but they are very important; and I think the Consolidated Guidance does provide the right direction on that.*<sup>247</sup>

These contrasting views clearly illustrate the dangerous ambiguities in the Guidance – individual Ministers have entirely different understandings of what they can and cannot, and would and would not, authorise.

### *Authorising mistreatment*

180. In relation to CIDT, the Foreign Secretary, the Right Hon. Boris Johnson MP, said “*I think when it comes to cruel, inhuman and degrading treatment, it's less clear [that there is an absolute prohibition].*”<sup>248</sup> This was echoed by his predecessor, the Right. Hon. Philip Hammond MP, who told the Committee:

*Then we go to look at a submission where there is judged to be a serious risk of CIDT occurring ... where the benefit of the operation is such that it outweighs the risk of the CIDT occurring and mitigations, appropriate mitigations, can be put in place. This is a judgement. Clearly one has to make a judgement about the importance of the operation, the effect of the operation and how real the risk is and what the nature of the risk is.*<sup>249</sup>

181. However, other forms of mistreatment – such as denial of due process – are perhaps viewed as less serious than CIDT. SIS said:

*what we frequently have to come to terms with is this breach of due process, so extended detention times, sometimes outside their own domestic laws. ... but it is not uncommon, that we ask for and recognise the serious risk of [mistreatment], but in the context of due process, as opposed to the physical, rather more egregious examples of it on that list, although we recognise due process is an egregious breach as well.*<sup>250</sup>

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<sup>246</sup> Oral evidence – Foreign and Commonwealth Office, 9 June 2016.

<sup>247</sup> Oral evidence – Home Office, 2 March 2017.

<sup>248</sup> Oral evidence – Foreign and Commonwealth Office, 27 October 2016.

<sup>249</sup> Oral evidence – Foreign and Commonwealth Office, 9 June 2016.

<sup>250</sup> Oral evidence – SIS, 4 February 2016.

This was clearly a factor for the then Foreign Secretary, the Right Hon. Philip Hammond MP, who explained his approach by reference to section 7 of the Intelligence Services Act 1994 authorisation requests he had received in relation to some operations in HASTINGS:

*My position always was that we have to take a realistic view of what the situation was on the ground and if the reality was that it was taking people five or six days to be brought to the proper charging process rather than 48 hours that in itself was not a reason for refusing section 7 authorisation where valuable intelligence or a detention to \*\*\* ... was in question.*<sup>251</sup>

182. When asked about Ministers' differing interpretations of the Guidance – and specifically in relation to the very different views of two Foreign Secretaries – the Cabinet Office told the Committee:

*It's an ethical position, it is permissible for him [the Right Hon. Boris Johnson MP] to be more restrictive than the Consolidated Guidance, and he did, I think, specifically say that that position was based on his own principles. So I think you cannot remove an element of personal judgement from Ministers' eventual decision in these cases, and it's not unreasonable for different Ministers to take a different position.*<sup>252</sup>

**JJ. The Guidance is insufficiently clear as to the role of Ministers, and what – in broad terms – can and cannot be authorised. For example, the Guidance should specifically refer to the prohibition on torture enshrined in domestic and international law to make it clear that Ministers cannot lawfully authorise action which they know or believe would result in torture.**

**KK. The public must be sure that all decisions are based on the same legal and policy advice and within the same parameters – and that subjectivity is kept to a minimum. This is a structural weakness in the Guidance and the recent proposed revisions to the Guidance have not addressed these issues. The Guidance must provide clarity on what information is to be provided to Ministers when asking them to make a decision.**

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<sup>251</sup> Oral evidence – Foreign and Commonwealth Office, 9 June 2016.

<sup>252</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

## 8. RENDITION

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### Definition of ‘rendition’

There is no universally recognised legal definition of rendition, and it is not defined in domestic law.

The term is most commonly used to cover the extra-judicial transfer of an individual from one jurisdiction or State to another – this may itself be a form of mistreatment if it involves, for example, detention, transfer and/or interrogation in contravention of legal rules. ‘Extraordinary rendition’ is generally used to refer to rendition when there is a real risk of torture or CIDT.<sup>253</sup>

‘Circuit flights’ are a type of rendition flight in which an aircraft transits the UK on its way to or from an extraordinary rendition operation but without a detainee on board.

183. We have already reported on whether rendition should be included in the list of CIDT techniques contained in the Consolidated Guidance. Stepping away from the Consolidated Guidance, it is clear that there are a number of other concerns around policy and process on rendition that have still not been addressed since this Committee last reported on rendition in 2007.

184. Our Report, *Detainee Mistreatment and Rendition: 2001–2010*,<sup>254</sup> explores the UK’s knowledge of, and involvement in, the US rendition programme. It is clear that HMG and the Agencies were slow to grasp the significance of the programme and the reputational risk to the UK of being involved in it. We found the failure to consider the issues involved and then to develop a clear policy framework unacceptable. The question we have considered in this Report is whether there has been any improvement: is there now clarity over policy and process? Do the aviation laws now enable the collation of the information necessary to ensure that the UK will not unknowingly be involved in renditions?

### *Is rendition legal?*

185. While some human rights organisations argue that all rendition is unlawful,<sup>255</sup> under international law some forms of rendition are justifiable: for example, an alleged war criminal being transported for trial at The Hague from a failed State that has no mechanisms for agreeing

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<sup>253</sup> The transfer of prisoners under certain international frameworks, for example the Geneva Conventions, can be undertaken lawfully in some circumstances. However, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) prohibits a State party from expelling, returning or extraditing a person where there are substantial grounds for believing they would be in danger of being subjected to torture (although the US entered a reservation upon ratifying the Torture Convention to the effect that a person must be “*more likely than not*” to be tortured for this prohibition to operate in relation to the US). Additionally, the European Court of Human Rights ruled that a State party could not extradite where it was aware that there was a real risk that the person would be subject to inhuman or degrading treatment in *Soering v. UK* (1989) 11 EHRR 439.

<sup>254</sup> ISC, *Detainee Mistreatment and Rendition: 2001–2010*, 28 June 2018, HC 1113 (2017–19).

<sup>255</sup> For example, Amnesty International and Reprieve – see Foreign Affairs Select Committee, *Human Rights Annual Report 2008*, 9 August 2009, HC 557 (2008–09), paragraph 14.



or upholding an extradition treaty.<sup>256</sup> Some countries – most notably the UK’s close partner, the US – have formal policies authorising rendition.

186. The UK is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and has incorporated a prohibition on torture into domestic law. Furthermore, ‘complicity’ in an extraordinary rendition would also be unlawful under both UNCAT and domestic laws on secondary liability and joint enterprise (however, there is no specific offence of rendition in the UK).<sup>257</sup> Complicity can include providing resources to aid a rendition – whether monetary or use of airspace – and providing intelligence to enable a rendition to take place. More detail of the relevant legal framework is contained in Chapter 2 of this Report.

### ***What is the Government’s policy on rendition, and what guidance is available?***

187. The case of *R v. Mullen* provides the basis of the UK’s position on rendition. In 1989, SIS facilitated the transfer of Nicholas Mullen from Zimbabwe to the UK in order for him to stand trial on charges related to Irish republican terrorism. Mr Mullen’s conviction was overturned by the Court of Appeal in February 1999 on the grounds that his deportation represented a “*blatant and extremely serious failure to adhere to the rule of law*” and involved a clear abuse of process.<sup>258</sup> The UK has not sought to conduct such renditions to the UK since.

188. In terms of the UK enabling or supporting others to conduct a rendition, HMG policy was most recently set out in a Parliamentary adjournment debate in June 2016, when the Government stated:

*We oppose any form of deprivation of liberty that amounts to placing a detained person outside of the law including so called extraordinary rendition ... We should not make the mistake of thinking that all rendition is necessarily unlawful ... Rendition may in certain circumstances be acceptable. For example we would support the transfer of an individual to safety, from a place there was no apparent legal framework, or if there was some other legal basis for the transfer, such as a United Nations Security Council resolution.*<sup>259</sup>

189. When we sought further clarification from the FCO as to how it assesses rendition requests, it set out its position as follows:

*Should an ally seek our assistance in transferring detainees, our policy is to look at each request on a case by case basis. We would decide whether or not to assist*

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<sup>256</sup> For example, see: (i) UN Security Council Resolution 138 on the rendition of Adolf Eichmann; (ii) *Sanchez v. France* ECtHR 28780/95 on the rendition of Carlos the Jackal from Sudan to France; and (iii) in 2003, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered a defendant’s challenge to his detention on the basis that he had been rendered. The court stated that there was a balance to be struck “*between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.*” *The Prosecutor v. Dragan Nikolic* – Case No IT-94-2-AR73, 5 June 2003.

<sup>257</sup> In 2009, the Chairman of the All-Party Parliamentary Group on Extraordinary Rendition (APPGER) proposed changes to the law to create specific rendition offences. The Government has failed to respond to the proposal. [Source: APPGER, *Extraordinary Rendition: Closing the Gap: A Proposal to Criminalise UK Involvement* (2009).]

<sup>258</sup> *R v. Mullen* [1999] EWCA Crim 278.

<sup>259</sup> Hansard, HC Deb, 29 June 2016, vol. 612, col. 442 (‘UK Involvement in Rendition’).

*taking into account all circumstances, including our obligations under domestic and international law.*<sup>260</sup>

190. In terms of the form such assistance might take, the Consolidated Guidance implicitly covers the provision of intelligence to enable a rendition, because a rendition would necessarily involve a detainee.<sup>261</sup> However, the Guidance does not cover the provision of practical assistance to enable a rendition, such as the use of UK territory or airspace.

### ***Use of British territory (with a detainee on board)***

191. The ally most likely to seek the UK's assistance with a rendition is the US. It is now a matter of public record that the US has used British territory when conducting extraordinary renditions (as the US itself admitted in 2008). We have questioned the FCO on what processes are now in place to ensure that the US will not use UK territory to conduct rendition operations without the UK's permission. The FCO cited the clear policy statements of the Obama administration, and the annual statement of assurance provided since 2008 by the US Government that it has not used UK airspace or territories in the preceding year for the movement of detainees.<sup>262</sup>

192. In relation to the former, we note that the US administration has since changed and, given the various pronouncements from the Trump administration about the increased use of Guantanamo Bay for the detention of those allegedly involved in Al Qaida, the Taliban and Daesh, the new administration appears to take a different view of detainee issues. Statements of the previous administration cannot therefore be relied on.

193. In terms of the annual statement of assurance, this is retrospective and cannot therefore be used to ensure that the US will not use UK territory for rendition purposes without prior permission.<sup>263</sup> When asked about the value of a retrospective assurance, the FCO said "*our confidence in the value that the US continues to put on its access and co-operation with us to our facilities, our military co-operation, means that they would be taking a considerable risk if they did ignore the assurances that they had given.*"<sup>264</sup> However, this view notably fails to take into account the lessons of the past: the events of 2001–2010 clearly demonstrate that the US is prepared to take action which will upset its closest allies should circumstances dictate.

**LL. The Committee is concerned to note that, despite past events, HMG has failed to introduce any policy or process that will ensure that allies will not use UK territory for rendition purposes without prior permission. Given the clear shift in focus signalled by the present US administration, reliance on retrospective assurances and the voluntary provision of passenger information – as at present – cannot be considered satisfactory.**

<sup>260</sup> Written evidence – Foreign and Commonwealth Office, 14 November 2014.

<sup>261</sup> We have recommended earlier in this Report that this should be explicit.

<sup>262</sup> Written evidence – Foreign and Commonwealth Office, 27 July 2016. The statements and annual assurances followed the admission by the US Government to the UK Government in 2008 that in 2002 two rendition flights had transited Diego Garcia, a British Overseas Territory.

<sup>263</sup> The only formal process that could form a barrier to this misuse is the Diplomatic Flight Clearance (DFC) policy but this system relies on the voluntary provision of passenger information.

<sup>264</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

### ***Circuit flights (i.e. without a detainee on board)***

194. An aircraft transiting the UK on its way to or from an extraordinary rendition operation, but without a detainee on board, is often referred to as a ‘circuit flight’.<sup>265</sup> In 2008, the then Foreign Secretary, the Right Hon. David Miliband, wrote to the Right Hon. Andrew (now Lord) Tyrie, setting out that:

*We do not consider that a flight transiting our territory or airspace on its way to or from a possible rendition operation constitutes rendition. Nor do we consider that permitting transit or refuelling of an aircraft without detainees on board without knowledge of what activities that aircraft had been or would be involved in, or indeed whether or not those activities were unlawful, to be unlawful in itself.*<sup>266</sup>

In effect, the FCO does not view transit flights as an issue: it is only if there is a detainee on board a flight that it considers that UK complicity in rendition could arise. Furthermore, the FCO position appears to be that it is absolved from any notion of complicity in permitting transit or refuelling of a possible rendition flight, because it has no knowledge of what the aircraft has done or is doing.

195. When asked whether it took any action to attempt to identify circuit flights, the FCO explained:

*Given the volume and range of allied traffic that makes use of the UK for reasons that are directly and indirectly beneficial to the UK, attempts to block flights by aircraft that could potentially have been used for rendition at some point but which were also performing other duties would have almost certainly undermined key areas of cooperation without providing a more effective guarantee than currently existed that rendition would not occur.*<sup>267</sup>

196. This fails to recognise the possibility that a strong stand by the UK on identifying and putting a stop to the possible use of its territories or airspace for unlawful rendition might have entirely the opposite effect and could engender respect for the UK’s laws and position on this matter rather than undermining co-operation.

**MM. The FCO’s position that the UK is absolved from complicity in permitting transit or refuelling of a possible rendition flight, because it has no knowledge of what the aircraft has done or is doing, is not acceptable.**

### ***Aviation records: flight plans***

197. We have examined the current aviation laws to assess whether they can assist in the identification of rendition flights. It has been challenging to gather a full picture as the laws are

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<sup>265</sup> As set out in our Report, *Detainee Mistreatment and Rendition: 2001–2010*, there have been a number of investigations into the use of UK airports by US aircraft on rendition operations. In 2008, the FCO passed a list of 391 possible rendition/circuit flights through UK airports/airspace to the US for verification; however, the US refused to consider it. In 2011, The Rendition Project was established. This is an academic project gathering information about the US rendition programme (including the possible use of UK airports) from 2001 to 2006. In 2014, the Lord Advocate instructed Police Scotland to investigate circuit flights landing at Scottish airports. The investigation has yet to report.

<sup>266</sup> Letter from the Foreign Secretary to the Chair of APPGER, 5 June 2008 ([www.extraordinaryrendition.org/component/jdownloads/send/23-foreign-office/260-miliband-reply-05-06-08.html](http://www.extraordinaryrendition.org/component/jdownloads/send/23-foreign-office/260-miliband-reply-05-06-08.html)).

<sup>267</sup> Written evidence – Foreign and Commonwealth Office, 14 November 2014.

complex and the Home Office, in consultation with other relevant Government Departments, has declined to meet us to discuss the matter.<sup>268</sup> In terms of the information provided by aircraft (and which could be used to identify a rendition flight), under the Chicago Convention on International Civil Aviation 1944 a ‘flight plan’ must be filed for all flights crossing international borders. The flight plan includes information on the aircraft’s identity, route and timings but not any details on passengers.

198. State flights (which include diplomatic, military, customs and police services) are not subject to the Chicago Convention and are not therefore required to file a flight plan under Convention rules. However, they must seek authorisation before flying over, or landing on, the territory of another State. The UK operates the Diplomatic Flight Clearance (DFC) system for requests from State aircraft for permission to enter UK airspace or land on UK territory. MOD operates the DFC procedure using a traffic light system. MOD grants permission in routine cases, but refers to the FCO any flight requests where: the requesting state is ‘amber’ or ‘red’ on the political clearance list; the flight is not ‘routine’ (as defined by cargo, personnel, destination and purpose); or, the flight is scheduled to land in an ‘amber’ or ‘red’ country as part of the trip. The FCO can then request further information about the purpose of the flight and the individuals and cargo it will be carrying.

199. The FCO stated:

*If a foreign government were to approach HMG now with a request to pass through the UK or overseas territory for a rendition, such requests would be considered on a case-by-case basis. The request would only be granted where the purpose of the transit complied fully with international law. ... On receipt of such a request, the FCO would consult the relevant government departments to consider the legal, diplomatic, security and political implications, including seeking Ministerial approval where appropriate, and consulting with the Territory’s elected government as appropriate, before deciding whether to grant or decline a request.*<sup>269</sup>

The FCO has said that it is not aware of any requests having been made since 2008 to approve the transit of a rendition flight, by a State aircraft, through British territory.<sup>270</sup> (A single request to allow “movement of a criminal being extradited to the US via Diego Garcia” was made in July 2014 but, when HMG sought further details from the US State Department, it was found that it had no knowledge of the request, which then “became inactive”).<sup>271</sup>

## ***Aviation records: passenger information***

### ***General aviation aircraft***

200. Flight plans which have to be filed under the Chicago Convention do not include passenger details. Instead, a voluntary system is operated for all general aviation aircraft (aircraft not operating to a specific and published schedule and not State aircraft) where

<sup>268</sup> We were told that “Stakeholders preferred to submit full-staffed positions in writing.” [Source: written evidence supplied by the Home Office under cover of a letter from the Cabinet Office, 12 March 2018.]

<sup>269</sup> Written evidence – Foreign and Commonwealth Office, 1 September 2016.

<sup>270</sup> Ibid.

<sup>271</sup> Written evidence – Foreign and Commonwealth Office, 14 November 2014.

they are asked to provide a General Aviation Report (GAR) which does include passenger information.

#### Use of private aircraft

The Rendition Project stated that, during 2001–2006, whilst the CIA set up a group of shell companies operating 25 to 30 aircraft, some of which it is alleged were used for rendition,<sup>272</sup> the majority of the aircraft thus far identified as having been used in the CIA's rendition programme were provided by private companies. These would have fallen under the voluntary GAR system, i.e. they were not under any legal obligation to provide passenger information.

This demonstrates that it is essential that all types of flights and aircraft provide records, and that these records are comprehensive and accessible. Without these measures in place, it will be difficult to identify or track any unlawful activity or failure by foreign States to obtain the necessary permission or clearance.

201. In 2007, in response to this Committee's concern that the voluntary GAR system was systemically flawed,<sup>273</sup> HMG noted that:

*The Border Management Programme, jointly directed by Home Office and Treasury Ministers, has begun a thorough review of general aviation. Its initial focus is the completion of a comprehensive threat and risk assessment, ... this risk-assessed approach will remain the most effective way of policing such flights until the introduction of the e-Borders programme.*<sup>274</sup>

A UK-wide, consistent GAR system was introduced in 2013 and since then the compliance record (which was worryingly low) has improved and is currently 90 per cent. Aircraft which do not comply are tracked by UK Border Force which has the right to examine general aviation aircraft passengers for immigration purposes and has access to all GARs. In addition, the police have the right to demand passenger information from any general aviation aircraft arriving in or leaving the UK and to examine passengers.

202. However, the Home Office noted: "*Border Force Officers are not trained to identify rendition flights and it is unlikely that Border Force would be made aware of, or asked to meet, a rendition flight.*"<sup>275</sup> The Home Office explained that the FCO holds the overall lead on rendition issues and would co-ordinate a UK response to a rendition flight. The FCO has offered no information on how a rendition flight could be identified or how it would co-ordinate a response were that to occur. The Committee was told "*If we had strong verifiable information that an individual on board [a private flight] was being rendered contrary to international law principles, the police would attend the plane on arrival to investigate*",<sup>276</sup> but it was not explained how such information would ever be received in the first place, given that

<sup>272</sup> This was exposed in 2005 by *The Washington Post*. The Rendition Project, building upon this work, created a searchable database of suspected aircraft utilised in alleged rendition flights, [www.therenditionproject.org.uk](http://www.therenditionproject.org.uk).

<sup>273</sup> ISC, *Rendition* (Cm 7171, 2007), page 63.

<sup>274</sup> HM Government, *Government's Response to the Intelligence and Security Committee's Report on Rendition* (Cm 7172, 2007), page 9.

<sup>275</sup> Written evidence – Home Office, 6 April 2017.

<sup>276</sup> Written evidence – Foreign and Commonwealth Office, 20 November 2017.

flight operators are not obliged to volunteer passenger information or why someone carrying out an unlawful act is likely to volunteer passenger information.

203. In 2015, HMG amended the Immigration Act 1971 and the Immigration, Asylum and Nationality Act 2006 through the Counter-Terrorism and Security Act 2015, in order to allow for the introduction of regulations which will mandate the provision of advance passenger information for aircraft flying in and out of the UK. However, these regulations have yet to be published.

204. The e-Borders programme, cited in 2007 as intended to provide a more complete answer to these issues, was subsequently abandoned. A National Audit Office report in 2015 found that:

*The Department has not yet built an integrated system and processes are therefore inefficient, with the Home Office unable to fully exploit the potential of the data it is receiving. Current processes include extensive manual effort, duplication of effort and restrict the use that can be made of travel history ... information about travellers is still being processed on two systems that do not share data or analysis effectively.*

### *State aircraft and transit/overflights*

205. Perhaps more worryingly, no passenger information is either requested or provided for transit flights and overflights, or for diplomatic/State flights. In terms of the latter, the DFC form requests no passenger information other than VIP details. The Home Office told the Committee that:

- Border Force does not compel UK or foreign government/military flights to provide advance service, crew and passenger information;
- the RAF, where it can, provides advance notification of arriving foreign government/military flights to Border Force but, where a foreign government/military flight is arriving at a non-RAF military operated airfield, such as a US Air Force base within the UK, the RAF does not routinely provide such notification; and
- where Border Force officers receive advance notification or are aware of the expected arrival of foreign armed forces personnel, they may decide, on an intelligence-led basis, to carry out checks remotely or to physically meet the aircraft.

Both transit flights and diplomatic flights could therefore theoretically be used to hide the presence of a detainee.

206. The FCO told the Committee that flight requests are brought to its attention through the DFC: MOD notifies the Security Policy Department at the FCO, which then forwards it to the relevant policy lead, usually at Geographical Desk Officer level. The flight request may thereafter become the subject of legal advice or a note to a Minister. The FCO went on to say that “Any requests indicating that the UK might be complicit in ‘rendition’ planned by a third country would automatically be submitted for FCO legal advice and to the Foreign Secretary



and Defence Secretary for a decision.”<sup>277</sup> As is the case with general aviation aircraft, however, the FCO did not explain how such a flight would be identified unless the information was provided voluntarily by the flight operator, nor was it able to provide any information as to what guidance was available on identifying rendition outside of the DFC process.

207. Police Scotland has vividly described the limitations on its powers in relation to diplomatic flights with reference to a military aircraft carrying US senators that landed at Prestwick en route from North Africa:

*As head of Border Policing Command at the time, I did receive a telephone call from a colleague, Bob ... on his very first day at Prestwick airport, when he was confronted with a particular challenge: that our colleagues in Border Force were aware of an aircraft, an American aircraft, having landed at Prestwick, having departed – I can't remember the specific country in Africa, North Africa, if I recall – and Border Force, acutely aware of potential allegations in the past around extraordinary rendition, wished to meet that aircraft and wished to board the plane. The chief immigration officer was seeking some guidance in terms of what can we or can we not do, and that guidance also involved them having a conversation with the Americans, who provided them with some guidance. And that guidance was that we can have the individuals on the aircraft come off and meet you on the tarmac; however, you cannot come on board the aircraft. So we were then presented with Bob in the distance watching Border Force engaging with the Americans on the tarmac, taking them on their word that there was no one left on board their aircraft.*<sup>278</sup>

208. Despite these obvious limitations, MOD told the Committee: “We are confident that on the basis of the Diplomatic Flight Clearance process, and our relationships with our allies, that no rendition flights are facilitated without our knowledge.”<sup>279</sup>

## **Levels of confidence**

209. In its 2007 Report on rendition, the ISC said:

*We are concerned that the Government departments have had such difficulty in establishing the facts from their own records in relation to requests to conduct renditions through UK airspace. These are matters of fundamental liberties and the Government should ensure that proper searchable records are kept.*<sup>280</sup>

The paucity of record-keeping has been similarly highlighted by academics such as The Rendition Project and by Police Scotland in seeking to conduct a criminal investigation.<sup>281</sup>

210. There have been changes and improvements in record-keeping and the increase in completion of GARs is welcome. However, the situation is not yet such that we are confident that incidents will be spotted. In particular, we note that:

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<sup>277</sup> Written evidence – Foreign and Commonwealth Office, 20 November 2017.

<sup>278</sup> Oral evidence – Police Scotland, 26 January 2017.

<sup>279</sup> Written evidence – MOD, 18 December 2017.

<sup>280</sup> ISC, *Rendition* (Cm 7171, 2007), pages 17–18.

<sup>281</sup> Whilst much of the evidence given to this Committee by Police Scotland has not been quoted in this Report due to the ongoing police investigation into circuit flights, it provided very helpful context as to the systems and processes used when identifying a potential rendition flight and the evidence needed to confirm that fact.

- the new regulations which will mandate the provision of passenger information have not yet been published or brought into force;
- even when Border Force or the police have the information to identify a suspicious flight, their powers to take action are limited;
- there are loopholes and no thought is being given as to how to close them;
- there is no cross-government system in place for the retention of information which would be necessary in order to prove breaches of law in extraordinary rendition cases; and
- the e-Borders programme has been abandoned.

211. We were told in 2007 that the FCO had assumed responsibility for rendition policy. When we questioned the FCO initially in this Inquiry, it described its role more narrowly as being on “*legal issues that can arise when crossing international borders*”.<sup>282</sup> It subsequently accepted that it “*leads on rendition policy within Government*”, going on to explain that “*If necessary, and in coordination with other relevant government departments, the FCO would also be responsible for reviewing rendition policy.*”<sup>283</sup> However, it does not appear that this is proactive, in that it is not kept under regular review. Neither the FCO nor other Government Departments questioned have been able to provide a comprehensive picture of all areas of responsibility where rendition comes into play. Whilst individual spheres of responsibility are held by a number of different departments, there is no evidence that the FCO holds the ‘clear lead’ on rendition policy and there is no evidence of any strategic overview or oversight either from the FCO or HMG more widely.

212. When asked if it was confident that any rendition flight could now be identified, the FCO said: “*where aircraft land in the UK, at a UK airport, where they are government or military flights, which have been ... in the past, used for rendition purposes, diplomatic clearance is required. The diplomatic clearance process that is run between the MOD and the Foreign Office is, we think, a rigorous one.*” This fails to acknowledge that a number of alleged circuit flights used commercially leased aircraft that would not have been subject to that policy, even if it had been in place at the time, and still would not be subject to it today.<sup>284</sup>

**NN. While there have been small improvements made since 2007, we remain unconvinced that the Government recognises the seriousness of rendition and the potential for the UK to be complicit in actions which may lead to torture, CIDT or other forms of mistreatment.**

**OO. There is no clear policy on, and not even agreement as to who has responsibility for, preventing UK complicity in unlawful rendition. We find it astonishing that, given the intense focus on this issue ten years ago, the Government has still failed to take action. Through this Report, we formally request that HMG should publish its policy on rendition, including the steps that will be taken to identify and prevent any UK complicity in unlawful rendition, within three months of publication of this request.**

<sup>282</sup> Written evidence – Foreign and Commonwealth Office, 7 September 2017.

<sup>283</sup> Written evidence – Foreign and Commonwealth Office, 20 November 2017.

<sup>284</sup> Oral evidence – Cabinet Office, Home Office and Foreign and Commonwealth Office, 30 November 2017.

## 9. AGILITY

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213. The Agencies have recognised that they were not sufficiently agile in responding to events after 9/11. The Chief of SIS commented in a letter to the Prime Minister in 2014, responding to the interim report of Sir Peter Gibson's Detainee Inquiry:

*The demands placed on the security and intelligence services were huge. We had to deal with a sudden upsurge in counter terrorism work for which we were not prepared. ... In short we were simply not prepared for the work we became involved in.*<sup>285</sup>

214. This failure to adapt quickly to significant changes in circumstances, and the pressure they were operating under as a result, has been cited by the Agencies as one of the key reasons why they failed to recognise the emerging signs of detainee mistreatment and the US rendition programme. The position the Agencies are now in, the strategies they have developed and the management structures in place are therefore critical if we are to have confidence in the Agencies in the future.

215. SIS has recognised that:

*The legacy from the detainee casework of a decade ago has taught us broader lessons about conducting intelligence operations in a challenging compliance space. We learned that we needed to build up and maintain our legal and compliance capability and give staff in those directorates the same status and authority as those in operational directorates. We needed to identify risks earlier and share them with Ministers, to train staff better in operational compliance, and to be better prepared for legal challenge and operate and record accordingly.*<sup>286</sup>

216. Reviewing past performance is essential in order to inform future outcomes, so we have examined whether the Agencies are alert to emerging matters of concern and whether they are well placed to respond. This is not about identifying a specific threat and planning for it but about the way the Agencies are resourced and structured, and whether those structures and resources are such that they will allow for a rapid change of approach and operation where necessary.

217. In this chapter, we examine what change has taken place in the key areas of concern identified in our Report, *Detainee Mistreatment and Rendition: 2001–2010*, including: processes whereby lessons are learned; organisational change; inter-Agency and cross-Whitehall frameworks; testing the changes; and preparedness for identifying major new security events.

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<sup>285</sup> Letter from the Chief of SIS to the Prime Minister, 26 February 2014, regarding the SIS response to the issues raised in Sir Peter Gibson's *Report of the Detainee Inquiry*.

<sup>286</sup> Classified SIS report (2014) responding to the issues raised in: Sir Peter Gibson, 'The Report of the Detainee Inquiry' (closed version) (2013).

## ***What has changed?***

### *Lessons learned*

218. The Committee has been told that none of the Agencies carried out a formal review of their performance in the aftermath of 9/11. It is not clear whether this was because they did not think there was a need, or due to pressures of operational work leaving little time for more reflective work, or whether it was not, culturally, an exercise that was generally undertaken in those organisations.

219. However, all three Agencies and MOD have provided evidence of active programmes of change over the last ten years in response to operational, political and technological issues. SIS, for example, told the Committee:

*Since 9/11, SIS has managed a number of challenging incidents including 7/7, 21/7, our deployment to SKEGNESS in \*\*\* and the Snowden leaks. The lessons we have learned from dealing with those and other major events in which SIS have played a significant role have helped us to adapt and constantly improve our business model.<sup>287</sup>*

**PP. The Committee is reassured that reviews now take place within the Agencies but recommends that there must be a formal, documented ‘lessons learned’ follow-up process in place, following any major event.**

### *Organisational change since 2010*

#### *(i) Flexibility*

220. The Committee questioned each of the Agencies as to whether they had reviewed their corporate structures in order to establish whether they were sufficiently flexible – thereby reducing the risk that a sudden unexpected change in direction would leave them on the back foot:

- SIS described a major programme which has taken place since 2010 including, for example, the creation of a directorate to increase agility and efficiency in support of overseas missions:<sup>288</sup>

*As a result of the changes ... decisions are made faster on the basis of an improved evidence base of impact. Easier dissemination of lessons learned and alignment of compliance, policy and skills across Mission teams have been enabled. ... For example, the new structure enabled [a senior SIS officer] to respond effectively to urgent demand on PEEBLES in \*\*\*, surging bodies to the PEEBLES Mission and drawing on expertise from other areas of the Service to increase productivity in response to increased customer requirement.<sup>289</sup>*

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<sup>287</sup> Written evidence – SIS, 13 September 2017.

<sup>288</sup> Written evidence – SIS, 6 May 2015.

<sup>289</sup> Written evidence – SIS, 13 September 2017.

- MI5 has undergone a similar change programme, creating a senior post in 2011 to focus on strategic leadership<sup>290</sup> and, more recently, establishing another new senior post to lead on strategic issues and risks. MI5 has told the Committee that these issues are regularly discussed by its management board.<sup>291</sup>
- GCHQ told us: “*Director level strategy owners set the strategic outcomes we need to achieve and how we will achieve them, which then drives the GCHQ investment process which resources this, it is reviewed monthly through strategy owners responding to changes in mission environment, priorities and resource consumption.*”<sup>292</sup>

221. All of the Agencies were able to provide details of how internal structures and processes had been redesigned to ensure legal input to policy and decision-making at all stages.

### *(ii) Knowledge of Field Officer activity*

222. Evidence given to our Inquiry on Detainee Mistreatment and Rendition during 2001–2010 indicated a lack of knowledge, on the part of SIS and MI5, as to the experiences of their officers in the field (this was partly due to inadequate communications equipment supplied to those officers).<sup>293</sup>

- SIS informed the Committee that operational work is now conducted under a series of mandates whereby a mission is planned and overseen from the centre, regardless of the location or locations involved, with a senior employee deployed locally to oversee work and organise resources. It also reported that changes to IT connectivity and a focus on employees’ responsibility to record information have reduced the risk that activities overseas are not properly communicated to or scrutinised by Head Office.<sup>294</sup>
- MI5 said that resources for officers in the field have significantly improved since 2001 as \*\*\* IT has improved and MI5 officers are usually deployed overseas with SIS. Proposals for deployment are considered by an operational legal adviser. Any deployment is overseen by a controller, an operational security adviser and a senior manager based in the UK. This structure is responsible for any escalation of issues.<sup>295</sup>

### *(iii) Analysis of training needs*

223. The lack of relevant training was another of the problems identified. The Agencies and MOD have put in place comprehensive and flexible training programmes on issues related to the Consolidated Guidance. More importantly, all three of the Agencies have processes in place for identifying changed or new training needs. Additionally, SIS and MI5 have established a joint professional development centre which provides a further route by which the need for new training may be identified. SIS did however caveat its response explaining that, as its training was largely produced in-house:

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<sup>290</sup> Written evidence – MI5, 17 May 2015; written evidence – MI5, 10 June 2016.

<sup>291</sup> Written evidence – MI5, 10 June 2016.

<sup>292</sup> Written evidence – GCHQ, 18 September 2017.

<sup>293</sup> ISC, ‘Detainee Mistreatment and Rendition: 2001–2010’ (closed version) (2018).

<sup>294</sup> Written evidence – SIS, 6 May 2015.

<sup>295</sup> Written evidence – MI5, 19 May 2015.

*any requirement significantly and urgently to develop new guidance or training would require a balance to be struck between the requirement to devise and deliver the new training, and the operational requirements placed on the Agencies by the Government.*<sup>296</sup>

**QQ. Provision of proper training is essential if officers are to be confident in their actions and feel supported. It must be given significant consideration and viewed as an integral part of any deployment, even when operational pressures are elevated.**

*(iv) Record-keeping*

224. Deficient record-keeping by MI5 and SIS has been a feature of many ISC investigations. Since 9/11, until as recently as the investigation into the death of Fusilier Lee Rigby conducted by the Committee in 2013–2014, we have found significant failures in record-keeping which have had serious ramifications.

225. The Agencies appear to have recognised the need to address this:

- SIS told the Committee that it is now in the process of introducing a new information management system, which it believes will reduce risks concerning information and records – ensuring that it is in better control of its data and can meet disclosure requests more effectively and work more efficiently. It has also cited improved training on the need for good record-keeping.
- MI5 has formed a specific department for information-handling \*\*\* and has introduced a new data management system, \*\*\*. The project has had some problems, including being over budget – but the Committee was told that it was in operation by November 2017.<sup>297</sup>

**RR. Whilst SIS and MI5 have provided assurances that their record-keeping practices have improved and continue to do so, these are as yet untested. Record-keeping is an issue that the Committee has raised repeatedly over a number of years and which has played a major part in our Report, *Detainee Mistreatment and Rendition: 2001–2010*. The importance of proper record-keeping must be communicated to staff and action taken to ensure that processes are followed.**

*Inter-Agency and cross-Whitehall frameworks*

226. The lack of a cross-Governmental national security framework has also been cited as contributing to the failures of the 2001–2010 period. We have considered this issue at a tri-Agency level, at a broader cross-Government level, including with Ministers, and at a global level.

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<sup>296</sup> Written evidence – SIS, 6 May 2015.

<sup>297</sup> Oral evidence – MI5, 1 December 2016; written evidence – Cabinet Office, 12 March 2018.



*(i) Inter-Agency*

227. The Agencies consider that the level of collaboration between them has undergone a drastic transformation over the last 15 years and they are increasingly working together on corporate services and operationally. GCHQ told the Committee:

*Our operational partnerships with SIS and MI5 are thoroughly transformed in comparison to pre 7/7 days. Counter-terrorism was the catalyst and initial focus for much of this, but a high degree of cooperation and integration now exists across the intelligence and security missions.*<sup>298</sup>

SIS referred to collaboration with the Agencies (and other partners) as “core to SIS”: it is one of the risks regularly monitored at Board level.<sup>299</sup>

228. However, challenges remain. GCHQ and MI5 identified incompatibility of technologies as a barrier to closer collaboration between the Agencies, and GCHQ noted that there is significant effort being devoted, across the Agencies, to addressing this matter. SIS identified further issues – for example, different tolerances between the Agencies around exposure of staff names and public avowal, as well as different terminology and corporate structures. Nevertheless, it was clear to the Committee that the Agencies were now looking closely at such matters to identify solutions.

*(ii) Relationships with Ministers*

229. Our Report, *Detainee Mistreatment and Rendition: 2001–2010*,<sup>300</sup> demonstrates that Ministers were not as informed as they should have been. The relationship between the Agency Heads and their Ministers does now appear to be closer: the Foreign Secretary meets with the Heads of SIS and GCHQ formally around once a month and sees them informally on a weekly basis;<sup>301</sup> the Home Secretary has the same level of contact with MI5 and is supported by the Office for Security and Counter-Terrorism, within the Home Office, in his dealings with MI5. In addition, all Agency Heads attend the weekly National Security Council (NSC) meetings at which Ministers are present.

230. However, the Committee questioned SIS about how well this works in practice. It became apparent in 2015, when the Committee questioned the Foreign Secretary about redactions to the US Senate Report on Detention, that the Foreign Secretary knew very little about the redaction exercise, even though SIS had been briefing FCO officials. The Chief of SIS did not know whether, or what, the FCO official had relayed to the Foreign Secretary.<sup>302</sup> This indicates to us that the information flow is not always as good as it should be.

**SS. While communication between the Agency Heads and Ministers is greatly improved, there is a question as to whether the processes in place between the lead Departments and the Agencies are as robust as the parties believe. Information appears sometimes to get ‘stuck’ in policy Departments and steps should be taken to ensure that Ministers are kept fully informed.**

<sup>298</sup> Written evidence – GCHQ, 19 May 2015.

<sup>299</sup> Written evidence – SIS, 6 May 2015.

<sup>300</sup> ISC, *Detainee Mistreatment and Rendition: 2001–2010*, 28 June 2018, HC 1113 (2017–19).

<sup>301</sup> Oral evidence – Foreign and Commonwealth Office, 27 October 2016.

<sup>302</sup> Oral evidence – SIS and MI5, 22 January 2015.

(iii) *Cross-Whitehall*

**Structures and strategies**

In 2010, HMG published the National Security Strategy. This was revised and updated in 2015 and set out counter-terrorism and counter-extremism policy for the following five years.

The strategy is owned by the National Security Secretariat and informs the work of the NSC, also established in 2010, which meets weekly to identify and monitor national security risks and opportunities, provide resilience by being prepared for all kinds of emergencies, and work on alliances and partnerships to generate a stronger response on national security.

The Home Office also published a specific policy on counter-terrorism, CONTEST, in 2011. This too was reviewed in 2015 and revised in June 2018.

231. All of the Agencies believed that the new structures, headed by the NSC, meant that they would not find themselves in the position they did after 9/11. MI5 noted:

*The effective working relationships we have built at all levels of the organisation with the other Agencies and Whitehall departments, and with cross-Government structures such as the National Security Council, have ... significantly reinforced our ability to identify and manage emerging strategic risks.*<sup>303</sup>

(iv) *Overseas partners*

232. The Agencies' relationship with the US remains the closest partnership across the intelligence community globally. Any change in US policy on treatment of detainees would therefore have significant ramifications. The Agency Heads told the Committee that they were aware of this and were monitoring the situation given recent pronouncements by the US President, but had not yet seen any reason why the relationship should change (this discussion took place prior to the 2018 State of the Union address). The cross-Agency view was that most of what was being said and written was speculation.<sup>304</sup> The Director General of MI5 commented:

*On the questions about whether this signals a likelihood to return to forms of abuse of detainees, I think we spent enough time in this room talking about that for you to know I would be very highly alert to any changes like that. I have communicated internally already about this in MI5, that, you know, whatever happens, MI5 will operate within the law and by our values.*<sup>305</sup>

**TT. The Committee notes that the Agencies are monitoring the actions of their US liaison partners in order to identify at an early stage any shift in policy on detainees. It is essential that this is taken seriously given the grave repercussions of their failure to detect the change in US working practices that occurred after 9/11.**

<sup>303</sup> Written evidence – MI5, 10 June 2016.

<sup>304</sup> Oral evidence – GCHQ, 8 December 2016; oral evidence – SIS, 17 November 2016.

<sup>305</sup> Oral evidence – MI5, 1 December 2016. The President had previously made clear his intention to keep open Guantanamo Bay – most notably in an address to supporters in Nevada in early 2016.

## Testing the changes

233. While there have been significant changes over the past 17 years, many are as yet untested by an event as serious as 9/11. There is therefore a question as to whether the Agencies can be sure that the changes implemented will achieve their purposes.

234. Nevertheless, the Agencies have told us of a number of events where they consider that their improved structures and agility have made a real difference to how they were able to respond:

- SIS cited the application of a process introduced in 2013 to improve the recording of operational decisions, in response to the Manchester bombing, and also how the lessons it had learned from dealing with the Snowden leaks had enabled it to improve its response to the March 2017 WikiLeaks release on CIA computer network exploitation capabilities.<sup>306</sup>
- MI5 cited the handling of the 7/7 attacks, its assumption of the lead responsibility for counter-terrorism in Northern Ireland in 2007, and preparation for the Olympics, as key examples where changes implemented after 9/11 had been tested. Further changes had been introduced following a post-Olympics ‘lessons learned’ exercise. MI5 also referred to its “*important role in National Exercises to test readiness across HMG, military and law enforcement, emergency services and others for threats which could materialise in future, such as a CBRN attack or marauding firearms incident.*”<sup>307</sup> The Committee notes, however, that problems such as information-sharing/collaboration with the police which have been identified in a number of ISC reports, most recently in its *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, had not been addressed. In evidence to the Committee in 2016, the then Home Secretary, the Right Hon. Theresa May, said that there had been significant changes in governmental collaboration on counter-terrorism, pointing to the relationship between the police and MI5 specifically in this regard,<sup>308</sup> although the Committee notes that this is still work in progress: collaboration between the police and MI5 is a matter referred to a number of times in the recent Anderson report on the 2017 attacks.<sup>309</sup>
- GCHQ gave details of its response to the Mumbai attack and the Arab Spring, demonstrating the use of working models introduced post 9/11. It also told the Committee that changes implemented following 7/7 to address issues identified in the flexibility of employees and the organisation’s ability to reallocate staff meant that GCHQ’s response to the demands of the Olympics in this respect was much better,<sup>310</sup> and it had planned, amongst other things, a response to a Paris-style attack in the UK.

<sup>306</sup> Written evidence – SIS, 13 September 2017.

<sup>307</sup> Written evidence – MI5, 19 May 2015; oral evidence – Home Office, 5 May 2016.

<sup>308</sup> Oral evidence – Home Office, 5 May 2016; written evidence – MI5, 19 May 2015.

<sup>309</sup> Sir David Anderson, *Attacks in London and Manchester March-June 2017: Independent Assessment of MI5 and Police Internal Reviews* (December 2017).

<sup>310</sup> Written evidence – GCHQ, 19 May 2015.

**UU. All three of the Agencies said that they had not undertaken any ‘what if’ modelling after 9/11 or 7/7 to address the sort of change in focus required. Both MI5 and GCHQ are however now involved in scenario-planning work. The Committee is concerned not to have received evidence of any similar approach from SIS.**

### *Preparedness – identifying major new security events*

#### *(i) Horizon-scanning*

235. The Agencies differentiate between broader, longer-term horizon-scanning, and horizon-scanning for specific issues. In terms of scanning for specific issues, GCHQ described its horizon-scanning work on future telecommunications and other information technologies as essential to the safeguarding of its ability to deliver its missions,<sup>311</sup> while MI5 told the Committee that it held horizon-scanning discussions about future areas of work that may lead to a situation (such as with the detainees before 2010) where the Agencies are seen to be complicit in the unlawful acts of partners where possible complicity issues may arise in the future.<sup>312</sup>

236. However, the consensus from the Agencies was that they did not (either together or in isolation) attempt broad, long-term forecasting of future developments which may impact on their work. They do not view this as their role. SIS said “*we are too small for there to be any benefit in doing what would essentially duplicate the efforts of what is already undertaken by those who are better configured to deliver this.*”<sup>313</sup>

237. The Committee was told that this wider government work was carried out by a number of different governmental bodies, including:

- the Development, Concepts and Doctrine Centre at the Defence Academy (which carries out MOD’s global strategic trends work);<sup>314</sup>
- the Joint Terrorism Analysis Centre (on future strategic threats);
- the FCO policy unit (which carries out a limited horizon-scanning role in relation to international affairs. The FCO has drawn on such expertise in its contribution to the process of setting the priorities for intelligence collection for the Agencies);<sup>315</sup>
- the NSC (in setting the priorities for intelligence collection);
- the Joint Intelligence Organisation; and
- the National Cyber Security Centre.

The Agencies have input to the work of many of these bodies and this is viewed as sufficient in planning terms.

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<sup>311</sup> Written evidence – GCHQ, 19 May 2015.

<sup>312</sup> Oral evidence – MI5, 21 April 2016.

<sup>313</sup> Written evidence – SIS, 6 May 2015.

<sup>314</sup> Written evidence – MOD, 18 December 2017.

<sup>315</sup> Written evidence – Foreign and Commonwealth Office, 9 July 2015.

*(ii) How well prepared are the Agencies to cope with an event on the scale of 9/11 today?*

238. While horizon-scanning is important, it cannot be relied on. It is essential therefore to have an established process in place to ‘surge’ into a key operational area in response to unexpected events, i.e. quickly to reallocate officers to priority operations:

- SIS told the Committee: *“We are going to remain under a lot of pressure but we have, as a result of the experience we have been discussing in these hearings, put in place structures to deal with that pressure. I am not going to sit here and tell you that there will not be times when ... we come under a lot of pressure and we are squeezed in one way or another and we have to adapt to circumstances that I cannot foresee. ... I do feel that, structurally, in terms of our skills framework, in terms of the compliance structures that we have got and the way in which we have organised the regional networks, we are a much more robust organisation, I think, with hindsight, than I would describe us in 2001.”*<sup>316</sup>
- MI5 said: *“We are not like the army with ... some deployed and some in barracks and you can surge when there is a crisis. We are fully deployed all the time, all day every day. So the question about having a reserve is actually one of operational agility and flexibility, one of do we have areas of work that we can draw down, pretty much instantaneously, in order to reinforce more urgent things? And the answer is, yes, we do.”*<sup>317</sup>
- GCHQ told the Committee: *“At a tactical level, GCHQ ... has a demonstrable capability to respond 24/7 in an effective and agile way to a wide range of operational crises, ... GCHQ continues to optimise our processes for how we surge within existing resources. Since late 2016, GCHQ has re-launched its 24/7 HQ, adding staff, increasing its responsibilities and building stronger connections with teams both within GCHQ and beyond.”*<sup>318</sup>
- Defence Intelligence explained that it is going through a major transformation programme and part of this transformation includes putting Defence Intelligence *“in a position where that prioritisation against a shifting demand signal is much more proactive, and is much easier to execute”*.<sup>319</sup>

**VV. All of the Agencies and Defence Intelligence have undergone substantial structural change since 9/11 with a number of reviews and changes being implemented over the last 10–12 years. Where further major incidents have taken place, the outcomes of the Agencies’ responses to those incidents have informed post-event changes. The Committee is reassured that agility – the ability to respond quickly to an unexpected event – has been a focus in many of these change programmes and hopes that the lessons learned from the failures post 9/11 mean that the Agencies will not be caught unprepared in future.**

<sup>316</sup> Oral evidence – SIS, 4 February 2016.

<sup>317</sup> Oral evidence – MI5, 21 April 2016.

<sup>318</sup> Written evidence – GCHQ, 2 August 2017.

<sup>319</sup> Oral evidence – MOD, 30 June 2016.

## ANNEX A: FULL LIST OF CONCLUSIONS AND RECOMMENDATIONS

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A. While some of the recommendations in the Committee's March 2010 Report on the draft Consolidated Guidance have subsequently been overtaken, the Report as a whole remains relevant to the continuing debate. We therefore regard it as essential that the Report is placed on the public record. Under the Justice and Security Act 2013, the Committee has the power to publish its own reports (previously it was reliant on the Prime Minister to publish them). We have therefore included the March 2010 Report as an Annex to this Report, placing it in the public domain for the first time.

B. The Committee is pleased to note that resources provided to enable the Investigatory Powers Commissioner to carry out the important task of oversight of the application of the Consolidated Guidance have increased. Any extension of the Guidance to cover other bodies must give rise to a further increase in resources to the Commissioner.

C. The approach and methodology for sampling and assessing detainee-related cases put in place by Sir Mark Waller during his time as the Intelligence Services Commissioner mean that there is a high level of confidence that the Investigatory Powers Commissioner will be informed about all cases in which the Consolidated Guidance has been applied.

D. We remain concerned that cases which ought to have engaged the Consolidated Guidance, but did not, might escape scrutiny and we suggest that this is an area which the Investigatory Powers Commissioner may wish to keep under review.

E. We commend the previous Commissioner's approach in enabling the Agencies and MOD to discuss issues with him at an early stage. The Agencies are working with an increasing variety of overseas partners, whose standards may not be entirely clear, and scenarios may arise which are not covered by the Guidance.

F. The Committee notes that, in one of the cases we sampled, while the SIS officer did not correctly apply the Guidance initially, he realised his mistake immediately and correctly escalated the issue to Head Office, which referred the matter to Ministers and put in place the measures subsequently determined. It is reassuring that this demonstrates that potential breaches are raised in real time and acted upon as a matter of urgency.

G. Of the cases sampled, a number illustrate the considerations the Agencies make when seeking adequate assurances and the ongoing checks that are made to ensure that the assurances are complied with. Specifically, the REDSHANK case illustrates the challenges of working through partners and of not being able to approach the detaining authority directly for assurances.

H. The Committee notes that, in the case featuring the LOCHGILPHEAD liaison service, MI5 and SIS officers actively monitored whether assurances were being adhered to, escalating concerns and suspending co-operation when needed. This is an example of the Consolidated Guidance working as intended.



I. We are reassured that the cases we have examined show that the application of the Guidance is taken seriously by officers and there is an ongoing dialogue between Field Officers and their policy and compliance colleagues in Head Office. This dialogue means that, where officers have concerns about their actions, or the actions of others, these are escalated for advice rather than ignored.

J. The Committee is concerned that the Agencies and Defence Intelligence have not evaluated the overall operational impact of the Consolidated Guidance. The Committee recommends that work is done to establish what the operational impact has been, such that it can inform any future changes, whether to ways of working or to the Guidance itself.

K. The Committee is concerned 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. The Cabinet Office must take proper ownership of the Guidance. It is too important an issue to be left unattended.

L. The light touch review carried out in 2017 was insufficient. A full review of the Consolidated Guidance is overdue. This should encompass the points raised by the Intelligence Services Commissioner and by this Committee since 2010. HMG should also proactively consult non-governmental organisations and the EHRC.

M. The Cabinet Office should review the Guidance periodically (at least every five years) to ensure that issues raised by the Commissioner or those bodies covered by the Guidance are addressed, and revisions made where necessary. These reviews should be published to improve transparency.

N. We remain of the view that the public should be given as much information as possible about the underlying decision-making process in this area. Although we recognise that there are limits to the amount of information that can safely be made publicly available, we consider that there is more information which could be published about the way officers apply the Guidance: perhaps a précis of each of the Agencies' working-level guidance could be included as Annexes to an expanded Consolidated Guidance. This will increase transparency and hopefully improve confidence in the decision-making processes being followed.

O. It is clear that the Consolidated Guidance does fulfil a function: it provides a public statement of HMG's position in regard to detainee issues, and it has been received positively by the Agencies as giving them a consistent frame of reference.

P. The Committee remains of the opinion that the Consolidated Guidance does not provide guidance and it is misleading to present it as such. The current review provides an opportunity to rectify this. Since some of the proposed changes will render the current title obsolete (for example, the addition of the NCA and SO15 will mean that the existing references to 'Consolidated' and 'Intelligence Officers and Service Personnel' are no longer appropriate), we recommend that it is renamed in such a way that its purpose as a framework which sets the boundaries within which the Agencies must operate is clearly apparent to the public, for example 'UK Standards for Action relating to Detention and Rendition'. The foreword should explain fully the nature of what the Framework is trying to achieve, with reference to the underlying working-level documents.

Q. The bodies covered by the Consolidated Guidance also have to comply with the *Overseas Security and Justice Assistance Guidance* and we welcome the clarification of the position in the updated OSJA Guidance. Nevertheless, we question whether the use of two parallel frameworks is a practical solution, and remain concerned that it could lead to duplication and inefficiency. We recommend that the Consolidated Guidance and the OSJA Guidance are merged for those bodies that are subject to both.

R. Where HMG has a close working relationship with overseas partners, and \*\*\* a unit overseas, it must carry some responsibility for the actions of that unit. If it does not, it leaves itself open to accusations that it is outsourcing action it cannot take itself.

S. We reiterate the recommendations made in our *Report on the Intelligence relating to the Murder of Fusilier Lee Rigby*, and by the Intelligence Services Commissioner: the Consolidated Guidance must specifically address the question of joint units and make clear that it applies to such units. The difference of opinion between SIS and the Commissioner and the Committee over the case of Mr Adebolajo clearly demonstrates that there is a serious problem in this area.

T. We welcome the fact that both SO15 and the NCA have been brought within the scope of the Consolidated Guidance. We remain concerned that there may be other bodies that are engaged in detainee issues and are not bound by the Consolidated Guidance. We note that the Cabinet Office will be keeping this under review – this must be proactive and continuous however, as opposed to only when prompted.

U. Whilst the Agencies have said that they do not see the need for any formal memoranda of understanding when working with bodies that are not covered by the Consolidated Guidance, they recognise that this can cause difficulties. This should therefore form part of a wider and more detailed review of the Consolidated Guidance.

V. The Committee recognises that securing a formal, binding, written agreement from liaison partners on standards of behaviour may not always be easy, given that it can be taken to imply suspicion, and therefore to insist on a written agreement could undermine trust and jeopardise future co-operation. We agree with the stance taken by the former Intelligence Services Commissioner that, where it is not possible to obtain a written assurance from a liaison partner, a written record of the oral assurance should be produced and sent to the liaison partner so that there is a shared understanding of expectations.

W. We note that statistics have not previously been collected on the number of written assurances obtained or the number of verbal assurances recorded, and we have therefore been unable to make as thorough an assessment of assurances as we would have wished. We welcome the Investigatory Powers Commissioner's intention to begin collecting this data in 2018.

X. The extension to the Agencies of the ability to authorise action in an emergency situation, without reference to Ministers, is sensible. However, it should not extend to situations where an official believes there is a serious risk of torture. No public official should be able to authorise torture.

Y. Furthermore, use of the provisions relating to time-sensitive operational decisions must be strictly monitored: they should only be used in real emergencies. In addition, a time limit of 48 hours should be set for retrospective escalation of any case to senior personnel and, where necessary, to Ministers.

Z. We recognise the ambiguity inherent in the term ‘serious risk’ and the burden this places on individual officers. The Agencies have developed their own training on how to recognise serious risk, and they have all erred on the side of caution.

AA. 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. This must be addressed. Further, when submitting to Ministers on the Guidance, the organisation concerned should append its working definitions to ensure that all involved are working on the same understanding.

BB. The list of types of CIDT contained in the Consolidated Guidance is not intended to be exhaustive. However, rendition has been such a contentious issue that we believe it should be specifically mentioned in this list for clarity. We recognise that defining rendition has previously caused problems; however, this is not a reason to stop its inclusion – indeed, it is precisely because of the uncertainty in the term that officers should be prompted to consider it.

CC. It is essential that the Agencies and their personnel follow the Consolidated Guidance not just in letter but in spirit as well. We welcome the previous Intelligence Services Commissioner’s proactive approach on this matter and urge the Agencies to continue to seek the advice of the Investigatory Powers Commissioner in situations which might appear to be on the periphery of the Guidance.

DD. The Cabinet Office has proposed an amendment to the Guidance to refer to intelligence received from third parties. The Committee welcomes this proposed revision, which addresses the concerns of the Intelligence Services Commissioner raised in 2015.

EE. We recommend that the Guidance should also explicitly apply to non-State actors and failed States. These relationships are likely to be an increasing feature of UK intelligence work. The Agencies should endeavour to obtain assurances in such situations but Ministers should then make the final decision.

FF. The Committee notes that, in response to a number of recommendations from the Committee and the Commissioner that the Consolidated Guidance be amended to address three important and contentious areas (non-State actors, rendition and joint units), HMG has said that defining these terms is too difficult. This is not an acceptable reason not to include them: if anything, it demonstrates why it is so important to reference them.

GG. The Consolidated Guidance does not offer legal protection to officers. This is clearly demonstrated by the fact that, when SIS or GCHQ submit to Ministers under the Guidance, they seek – in parallel – an authorisation under section 7 of the Intelligence Services Act 1994.

HH. We recognise the Agencies’ need to ensure that their officers are protected where they are acting in accordance with the Guidance and consider that the solution of seeking a section 7 authorisation to cover an action is a pragmatic one.

II. However, we have previously recommended that there should be greater transparency around the use of section 7 authorisations and that the scope and purpose of section 7 authorisations should explicitly be addressed in the Consolidated Guidance, and we strongly urge the Government to reconsider this recommendation.

JJ. The Guidance is insufficiently clear as to the role of Ministers, and what – in broad terms – can and cannot be authorised. For example, the Guidance should specifically refer to the prohibition on torture enshrined in domestic and international law to make it clear that Ministers cannot lawfully authorise action which they know or believe would result in torture.

KK. The public must be sure that all decisions are based on the same legal and policy advice and within the same parameters – and that subjectivity is kept to a minimum. This is a structural weakness in the Guidance and the recent proposed revisions to the Guidance have not addressed these issues. The Guidance must provide clarity on what information is to be provided to Ministers when asking them to make a decision.

LL. The Committee is concerned to note that, despite past events, HMG has failed to introduce any policy or process that will ensure that allies will not use UK territory for rendition purposes without prior permission. Given the clear shift in focus signalled by the present US administration, reliance on retrospective assurances and the voluntary provision of passenger information – as at present – cannot be considered satisfactory.

MM. The FCO's position that the UK is absolved from complicity in permitting transit or refuelling of a possible rendition flight, because it has no knowledge of what the aircraft has done or is doing, is not acceptable.

NN. While there have been small improvements made since 2007, we remain unconvinced that the Government recognises the seriousness of rendition and the potential for the UK to be complicit in actions which may lead to torture, CIDT or other forms of mistreatment.

OO. There is no clear policy on, and not even agreement as to who has responsibility for, preventing UK complicity in unlawful rendition. We find it astonishing that, given the intense focus on this issue ten years ago, the Government has still failed to take action. Through this Report, we formally request that HMG should publish its policy on rendition, including the steps that will be taken to identify and prevent any UK complicity in unlawful rendition, within three months of publication of this request.

PP. The Committee is reassured that reviews now take place within the Agencies but recommends that there must be a formal, documented 'lessons learned' follow-up process in place, following any major event.

QQ. Provision of proper training is essential if officers are to be confident in their actions and feel supported. It must be given significant consideration and viewed as an integral part of any deployment, even when operational pressures are elevated.

RR. Whilst SIS and MI5 have provided assurances that their record-keeping practices have improved and continue to do so, these are as yet untested. Record-keeping is an issue that the Committee has raised repeatedly over a number of years and which has played a major part in our Report, *Detainee Mistreatment and Rendition: 2001–2010*. The importance of proper record-keeping must be communicated to staff and action taken to ensure that processes are followed.

SS. While communication between the Agency Heads and Ministers is greatly improved, there is a question as to whether the processes in place between the lead Departments and the

Agencies are as robust as the parties believe. Information appears sometimes to get ‘stuck’ in policy Departments and steps should be taken to ensure that Ministers are kept fully informed.

TT. The Committee notes that the Agencies are monitoring the actions of their US liaison partners in order to identify at an early stage any shift in policy on detainees. It is essential that this is taken seriously given the grave repercussions of their failure to detect the change in US working practices that occurred after 9/11.

UU. All three of the Agencies said that they had not undertaken any ‘what if’ modelling after 9/11 or 7/7 to address the sort of change in focus required. Both MI5 and GCHQ are however now involved in scenario-planning work. The Committee is concerned not to have received evidence of any similar approach from SIS.

VV. All of the Agencies and Defence Intelligence have undergone substantial structural change since 9/11 with a number of reviews and changes being implemented over the last 10–12 years. Where further major incidents have taken place, the outcomes of the Agencies’ responses to those incidents have informed post-event changes. The Committee is reassured that agility – the ability to respond quickly to an unexpected event – has been a focus in many of these change programmes and hopes that the lessons learned from the failures post 9/11 mean that the Agencies will not be caught unprepared in future.

# ANNEX B: THE CONSOLIDATED GUIDANCE

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**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 ..... 106**

**Note of Additional Information from the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary, and Defence Secretary ..... 120**



## **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**

1. This 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. This guidance must be adhered to by officers of the UK's intelligence and security agencies, members of the UK's Armed Forces and employees of the Ministry of Defence ('personnel'). Personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future.
2. The security and intelligence agencies (the Agencies) do not have powers of detention either in the UK or overseas. UK Armed Forces may have a power to detain individuals in overseas operations depending on the circumstances of the operation. For MOD and UK military personnel, 'interviewing' includes tactical questioning, interrogation or debriefing.
3. To pursue their statutory functions, in particular to counter threats against the UK, the Agencies need to work with a range of overseas security and intelligence services ("liaison services") for the proper discharge of their functions.
4. UK Armed Forces may need to detain individuals and interview them in support of mission objectives (e.g. in order to understand threats to Armed Forces units). The Ministry of Defence (MOD) and UK Armed Forces may also need to work with liaison services for similar reasons, as well as military partners within a coalition where appropriate.

***Policy regarding torture and cruel, inhuman or degrading treatment or punishment***

5. Personnel will be aware of concerns about torture and cruel, inhuman or degrading treatment or punishment (“CIDT”). There is an absolute prohibition of torture in international law and a clear definition of what constitutes torture. There is also an absolute prohibition on CIDT, but there is no agreed or exhaustive definition of what constitutes CIDT. Although it is legitimate to differentiate between torture and CIDT, individual instances of mistreatment that might in isolation constitute CIDT could amount to torture in circumstances in which e.g. they are prolonged, or coincide with other measures.

6. 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. In no circumstance will UK personnel ever take action amounting to torture or CIDT. We take allegations of torture and cruel, inhuman or degrading treatment or punishment very seriously: we investigate allegations against UK personnel; and we bring complaints to the attention of detaining authorities in other countries except where we believe that to do so might itself lead to unacceptable treatment of the detainee.

7. When we work with countries whose practice raises questions about their compliance with international legal obligations, we ensure that our co-operation accords with our own international and domestic obligations. We take great care to assess whether there is a risk that a detainee will be subjected to mistreatment and consider whether it is possible to mitigate any such risk. In circumstances where, despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, our presumption would be that we will not proceed. In the case of cruel, inhuman or degrading treatment or punishment, 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. Our aim is to

develop and promote human rights in those countries, consistent with the lead the UK has taken in international efforts to eradicate torture.

***Policy regarding the involvement of UK personnel with detainees overseas in the custody of a liaison service***

8. Some liaison services adopt a different approach and different standards to the UK in the way that they detain people and treat those they have detained. The extent to which they are prepared to take account of UK views on the way that they should behave varies, depending on such factors as the extent to which a relationship of trust exists with the UK, the extent to which there is international consensus on the issue, and the extent to which the liaison service believes it has a justification or need for taking a different approach. Personnel need to be aware of the tensions this can create and the need to manage them in a manner that is consistent with the policy described above in paragraph 6. Distinct from any personal liability, the circumstances covered by this guidance may engage the responsibility of the UK – with the potential for damage to its international reputation.

9. Before interviewing or seeking intelligence from detainees in the custody of a liaison service, or before soliciting an individual's detention by a liaison service, personnel must consider whether the detainee or individual may have been or may be subjected to unacceptable standards of detention or treatment. 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 as to the standards that have been or will be applied in relation to that detainee or individual to minimise any perceived risk in this regard. Personnel should feel free to raise any concerns with senior responsible personnel nominated personally by the head of their Agency or Department ("senior personnel").

10. The table at paragraph 11 gives details of what officers should do when considering whether to proceed with action when there is a risk of torture or CIDT

occurring at the hands of third parties. Personnel should also refer, where available, to departmental views on the legal framework and practices of liaison services and authorities involved in detention in the country concerned. The Annex describes the issues which should be taken into account when considering whether standards of detention and treatment are acceptable but officers should consult senior personnel and/or legal advisers if they are in doubt.

11. Officers should use the following table (see next page) when considering whether to proceed with action when there is a risk of torture or CIDT occurring at the hands of a third party.

Situation	Action
If you know or believe torture will take place	<ol style="list-style-type: none"> <li>1. You must not proceed and Ministers will need to be informed</li> <li>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.</li> </ol>
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"> <li>1. You must consult senior personnel. You must not proceed unless either: <ol style="list-style-type: none"> <li>a) senior personnel and legal advisers conclude that there is no serious risk of torture or CIDT, or;</li> <li>b) you are able to effectively mitigate the risk of mistreatment to below the threshold of a serious risk through reliable caveats or assurances.</li> </ol> </li> <li>2. If neither of the two preceding approaches apply, Ministers must be consulted. <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> </ul> </li> </ol>

12. Where UK Armed Forces personnel are operating in a coalition and are under time sensitive military operational conditions, they may find themselves engaged in tactical questioning of detainees held by other nations with no opportunity to refer to senior personnel or Ministers for guidance on any concerns over standards of detention or treatment. If such a situation arises, UK Armed Forces personnel should continue to observe this guidance so far as it is practicable and report all the circumstances to senior personnel at the earliest opportunity.

### ***Roles and responsibilities***

13. Personnel must ensure that they comply with the guidance in this paper, together with any supporting legal, administrative and procedural material which may be relevant to its application in their specific Agency or Department. The Agencies, MOD and UK Armed Forces will ensure that personnel receive appropriate training. Agency, Departmental and Armed Forces' legal advisers will be able to advise on any legal issues that arise in particular cases. Crown servants should be aware that they are subject to English criminal law in respect of their actions in the course of their duties overseas.

14. Ministers must be consulted in line with the circumstances described in the table in paragraph 11. Ministers will consider all relevant facts in deciding whether an operation should proceed. Consulting Ministers does not imply that an operation will be authorised but it enables Ministers to look at the full complexities of the case and its legality.

15. Personnel should make themselves aware of departmental views on the legal framework and practices of States and liaison services with which UK personnel are engaged.



***Procedures for interviewing detainees overseas in the custody of a liaison service***

*Prior to an interview*

16. Before interviewing a detainee in the custody of a liaison service, personnel must consider the standards to which the detainee may have been or may be subject. Personnel should consider obtaining assurances from the relevant liaison service as to the standards that have been or will be applied to address any risk in this regard.

17. The table in paragraph 11 explains what personnel should do if there is a serious risk that a detainee has been or will be subject to unacceptable standards. Senior personnel must be consulted and further consideration should be given to obtaining assurances from the relevant liaison service as to the standards that have been or will be applied in relation to that detainee, before any action is taken. Where personnel believe that the assurances are reliable, they may continue with the proposed interview. If, despite any assurances obtained, personnel believe there is a serious risk of torture or cruel, inhuman or degrading treatment or punishment of an individual taking place, Ministers must be consulted.

18. The Agencies, MOD and UK Armed Forces cannot act as a consular authority in place of the FCO. Where the detainee is a UK national, the FCO must be briefed about the plans to interview the detainee.

*During an interview*

19. The essential requirements are that the detainee must be treated fairly, humanely, and with dignity and respect. Interviews must not involve torture or cruel, inhuman or degrading treatment or punishment. Again, the Annex describes the issues that need to be taken into account when considering the acceptability of standards.

20. Interviewing personnel must withdraw from the interview should they become aware of, or witness anything, which causes them to believe that there is a serious risk that the standards to which the particular detainee has been or will be subject are unacceptable, or if the detainee makes specific complaints in this respect that are considered credible by interviewing personnel. Interviewing personnel should also bring any complaints to the attention of the detaining authority, except where they believe that to do so might itself lead to unacceptable treatment of the detainee.

*Reporting concerns and complaints*

21. Where interviewing personnel have withdrawn from an interview, owing to the standards to which they believe the detainee has been or will be subject or following specific credible complaints by the detainee, senior personnel must be consulted and consideration should be given to obtaining assurances from the relevant liaison service as to the standards that have been or will be applied in relation to that detainee. Where personnel believe that the assurances are reliable, they may continue with the proposed interview. If, despite any assurances obtained, personnel believe there is a serious risk of torture or cruel, inhuman or degrading treatment or punishment of an individual taking place, Ministers must be notified. The Agencies, MOD and UK Armed Forces will then need to consider whether the concerns were such that this would have an impact on their engagement with that liaison service in relation to other detainees.

*Recording the interview*

22. Personnel conducting or witnessing an interview must complete a record of the interview (or, where more than one person conducts or witnesses an interview, one of them must produce an agreed record). This record must include any concerns about the standards to which the detainee may have been or may be subject, a statement on the physical and mental health of the detainee as observed by interviewing personnel, and a statement of any undertakings given to the detainee.

***Seeking intelligence from a detainee in the custody of a foreign liaison service***

23. Before feeding in questions to or otherwise seeking intelligence from a detainee in the custody of a liaison service, personnel must consider the standards to which the detainee may have been or 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 as to the standards that have been or will be applied in relation to that detainee to address any risk in this regard.

24. Where personnel believe there is a serious risk that a detainee has been or will be subject to unacceptable standards, senior personnel must be consulted and further consideration should be given to 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 as to the standards that have been or will be applied in relation to that detainee before any action is taken. Where personnel believe that the caveats attached will be observed, or believe that the assurances are reliable, they may continue with the proposed action, informing Ministers as appropriate. If, despite any conditions attached or assurances obtained, personnel believe there is a serious risk of torture or cruel, inhuman or degrading treatment or punishment of an individual taking place, Ministers must be consulted.

***Soliciting detention by a foreign liaison service***

25. 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 as to the standards that will be applied in relation to that detainee to address any risk in this regard.

26. Where personnel believe there is a serious risk that an individual will be subject to unacceptable standards, senior personnel must be consulted and consideration should be given to 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 as to the standards that will be applied in relation to that individual, before any action is taken. Where personnel believe that the conditions attached will be observed and/or the assurances are reliable, they may continue with the proposed action, informing Ministers as appropriate. If, despite any conditions attached or assurances obtained, personnel believe there is a serious risk of torture or cruel, inhuman or degrading treatment or punishment of an individual taking place, Ministers must be consulted.

***Receiving unsolicited information obtained from a detainee in the custody of a foreign liaison service***

27. In most instances, liaison services do not disclose the sources of their intelligence and it will therefore not be apparent whether intelligence received has originated from a detainee or to what standards that detainee may have been subject. However, in the cases where personnel receive unsolicited intelligence from a liaison service that they know or believe has originated from a detainee, and which causes them to believe that the standards to which the detainee has been or will be subject are unacceptable, senior personnel must be informed. In all cases where senior personnel believe the concerns to be valid, Ministers must be notified of the concerns.

28. In such instances, Agencies, MOD or UK Armed Forces will consider whether action is required to avoid the liaison service believing that HMG's continued receipt of intelligence is an encouragement of the methods used to obtain it. Such action could, for example, include obtaining assurances, or demarches on intelligence and/or diplomatic channels. They will also consider whether the concerns were such that this would have an impact on engagement with that liaison service in relation to other detainees.

***Procedures for interviewing detainees held overseas in UK custody***

29. Individuals may be detained and questioned by UK forces overseas in accordance with the rules of engagement for the specific operation. Interviewing of detainees for intelligence purposes may only be undertaken by authorised personnel. All detainees held by UK Armed Forces must be treated humanely at all times, in accordance with international law and any UK law that may be applicable. Guidance on the handling of detainees is published by MOD in Joint Doctrine Publication 1-10<sup>1</sup>. All UK facilities for the holding of detainees are subject to inspection by Provost Marshal Army, and by the International Committee of the Red Cross.

30. On occasion subject matter experts may be authorised to observe or join the questioning of detainees in the custody of UK or other forces. In such circumstances they must only be involved in the posing of specialist questions to the detainees which are specifically directed to their area of expertise. Any participation must always be conducted in the presence of authorised personnel, and the conduct of these experts during the questioning must comply with applicable UK law and international law at all times.

**July 2010**

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<sup>1</sup> Available on line at [www.mod.uk](http://www.mod.uk)

**Annex****STANDARDS OF ARREST, DETENTION AND TREATMENT (Paragraph 10)**

This Annex is not exhaustive, nor is it descriptive of any legal term. However, when considering what might be unacceptable, personnel should take account of -

- a. The lawfulness of arrest (under local law).
- b. The lawfulness of detention (under local and international law) and access to due process.  
 Considerations here may include:
  - (i) 'incommunicado detention' (denial of access to family or legal representation, where this is incompatible with international law);
  - (ii) whether the detainee has been given the reasons for his arrest;
  - (iii) whether he will be brought before a judge and when that will occur;
  - (iv) whether he can challenge the lawfulness of his detention;
  - (v) the conditions of detention; and
  - (vi) whether he will receive a fair trial
- c. 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.
- d. Cruel, inhuman or degrading treatment or punishment.  
 Cruel, Inhuman or Degrading Treatment or Punishment (CIDT) is a term which is used in some international treaties but is not defined in UK law. In the context of this guidance, the UK Government considers that the following practices, *which is not an exhaustive list*, could constitute cruel, inhuman or degrading treatment or punishment:
  - (i) use of stress positions;
  - (ii) sleep deprivation;
  - (iii) methods of obscuring vision (except where these do not pose a risk to the detainee's physical or mental health and is necessary for security reasons during arrest or transit) and hooding;
  - (iv) physical abuse or punishment of any sort;



- (v) withdrawal of food, water or medical help;
- (vi) degrading treatment (sexual embarrassment, religious taunting etc); and
- (vii) deliberate use of 'white' or other noise.

In any case of doubt interviewing personnel should seek guidance from senior personnel who may take appropriate advice on whether any conduct may amount to torture or cruel, inhuman or degrading treatment or punishment.

**Note on the text**

A. It is envisaged that each organisation will continue to provide more detailed advice to their officers and personnel where such material is necessary to prescribe precisely how the principles and requirements set out in this guidance should operate within their individual organisational structure. Where helpful, this advice may include additional detail on the legal principles that govern the detention and treatment of detainees. It is envisaged that minor updates can be made to such material without revisiting this overarching guidance.

B. Where developments call for significant updates that affect the principles and requirements set out in this guidance, Ministers will be consulted on any changes and an updated version will be published

Note of Additional Information:

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

**From the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary, and Defence Secretary.**

We currently face a diffuse, diverse and complex threat from international terrorism. This is not a threat we can counter on our own. In order to protect British citizens at home and abroad, including our troops in Afghanistan, it is absolutely essential that our security and intelligence services and armed forces are able to work with partners overseas to combat this threat.

This means working in challenging environments where we are not always in total control. This is the reality of combating the cross-border, international terrorist threat we live with today.

Nowhere is this reality more acute than in the case of detainees held abroad. Where the UK detains individuals itself, we can be confident of our standards and obligations. We cannot always have the same level of assurance with detainees held by third parties overseas. There have been concerns raised publicly about the nature of UK's involvement in such situations. That is why we are publishing today the Consolidated Guidance for intelligence officers and service personnel on the detention, interviewing and handling of intelligence in relation to detainees held overseas – putting into the public domain for the first time the policy framework within which we operate.

The UK stands firmly against the use of torture and cruel, inhuman or degrading treatment or punishment. We do not condone it, nor do we ask others to do it on our behalf. We, and in particular our personnel on the ground, work very hard to reduce the risks of detainees being subjected to mistreatment when they are held by other countries. But sometimes we cannot remove this risk completely. This raises difficult questions about how we should engage in those circumstances where the risk of mistreatment remains unclear, but the risk of inaction may have dire consequences.

The Consolidated Guidance makes clear the standards that our intelligence officers and service personnel must apply during the detention and interviewing of detainees held overseas. It provides a framework for dealing with the range of circumstances in which officers and personnel might have involvement with a detainee. It makes clear

that we act in compliance with our domestic and international legal obligations and our values as a nation.

There are occasions when officers and personnel are faced with difficult situations which are not within their control, when the information is often patchy and when, despite our efforts, a serious risk of mistreatment of a detainee at the hands of a third party remains. In such circumstances, the Guidance makes clear that personnel must consult Ministers and provide them with all the details of the particular case. It is right that responsibility in these cases lies with the democratically elected Government, and that ultimately it is Ministers who will make these judgements.

There is an absolute ban on and a clear internationally accepted definition of torture. There are no circumstances where we would authorise action in the knowledge or belief that torture would take place at the hands of a third party. If such a case were to arise we would do everything we could to prevent the torture occurring.

Where the situation is less clear personnel must provide Ministers with the full details of the case including the risks associated with acting and those we face if we do not proceed. Ministers may themselves attempt to mitigate the risk through personal intervention. In circumstances where despite efforts to mitigate the risk, a serious risk of torture remained, our presumption would be that we will not proceed.

The decision can be more complicated in relation to other forms of mistreatment. The reality is that the term cruel, inhuman or degrading treatment or punishment covers a spectrum of conduct. At the lower end some have argued that this can include certain conditions of detention that are commonplace in many of the countries with which we must work if we are to effectively protect British lives. While the UK is at the forefront of efforts to try to tackle unacceptable treatment of detainees we recognise, for example, that it is unrealistic to expect that prisons in these countries will be built to the standards we expect in this country.

In cases involving cruel, inhuman or degrading treatment or punishment, officers must follow the same mitigation process and may ultimately consult Ministers. Consulting Ministers does not imply that action will be authorised but allows us to look at the circumstances of the case and the different considerations and legal principles which may apply.

We will consider a number of factors, including but not limited to: the credible and mitigating steps that can be taken, if necessary through our personal involvement, to reduce the risk of mistreatment; the range of UK action proposed and whether it would increase or decrease the likelihood of mistreatment taking place; whether there is an overwhelming imperative for the UK to take action of some sort, e.g. to save life;

and, above all, whether there is a legal basis for taking action. These are extremely difficult decisions and it is right that Ministers ought to bear responsibility for them.

The standards and approach outlined in this Guidance are not new. They are consistent with the internal guidelines under which the security and intelligence services and our armed forces currently operate. However, the Guidance published today is unprecedented because it makes those standards public. We are confident that it will enable our security and intelligence agencies and our armed forces to continue their crucial work to protect UK national security while maintaining the high standards we expect of them.

**July 2010**

ANNEX C: ISC 2010 REPORT ON THE DRAFT  
CONSOLIDATED GUIDANCE

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# Intelligence and Security Committee

## Review of the Government's Draft Guidance on Handling Detainees

Chairman:

The Rt. Hon. Dr Kim Howells, MP

March 2010

*From: The Chairman, The Rt. Hon. Dr Kim Howells, MP*

**INTELLIGENCE AND SECURITY  
COMMITTEE**

35 Great Smith Street, London SW1P 3BQ

ISC 2009/10/078

05 March 2010

Rt. Hon. Gordon Brown, MP  
Prime Minister  
10 Downing Street  
London  
SW1A 2AA

*Dear Prime Minister*

I enclose the Intelligence and Security Committee's Annual Report for 2009–2010. This covers our work between August 2009 and March 2010.

The Committee has met on a total of 29 occasions during this time, taking oral and written evidence on the administration, policy and expenditure of the three intelligence and security Agencies.

In addition, I enclose our Review of the Government's draft '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'.

I am grateful that you have agreed to publish both Reports before the House of Commons debate on our work on 18 March.

*Yours  
Kim*

**KIM HOWELLS**

## THE INTELLIGENCE AND SECURITY COMMITTEE

*The Rt. Hon. Dr Kim Howells, MP (Chairman)*

*The Rt. Hon. Michael Ancram, QC, MP*

*The Rt. Hon. George Howarth, MP*

*The Rt. Hon. Sir Menzies Campbell, CBE, QC, MP*

*The Rt. Hon. Michael Mates, MP*

*Mr Ben Chapman, MP*

*Mr Richard Ottaway, MP*

*The Rt. Hon. Lord Foulkes of Cumnock*

*Ms Dari Taylor, MP*

The Intelligence and Security Committee (ISC) is an independent Committee, established by the Intelligence Services Act 1994 to examine the policy, administration and expenditure of the three UK intelligence Agencies: the Security Service, the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ).

The Committee also examines the work of the Joint Intelligence Committee (JIC), the Assessments Staff and the Intelligence and Security Secretariat in the Cabinet Office, and the Defence Intelligence Staff (DIS) in the Ministry of Defence.

The Prime Minister appoints the ISC Members after considering nominations from Parliament and consulting with the leaders of the two main opposition parties. The Committee reports directly to the Prime Minister and through him to Parliament, by the publication of the Committee's reports. Sometimes we are asked to look into a matter, but most of the time we set our own agenda. We determine how and when we conduct and conclude our programme of work – this gives the Committee the freedom to pursue every avenue of inquiry to its satisfaction. Often this means that the Committee's inquiries are very detailed or wide-ranging.

The Committee has an independent Secretariat currently hosted by the Cabinet Office. The Committee also has a panel of three investigators: a General Investigator to undertake specific investigations covering the administration and policy of the Agencies; a Financial Investigator covering expenditure issues; and a Legal Advisor to provide the Committee with independent legal advice.

The Members of the Committee are notified under the Official Secrets Act 1989 and are given access to highly classified material in carrying out their duties. The Committee holds evidence sessions with Government ministers and senior officials (for example, the head of the Security Service). It also considers written evidence from the intelligence and security Agencies and relevant Government departments. This evidence may be drawn from operational records, source reporting, and other sensitive intelligence (including original records when relevant), or it may be memoranda specifically written.

The Prime Minister publishes the Committee's reports: the public versions have sensitive material that would damage national security blanked out ("redacted"). This is indicated by \*\*\* in the text. The Committee agrees with the Government what material will be blanked out, and to date no material has been excluded without our consent.

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## CONTEXT

### *Introduction*

1. The UK Government's policy regarding torture or cruel, inhuman or degrading treatment or punishment (CIDT) is as follows:

*[We do] not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose.<sup>1</sup>*

This is for both legal and ethical reasons. To do otherwise reduces us to the level of those from whom we are seeking to protect ourselves.

2. The protection of the UK and its citizens falls to a number of organisations, including our armed forces and intelligence and security Agencies. In seeking to do their job, the Agencies must, and are expected to, take every opportunity and follow every intelligence lead. In terms of the current threat from international terrorism, this means that our Agencies cannot work in isolation but must co-operate with intelligence services in other countries.

3. Working with foreign liaison services can, however, give rise to problems. This is most evident when another country has an individual in detention who our Agencies believe may know something about a threat to the UK. The problem is that when a detainee is not in our custody, we cannot be absolutely sure how they are being treated. How sure can we be that another country will treat a detainee fairly, and will not torture them or subject them to cruel, inhuman or degrading treatment or punishment?

4. This leaves our intelligence and security Agencies, and the ministers responsible for them, facing a conundrum: how do they reconcile the need to obtain vital intelligence to protect the British public, with the need to ensure that individuals' human rights are not infringed? At times the two are simply not compatible.

### *Allegations of complicity in torture*

5. Over the past few years a number of individuals have alleged very serious abuses of their human rights during detention overseas, and while under the control of foreign powers. The allegations include cruel, inhuman or degrading treatment and, in some cases, torture.

6. We are not aware of any allegation that the UK intelligence and security Agencies have themselves committed any acts of torture or CIDT.<sup>2</sup> However, in some cases, they have been accused of "complicity" in the alleged mistreatment inflicted by foreign Governments and agencies.

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<sup>1</sup> Letter from the Foreign Secretary and Home Secretary to The Guardian, 12 February 2010.

<sup>2</sup> There have, however, been a few allegations (some proven) that detainees have been mistreated by a small number of Armed Forces personnel.

### *Rendition inquiry*

7. The Committee's Report on Rendition (published in July 2007)<sup>3</sup> examined whether the UK intelligence and security Agencies had any knowledge of, and/or involvement in, rendition operations and considered their overall policy for intelligence sharing with foreign liaison services in this context.

8. The report detailed four specific rendition cases, in order to illustrate key developments in our Agencies' awareness of the changing nature of the US rendition programme.<sup>4</sup> One of these cases, which has been particularly high profile, was that of Mr Binyam Mohamed (also known as Binyam Mohamed al-Habashi). Mr Mohamed is an Ethiopian national, and a resident of the UK, who was arrested in Karachi in April 2002 and who was, at the time we wrote our Report on Rendition, being held by the US in Guantánamo Bay.

9. Mr Mohamed had alleged that between April and July 2002, while in detention in Pakistan, he was mistreated and that a British official who interviewed him during this period told him he was going to be tortured. He had alleged that on 21 July 2002 he was the subject of an "extraordinary rendition" to Morocco, where he was tortured and interviewed using information that had been provided by the British Government, and also that subsequently, on 21 January 2004, he was the subject of a further "extraordinary rendition" to the US-controlled detention centre at Bagram, Afghanistan, where he suffered further mistreatment. He has accused the Government of complicity in his torture.

### *Our advice to the Prime Minister*

10. Individual allegations against the Agencies, such as those raised by Mr Mohamed, are a matter for the Investigatory Powers Tribunal (which was established under the same legislation as the Intelligence and Security Committee)<sup>5</sup> to investigate and not this Committee, as is often incorrectly presumed.

11. However, in this case, the Committee considered that the issues raised by the allegations were so serious that they went right to the heart of how our intelligence and security Agencies operate, the policies they implement and the procedures they follow. It was this aspect that we investigated, writing to the Prime Minister on 17 March 2009 to report our findings (that letter is reproduced in full as an annex to this Review).

12. The main focus of our letter to the Prime Minister was the allegation that the British Security Service had been complicit in the alleged mistreatment of Mr Mohamed at the hand of foreign powers. We do not intend to cover the details of Mr Mohamed's case here. However, our letter to the Prime Minister also covered the wider policy issues that the case highlighted.

<sup>3</sup> Cm 7171.

<sup>4</sup> The Intelligence and Security Committee does not investigate individual cases – any complaints about alleged misconduct by, or on behalf of, the UK intelligence and security Agencies are properly a matter for the Investigatory Powers Tribunal, established under the Regulation of Investigatory Powers Act 2000.

<sup>5</sup> Section 9 of the Intelligence Services Act 1994, which was repealed and replaced by Section 65 of the Regulation of Investigatory Powers Act 2000 with effect from 2 October 2000.

13. The letter concluded:

*There are some who argue that to take action (such as passing questions to be put to a detainee or providing background information on a detainee) without a 100% guarantee of acceptable treatment would be to facilitate mistreatment and that any risk of mistreatment is unacceptable. This ignores the reality of the situation, which, as we have set out above, can come down to the safety of a country versus the potential mistreatment of an individual.*

*Professor A C Grayling of Birkbeck College, writing in The Independent earlier this year, described this dilemma accurately:*

*“Do we abide by normal standards of human decency in times of danger or is it justifiable to use harsher methods of getting information to safeguard the public?... The crux is whether an individual’s human rights can be put into temporary abeyance in the interests of thousands at risk... Would it be acceptable to mistreat someone who knows the whereabouts of a bomb in the centre of a city? The utilitarian view in ethics says that torturing one person to save many is justified. The deontological view in ethics says that torture is unacceptable even in the extremist circumstances. Real life does not seem to fit well with such a stark contrast.”*

*We are fully aware of the difficulty of such a decision in each and every case. The Foreign Secretary told us: “the threat to life weighs on you in deciding what to do”. Those who believe that there is a neat solution here and that the UK can be protected from the terrorist threat at the same time as being completely confident that the UK will never be involved, however indirectly or inadvertently, in an individual’s mistreatment, should recognise the dilemma.*

14. We made, and here reiterate, the following recommendation to the Prime Minister:

***The reality of the situation should be made clear publicly. This is a matter of Government policy, not Agency operation, and therefore it is not for this Committee to explain or defend. We recommend that a statement is made by the Government which sets it out in simple terms. We believe that the Government should, indeed must, be explicit in setting out the position and have confidence that the British public will understand the dilemma and the difficulty of the decisions that must be taken.***

### ***The Prime Minister’s request***

15. On 18 March 2009, as a result of the allegations, speculation and uncertainty surrounding the involvement of the intelligence and security Agencies and the armed forces in detention activities (including in the case of Mr Mohamed), the Prime Minister announced to Parliament:

*We will publish our guidance to intelligence officers and service personnel about the standards that we apply during the detention and interviewing of detainees*



*overseas once it has been consolidated and reviewed by the Intelligence and Security Committee. It is right that Parliament and the public should know what those involved in interviewing detainees can and cannot do. This will put beyond doubt the terms under which our agencies and service personnel operate. Once published, copies will be placed in the libraries of the House.<sup>6</sup>*

16. Also on 18 March 2009, the Prime Minister wrote to the Chairman of the ISC, formally inviting the Committee to review the guidance. He asked:

*If and where the guidance is not sufficiently clear, it would be helpful if the Committee could make proposals on how it might be adjusted.*

*...we will wish to put as much of [the guidance] into the public domain as is responsible. I would therefore welcome the Committee's views on the form in which that guidance might be published.<sup>7</sup>*

### ***Consolidating the guidance***

17. In taking forward the Prime Minister's request, the Government (with the Cabinet Office taking the lead) had first to consolidate the existing guidance relating to detainees into a single document, before providing this to the Committee for us to review.

18. The guidance that existed prior to March 2009 (with which the Committee had been provided previously, during its 2005 Detainees and 2007 Rendition inquiries) consisted of:

- i. A tri-Agency policy document, which outlined the Government's overall policy relating to detainees overseas and which included an overview of the UK's domestic and international legal obligations.
- ii. Individual Agency guidance, which reiterated the overarching legal and policy position and had detailed instructions regarding how to deal with detainees, or the passing of intelligence that could trigger detainee operations.
- iii. Military doctrine and guidance, which included a very substantial quantity of documentation. The overall doctrine and policy relating to detainees is contained in Joint Doctrine Publications, and the MoD Policy on Interrogation and Tactical Questioning. In addition, each operation has a comprehensive set of guidance, rules, standard operating instructions and procedures.

19. The process of consolidating the existing guidance took a considerable amount of time. The Committee, recognising the public interest in this matter, made a number of requests over several months for the document but it was not until some eight months later (18 November 2009) that we finally received it. We are disappointed at the length of time this took. The Cabinet Office has told the Committee that the Prime Minister and other Ministers shared these frustrations, but that the delays were unavoidable due to the legal

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<sup>6</sup> HC Deb 18 March 2009 c55WS.

<sup>7</sup> Letter from the Prime Minister, 18 March 2009.

complexities involved and, given the importance of the issues involved, the need to ensure that the guidance was correct.

20. The Foreign Secretary subsequently told us:

*It's taken longer than I would have liked to get to the stage that we are at. There's no point in beating about the bush on that. The reasons are a mixture of (a) the inherent caution that comes whenever issues are in front of the court, and there are a significant number of issues in front of the court, and that was an inhibition; (b) the inherent difficulty of getting different organisations on to the same wavelength. This was a consolidated guidance, not just three sets of guidance. And thirdly, I suppose, a bit of bureaucratic inertia, but we are where we are.<sup>8</sup>*

21. What was clear when we did receive the document was that the Consolidated Guidance was not simply a consolidation of what existed previously: it covers the same policy themes, guidance and instructions that the previous documents covered and it is consistent with those; however, it is a completely new document. The Cabinet Office explained the consolidation process it had undertaken:

*Previously, guidance existed in formats and styles which varied considerably, as did the terminology used. Both the Security Service and SIS had detailed operational instructions for staff. These instructions were in part informed by a tri-Agency policy document approved... in 2006 which covered the receipt of intelligence from, and feeding in of questions to, individuals held in detention in third countries. That document expressly did not cover circumstances in which the Agencies are directly involved in the questioning of detainees. Nor did it apply to the operational requirements of Ministry of Defence whose existing guidance on detention and interrogation was threaded through a range of policy documents and detailed standard operating instructions. The consolidated draft guidance therefore is effectively a new document. It is consistent with the existing guidance (and in particular the statement of principles in the 2006 document) but it has a wider scope and does not seek to reproduce or replace the administrative and procedural detail.<sup>9</sup>*

22. In providing the Committee with the draft guidance, the Prime Minister's Security Advisor, in addition to the questions already submitted to the Committee by the Prime Minister, asked for the Committee's views on:

- whether the Committee agrees that the guidance provides advice to officers in the field that will enable them to act with confidence and minimise the impact of uncertainty on operations; and
- whether the Committee agrees that the guidance makes a helpful contribution to the aim of making clear to the public the realities of the situations facing the Government in this context.<sup>10</sup>

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<sup>8</sup> Oral evidence – Foreign Secretary, 1 December 2009.

<sup>9</sup> Letter from the Prime Minister's Security Advisor, 18 November 2009.

<sup>10</sup> Letter from the Prime Minister's Security Advisor, 18 November 2009.

## REVIEW OF THE GUIDANCE

### *Introduction*

#### *How we have conducted our review*

23. In conducting this Review, we have considered the draft Consolidated Guidance, taken written and oral evidence from Ministers and the Heads of the intelligence and security Agencies, and consulted our own independent legal experts and our counterparts overseas. We have also seen additional supporting documentation from the Government, such as a note on the legal framework which underpins the guidance and lower-level guidance from the Agencies.

#### *Summary of the guidance*

24. The Consolidated Guidance is intended to provide guidance to Agency and Ministry of Defence (MoD) personnel in taking a decision involving a detainee. Although 13 pages long in total, it can be summarised as follows:

When evaluating whether or not to take action, the individual circumstances must be taken into account since there are too many variables to offer simple “black and white” advice. Such factors might include: the circumstances of an individual’s detention, the risk of mistreatment and torture, and the track record of the country or agency. If, on the basis of all the policy guidance, procedures and training at their disposal, and having taken into account all the variables in the individual case, the individual officer reaches the judgement that their actions would carry a “serious risk” that, as a result, a detainee will be tortured or suffer CIDT, they must refer the matter to senior personnel.<sup>11</sup> If senior personnel cannot reduce the risks of torture or mistreatment to an acceptable level (i.e. less than “serious risk”), but they still wish to proceed with the proposed action/operation, then they must refer the matter to Ministers who will then decide whether or not to proceed.

25. It was summarised by one of our witnesses: *“It’s simply this: if you know or believe that an action you are going to take is going to lead to CIDT or torture, don’t do it. And if there’s a serious risk, you know, you refer upwards.”*<sup>12</sup>

#### *Purpose: Policy versus Guidance*

26. Before considering the detail of the document, it is first important to be clear what the document is for, i.e. what it is meant to do. The stated aim of the Consolidated Guidance<sup>13</sup> is to provide guidance to intelligence and security Agencies’ officers, members of the Armed Forces and MoD personnel on interviewing detainees overseas, and the passing and receipt of intelligence relating to detainees. It also states 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”*.

<sup>11</sup> The Consolidated Guidance contains a list, although not exhaustive, of treatment which might constitute CIDT.

<sup>12</sup> Oral evidence – Home Office, 8 December 2009.

<sup>13</sup> Draft consolidated guidance, 18 November 2009, paragraph 1.

27. However, what then follows is not a set of hard and fast rules for personnel to follow, but instead a number of judgements and assessments. While we understand that this is a complex area and matters will not always be black or white, nevertheless the Consolidated Guidance provides very little in terms of real practical guidance. This Committee doubts that any officer could be confident in what they were doing on the basis of this document alone.

28. In practical terms, of course, this document does not stand alone. The Consolidated Guidance says that officers have access to “*supporting legal, administrative and procedural material... in their specific Agency or Department*”.<sup>14</sup> The “Note on the text” adds:

*It is envisaged that each organisation will continue to provide more detailed advice to their officers and personnel where such material is necessary to prescribe precisely how the principles and requirements set out in this guidance should operate within their individual organisational structure. Where helpful, this advice may include additional detail on the legal principles that govern the detention and treatment of detainees.*<sup>15</sup>

29. This is, of course, one of the dangers of trying to produce one document capable of being used in different organisations: what results is too high-level to be of any practical use to any of them and each relies on its own lower-level guidance. When taking evidence, we have consistently been told that there is more detail below and that the Consolidated Guidance is merely an overarching framework:

*What we are trying to do with this guidance is to provide a consolidated piece of guidance that covers obviously the work of all the Agencies and armed forces personnel, and each Agency has its own guidance which is more detailed – clearly more sensitive than this material which we have deliberately tried to make in a form that could foreseeably be published.*<sup>16</sup>

30. We have asked about this lower-level guidance, since it is clearly this that is the real guidance that officers will turn to when they need to make a decision. At the time of writing, the Secret Intelligence Service (SIS) was the only one of those organisations covered by the guidance to have started revising its lower-level guidance.<sup>17</sup> (This is understandable since other organisations have a less immediate need for it than SIS and can therefore wait until the Consolidated Guidance is finalised before then drafting their supporting documentation.)

31. We have seen the SIS draft lower-level guidance. It is considered further in paragraphs 100 to 104 below, but for now it is sufficient to note that it is, put simply, what we were expecting the Consolidated Guidance to look like. It provides flowcharts to aid decision making, practical examples of situations that might occur, and offers useful, practical guidance to staff.

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<sup>14</sup> Draft consolidated guidance, 18 November 2009, paragraph 10.

<sup>15</sup> Draft consolidated guidance, 18 November 2009, page 13.

<sup>16</sup> Oral evidence – Foreign and Commonwealth Office, 26 January 2010.

<sup>17</sup> MoD undertakes periodic reviews of its policy documentation; a review is currently under way.

32. This being the case, we questioned what purpose the Consolidated Guidance actually has. It has become clear in our questioning of witnesses that, in addition to providing guidance to staff, the other key purpose is to be able to put something in the public domain. The Director General of the Security Service told us:

*There is clearly and intentionally a degree to which this is aimed to provide public reassurance, given the media commentary on this, that actually Government are acting properly and in a controlled way in engaging in these quite difficult decisions. So I wouldn't dispute that this is, to some extent, aimed to provide public reassurance.*<sup>18</sup>

33. We do not seek to criticise this presentational aim. Indeed, we are strongly in favour of letting the public know the realities that the intelligence and security Agencies face. It is only by explaining the detail that we will then be able to have an informed debate on a subject that can attract extreme and often unrealistic views from those who have not been given the full picture. The Chief of SIS explained:

*I think it is important for reputational purposes that we can assure not just this Committee, but, through you, Parliament more widely and the British people, that our actions overseas are not beyond the law. We are not a Rambo service. We are taking the steps which are necessary to protect our security, but in line with the values that this country upholds.*<sup>19</sup>

34. However, we believe it is misguided to try and combine this presentational aim with a practical purpose: neither aim is then met satisfactorily.

35. The “Consolidated Guidance” document does not provide operational guidance since it is too vague to be of practical use to personnel, and it should not be presented as such. The practical use of the document lies instead in setting out what the Secretary of State for Defence referred to as the “strategic context” or “contextual environment”.<sup>20</sup>

36. The legal framework is set out in UNCAT, ECHR and ICCPR<sup>21</sup> and the ethical framework has already been set out publicly by ministers.<sup>22</sup> This document now gives us the policy framework within which our personnel will operate. It is as this that it has real value, and it is therefore in this context – as Consolidated Policy, not Guidance<sup>23</sup> – that we have considered and commented on the document.

**A. The “Consolidated Guidance” does not provide detailed practical guidance to staff and must not be published under this guise.**

<sup>18</sup> Oral evidence – Security Service, 8 December 2009.

<sup>19</sup> Oral evidence – SIS, 1 December 2009.

<sup>20</sup> Oral evidence – Defence Secretary, 26 January 2010.

<sup>21</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, European Convention on Human Rights and International Covenant on Civil and Political Rights.

<sup>22</sup> Written Ministerial Statement by the Foreign Secretary, 24 February 2009 (column 19WS).

<sup>23</sup> To ensure that it is clear that our comments are on the policy and are not intended as attempts to turn it into guidance, the document is referred to as “Consolidated Policy” throughout the rest of the report.

**B. As “Consolidated Policy”, however, it has real value in setting out the overarching strategic and policy framework relating to detainees within which individual organisations will operate and under which they can develop their own practical operational guidance.**

### ***Policy issues***

37. The UK Government’s public policy statement regarding torture and cruel, inhuman or degrading treatment or punishment (CIDT) remains unchanged, and is set out again in the Consolidated Guidance:

*We do not participate in, solicit, encourage or condone the use of torture and cruel, inhuman or degrading treatment or punishment for any purpose.*

This reflects the UK’s legal and ethical obligations.

38. The Consolidated Policy expands on this statement and provides further detail as to how this should work in practical policy terms. There are five key policy areas that require consideration:

- Eliminating the risk of complicity in torture;
- “Complicity”;
- Receiving intelligence;
- Seeking intelligence from detainees held by foreign powers or passing intelligence which might lead to an individual being detained; and
- Interviewing detainees ourselves.

#### *i) Eliminating the risk of complicity in torture*

39. Following our letter to the Prime Minister of 17 March and the Prime Minister’s decision, on 18 March, to consolidate and publish the guidance on detainees, the Committee wrote again to the Prime Minister, reiterating our recommendation that any public document should seek to explain the difficulties our Agencies face in handling detainees:

*As you will have seen from my letter of 17 March 2009, the key issue raised in the Binyam Mohamed case is not new. How do we reconcile the need to obtain vital intelligence to protect the British public, with the need to ensure that an individual’s human rights are not infringed? This is a fundamental policy question which must be answered before this Committee can determine what the detailed guidance should be. While not condoning, soliciting or encouraging torture or CIDT, the reality is that our Agencies are required to take action which runs the risk of it happening – this is something we would hope to see expressed in any policy statement on this matter.<sup>24</sup>*

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<sup>24</sup> Letter from the Chairman to the Prime Minister, 23 April 2009.

40. The Committee believes that it is vital that the public is made aware of the realities of the situation facing the intelligence and security Agencies. The joint article by the Foreign and Home Secretaries in August 2009, which sought to explain that the risk of mistreatment cannot be completely eliminated if we have any intention of protecting UK citizens from attack, was a helpful contribution to the public debate. The article says:

*When detainees are held by our police or armed forces we can be sure how they are treated. By definition, we cannot have that same level of assurance when they are held by foreign governments, whose obligations may differ from our own.*

*Yet intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK in this decade have had significant links abroad. Our agencies must work with their equivalents overseas. So we have to work hard to ensure that we do not collude in torture or mistreatment.*

*... our agencies are required to seek to minimise, and where possible avoid, the risk of mistreatment. Enormous effort goes into assessing the risks in each case. Operations have been halted where the risk of mistreatment was too high. But it is not possible to eradicate all risk. Judgments need to be made.<sup>25</sup>*

41. The need to work with other countries in order to counter the threat from international terrorism cannot be underestimated. It is simply impossible for our Agencies to work in isolation if they are to try and protect us. Eliza Manningham-Buller, the previous Director General of the Security Service, said publicly in 2005:

*Al Qaida and its affiliates pose a uniquely transnational threat which requires an international response. This has led to increased co-operation between governments, including on security/intelligence channels. The need for enhanced international co-operation to combat the threat from Al Qaida and its affiliates was recognised and has been emphasised since September 2001 in, for example, Security Council resolution 1373...<sup>26</sup>*

42. It is this international dimension that gives rise to potential problems. Other countries, and by implication their security services, may have different views as to what constitutes acceptable treatment within their own legal and ethical frameworks. Referring to the risk of detainees being mistreated, the Chief of SIS said: *"It's hard for anybody to rule it out absolutely, totally, in any country."*<sup>27</sup>

43. The question is how we manage these differences. Do we insist that the UK Agencies work only with countries that are guaranteed to uphold the same human rights standards as ourselves? If we want a cast-iron guarantee then we will not be able to continue working with more than a handful of countries. The flow of intelligence would be minimal and would mean a greatly reduced capability to prevent terrorist attacks. If, however, we wish

<sup>25</sup> "We firmly oppose torture – but it is impossible to eradicate all risk", Foreign Secretary and Home Secretary – joint article for The Sunday Telegraph, 8 August 2009.

<sup>26</sup> Evidence to the 2005 House of Lords Appeal on cases related to the Anti-Terrorism, Crime and Security Act 2001 ([2006] 2 AC 221 and [2005] UKHL 71).

<sup>27</sup> Oral evidence – SIS, 1 December 2009.



to protect our citizens then we have to cast the intelligence net as wide as possible. In so doing, the risk of involvement, albeit indirectly, in torture or CIDT is inescapable. We can therefore only manage these risks.

**C. We cannot protect the UK if we isolate ourselves. The UK intelligence and security Agencies must make use of foreign intelligence partnerships in order to safeguard our security and prevent terrorist attacks.**

**D. Working and sharing intelligence with foreign intelligence services inevitably carries risks that the UK will be indirectly involved in mistreatment. It is unfortunate, but inescapable, that those risks cannot be wholly eliminated. In dealing with other countries, there can be no cast-iron guarantee that the UK will not, however indirectly, be implicated in torture or CIDT. The challenge therefore is how to minimise that risk.**

ii) “Complicity”

44. As set out above, the UK has a clear policy that it does not “*participate in, solicit, encourage or condone the use of torture and cruel, inhuman or degrading treatment or punishment for any purpose.*” However, where the UK is not in control (for example, when a detainee is being held by a foreign power), we often do not know how that detainee is being treated. In dealing with that country’s intelligence agencies (receiving intelligence from them, for example), our Agencies may therefore be implicated in an individual’s mistreatment without being aware that the mistreatment is taking place. This has led to accusations of “complicity” in torture and CIDT.

45. While there is no suitable definition for “complicity” in UK law, we have been advised:

*It will be an offence for a UK official to aid or abet a criminal offence under UK law committed by a foreign liaison service. A UK official will be liable for aiding and abetting an offence if he intentionally does an act of assistance or encouragement, knowing or believing that an offence will be committed by the principal and believing that his act is capable of assisting or encouraging the principal in the commission of the offence.*<sup>28</sup>

In addition:

*A UK official will [also] commit a criminal offence under UK law if he does an act capable of encouraging or assisting the commission of an offence by a liaison service under the law applicable in that jurisdiction, and he either intends to encourage or assist its commission... or believes that an offence will be committed and that his act will encourage or assist its commission.*<sup>29</sup>

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<sup>28</sup> “Briefing paper for ISC”, Cabinet Office, 30 November 2009.

<sup>29</sup> “Briefing paper for ISC”, Cabinet Office, 30 November 2009.

In other words, “complicity” should be equated to the commission of a criminal offence. In this context, criminal liability would occur when an individual “knows or believes” that their actions will result in an unlawful act (such as torture, unlawful detention or cruel, inhuman or degrading treatment).

46. The Consolidated Policy does not use the legal threshold of “knowing or believing” however. Instead, it uses a lower threshold – “serious risk”. We have been told that the reason for using a threshold lower than the legal bar is to ensure that the checks, authorisations and other actions and safeguards described in the guidance would be triggered at an earlier stage, before any UK personnel would reach a point where they might be aiding, abetting, encouraging or soliciting an act of torture or CIDT. Explaining this decision, Home Office officials clarified:

*Setting the threshold where we have done it gives the best prospect of identifying those cases where there is a danger which needs to be exposed higher up the chain.<sup>30</sup>*

**E. It is a sensible precaution to put in place a stricter test for triggering safeguards than the law requires. This will ensure that personnel adopt the necessary safeguards and precautions before the legal threshold is reached, and therefore before they are in danger of becoming “complicit” in torture or CIDT committed by foreign agencies. The question of how this stricter test – of “serious risk” – is expressed is addressed later in this Report.<sup>31</sup>**

### *iii) Actions*

47. In working with other intelligence and security Agencies, the actions of UK personnel that could lead to accusations of complicity (i.e. aiding, abetting, encouraging or soliciting an act of torture or CIDT) might include:

- a) Receiving intelligence;
- b) Seeking intelligence from detainees held by foreign powers or passing intelligence which might lead to an individual being detained; and
- c) Interviewing detainees ourselves.

### *a) Receiving intelligence*

48. Given the international nature of the threat, the UK intelligence and security Agencies often receive intelligence from foreign intelligence services on potential plots concerning the UK.

49. Foreign intelligence services guard their sources as fiercely as the UK Agencies do. Intelligence is not generally accompanied by any details as to where it came from, and any inquiries as to how it was obtained are not likely to be answered. In our letter to the Prime Minister we cited Eliza Manningham-Buller, the previous Director General of the

<sup>30</sup> Oral evidence – Home Office, 8 December 2009.

<sup>31</sup> Paragraphs 74 to 78.

Security Service, who explained in the course of the 2005 House of Lords appeal on cases related to the Anti-Terrorism, Crime and Security Act 2001:

*Most credible threat reporting received by the Agencies requires immediate action. Often there is no specific timescale attached to the reporting, but public safety concerns dictate that the Agencies work from a position of possible imminence. The need to react swiftly to safeguard life precludes the possibility of spending days or weeks probing the precise sourcing of the intelligence before taking action upon it, especially when such probing is in any event unlikely to be productive...*<sup>32</sup>

50. The former Director General went on to describe a real-life example relating to the “Ricin plot” involving a detainee called Meguerba:

*Meguerba was already known to the Security Service and the police. The reporting required urgent operational action and was also relied upon for the purposes of immediate legal action... In those circumstances, no inquiries were made of Algerian liaison about the precise circumstances that attended the questioning of Meguerba. In any event, questioning of Algerian liaison about their methods of questioning detainees would almost certainly have been rebuffed and, at the same time, would have damaged the relationship to the detriment of our ability to counter international terrorism.*

51. This case demonstrated both that the operational imperative for the UK Agencies can sometimes take precedence over checking that detainees are being properly treated, and also that attempts to check how intelligence has been obtained will be rebuffed.

52. This raises difficult ethical questions: if our Agencies are passed intelligence, but they do not know how it was obtained, should they use it to prevent an attack in the UK? If they suspect that torture or mistreatment may have been used, should they still use it? If they know that torture or mistreatment has been used, should they then use it?

53. In his judgment in the House of Lords appeal mentioned earlier,<sup>33</sup> Lord Brown of Eaton-Under-Heywood said:

*Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. [emphasis added]*

In the same case, Lord Nicholls of Birkenhead reached a similar conclusion:

*The intuitive response... is that if use of such information [which is known or suspected to be the product of torture] might save lives it would be absurd to reject*

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<sup>32</sup> [2006] 2 AC 221 and [2005] UKHL 71.

<sup>33</sup> [2006] 2 AC 221 and [2005] UKHL 71.

*it. If the police were to learn of the whereabouts of a ticking bomb, it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act this way. In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The Government is using information obtained by torture. But in cases such as these, the Government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.*

**F. Where unsolicited intelligence regarding a threat to the UK's national security is received, then the UK Agencies have a duty to consider it regardless of its provenance and, if credible, to take action on it. We believe that such action does not condone torture or CIDT and that therefore it would be consistent with both the Government's policy and the law.**

*b) Seeking intelligence from detainees held by foreign powers or passing intelligence which might lead to an individual being detained*

54. There will, however, be circumstances where our Agencies must actively seek intelligence from detainees. It is these circumstances where the Consolidated Policy sets out what must be taken into consideration.

55. An essential factor that must be taken into consideration is the UK's international and domestic legal obligations. The Consolidated Policy can only operate within these boundaries and therefore the legal position must be made clear at the outset. The Consolidated Policy does not do this and therefore we have here set out our understanding of the position – based on the evidence we have taken.

56. The prohibition on torture is held to be a fundamental principle of international law which applies in all jurisdictions and from which no derogation is permitted.<sup>34</sup> The UK Government's policy statement – that it will not “*participate in, solicit, encourage or condone the use of torture and cruel, inhuman or degrading treatment or punishment for any purpose*” – clearly supports this. Taking any action (e.g. seeking intelligence) where it is known that torture will result is forbidden.

57. In most countries there is also a prohibition on cruel, inhuman or degrading treatment or punishment (CIDT). Such mistreatment (although not explicitly defined) is outlawed within the jurisdiction of the European Court of Human Rights<sup>35</sup> and those countries

<sup>34</sup> This principle has been accepted by the English Courts. See *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Urgate* (No 3) [2000] 1 AC 147 (at page 198); *A and others v Secretary of State for the Home Department* (No 2) [2006] 2 AC 221 (at page 259).

<sup>35</sup> Signatories to the European Convention on Human Rights (and members of the Council of Europe) are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom.

which are signatories to the 1966 International Covenant on Civil and Political Rights<sup>36</sup> and/or the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>37</sup> Therefore, there are only a small number of countries where CIDT is not outlawed.<sup>38</sup>

58. Given that the Consolidated Policy does not set out this legal position, we questioned Ministers in detail as to what they believed the position was, and in particular the distinction between the absolute prohibition on torture and the less than absolute prohibition on CIDT (i.e. did they believe that there were circumstances in which they could lawfully authorise action which would result in CIDT in certain countries).

59. The Foreign Secretary said that, given that CIDT is not legally defined, whilst there is an absolute ban on torture there is not an absolute ban on CIDT. He would, therefore, have to take into account the precise circumstances of the case.<sup>39</sup>

60. The Home Secretary also told the Committee that he thought that there could be circumstances where a very serious risk to national security might require difficult moral judgements to be made:

*There's a difference in our approach to these two issues. Torture must never, ever be contemplated in any circumstances. It's a very firm "no".*

*CIDT is a lot more difficult, as you have found out. Fortunately, I don't have to make those authorisations, or I haven't so far. They have been mainly a matter for the Foreign Secretary...*

*CIDT is something that we do not engage in ourselves, we are absolutely not involved in, we don't encourage. But in terms of where we are receiving information (I think the Ricin plot was a good example of this, where you know something is going to*

<sup>36</sup> The majority of states in the world are parties to the International Covenant on Civil and Political Rights. As of September 2009, the following states have either not yet signed the convention, or have signed but not yet ratified it: Antigua and Barbuda, Bhutan, Brunei, Burma, China, Comoros, Cuba, Fiji, Kiribati, Laos, Malaysia, Marshall Islands, Micronesia, Nauru, Oman, Pakistan, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, São Tomé and Príncipe, Singapore, Solomon Islands, Tonga, United Arab Emirates, Vanuata and Vatican City.

<sup>37</sup> Signatories to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as of 10 December 1984 are: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, São Tomé and Príncipe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, St Vincent and the Grenadines, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen and Zambia.

<sup>38</sup> This does not mean that UK personnel operating in one of these countries would themselves be able to inflict CIDT on detainees (or aid or abet others in doing so). We have also been told that, in deciding whether or not to authorise action, the Foreign and Commonwealth Office does not draw a distinction between those countries where CIDT is outlawed and those where it is not.

<sup>39</sup> Oral evidence – Foreign Secretary, 1 December 2009. The Foreign Secretary explained the factors and circumstances he would take into account and these are set out in detail in paragraph 92.

*happen very quickly), and you've got an idea, maybe sleep deprivation may have been used. There is an issue of judgement. It's not prohibited on the same basis that torture would be prohibited.<sup>40</sup>*

61. When the Secretary of State for Defence was asked whether he also believed that CIDT might be permissible under certain circumstances, he said:

*Yes... That's my interpretation of it... The risk of cruel and inhuman treatment would have to be balanced off against the risk of life to our armed forces, to our nation... That is the balance that only a Minister should be asked to take...*

*I get a lot of advice all the time on the extent to which the European Convention on Human Rights operates in our theatres, and the situation is changing all the time. I mean, I'm not a lawyer, and I would get hold of a lawyer as quickly as possible to try and help me and guide me in what I'm allowed to do and what I'm not allowed to do. But my understanding is that proportionality comes into some of these legal requirements and the decision making.<sup>41</sup>*

62. It appears that when considering whether or not to take action (e.g. seeking intelligence from a detainee in the custody of a foreign power, or providing intelligence to a foreign service to assist detaining people), from the evidence we have been provided with, there are five different scenarios:

- If it is known or believed that torture will result, then no action should ever be taken.
- If it is known or believed that CIDT will result (in circumstances where it is outlawed), then no action should ever be taken.
- If it is known or believed that CIDT will result (in those very limited circumstances where it is not outlawed), then ministers must decide, taking into account all the relevant factors, whether action should or should not be taken.<sup>42</sup>
- If there is judged to be a “serious risk” that torture or CIDT will result, senior personnel will attempt to reduce the risks. If they cannot, ministers must then decide, taking into account all the relevant factors, whether action should or should not be taken.<sup>43</sup>
- If there is judged to be less than a “serious risk” that torture or CIDT will result, personnel may proceed to take action.

63. The Consolidated Policy therefore explains that only where there is less than a serious risk of torture or CIDT are individual personnel able to take action without further authority. In all other cases, they are either prohibited from proceeding<sup>44</sup> or must refer the

<sup>40</sup> Oral evidence – Home Secretary, 8 December 2009.

<sup>41</sup> Oral evidence – Defence Secretary, 26 January 2010.

<sup>42</sup> The factors that the Foreign Secretary has said he would take into account are set out in paragraph 92.

<sup>43</sup> The factors that the Foreign Secretary has said he would take into account are set out in paragraph 92.

<sup>44</sup> No action may be taken where it is known or believed that torture will result. No action may be taken if it is known or believed that CIDT will result (in circumstances where it is outlawed).

matter to senior personnel. Where senior personnel cannot mitigate the risk then it must be referred to Ministers to approve. Ultimately, therefore, the responsibility for difficult decisions rests with Ministers.

64. What is clear to us now, which was not immediately apparent from either the Government's policy statement<sup>45</sup> or the Consolidated Policy,<sup>46</sup> is that there are very limited circumstances in which Ministers could lawfully authorise action that would knowingly result in CIDT.

**G. Whilst considerable time and care has been taken over drafting the Consolidated Policy, we nevertheless consider that the critical section (paragraph 8 of the draft before us), which aims to set out the options, conflates the issues and lacks sufficient clarity on what is such a crucial matter. We recommend a clearer and more structured approach based on the five scenarios we have described in paragraph 62 above. This will help to separate out where there is a prohibition on action and where there is discretion. It will also make clear, as we have done, what ministers can or cannot authorise.**

**H. Ministers have told us that they believe that there are exceptional circumstances where they could lawfully authorise action by UK personnel that would knowingly result in CIDT. Given that such action would be a clear departure from the Government's own stated policy, we recommend that the Government should commit (in its response to this Report) to informing Parliament if ever such an authorisation is granted, i.e. if their policy has changed.**

*c) Interviewing detainees ourselves*

65. The third set of circumstances in which UK personnel might be accused of complicity in torture or CIDT is where they interview detainees. UK policy is clear that personnel cannot participate in acts of torture or cruel, inhuman or degrading treatment or punishment.

66. When deployed on operations, the Armed Forces can be authorised to detain, tactically question, interrogate and debrief individuals, and have detailed guidance and procedures describing how they are to be treated. The intelligence and security Agencies do not detain people themselves; however they do interview detainees in the custody of other countries. It is this last issue that the Consolidated Policy seeks to address.

67. When the intelligence and security Agencies send their officers to interview a detainee in foreign custody, the Consolidated Policy makes clear that should an officer become aware of, or witness, anything that causes them to believe that there is a serious risk that the standards to which a particular detainee has been, or will be, subjected are unacceptable, then they must cease their involvement immediately. It also requires that they report their concerns to senior personnel so that representations can be made to the agency or service in control. If sufficient assurances regarding the treatment of the detainee and, depending on the precise circumstances, ministerial authorisation are obtained then UK personnel may re-engage in interviewing the detainee.

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<sup>45</sup> "We do not participate in, solicit, encourage or condone the use of torture and cruel, inhuman or degrading treatment or punishment for any purpose."

<sup>46</sup> The critical paragraph in the draft Consolidated Policy is paragraph 8.



68. The Consolidated Policy contains details of the circumstances under which UK personnel would be required to halt an interview or interrogation of a detainee. (Publishing these criteria would, of course, allow detainees in certain countries, or in the custody of certain security services, to prevent any interviews by UK personnel – potentially to the detriment of UK national security.)

**I. The safeguards described in the Consolidated Policy in relation to UK personnel interviewing detainees directly appear sufficient.**

### ***Proposed amendments***

69. One of the things that we were asked to do was consider possible changes to the document. The Home Secretary explained that: *“There’s always things you could express better, and your views would be very welcome... Of course, we would have to get endorsement across Whitehall, but... we really think you’ve got an important role to play in this.”*<sup>47</sup>

70. As we have set out previously, this is not detailed guidance to staff, but a policy framework within which our Agencies will operate. It would be inappropriate for an independent committee to draft Government policy, for which Government and ministers must be responsible. Nevertheless, in addition to the key changes already identified in recommendations J, K, P and Q, there are some areas of the Consolidated Policy where we believe further clarification would be helpful or which we consider require further thought, and we detail those here for Government to consider.

#### *i) Personal liability*

71. Recent events<sup>48</sup> have shown that it is essential that personnel have effective guidance that they can rely on when making difficult decisions as it is possible that they might, at some point, face charges in relation to their actions. We have therefore taken particular interest in the opening paragraph of the guidance, which states:

*This guidance must be adhered to by officers of the UK’s intelligence and security agencies, members of the UK’s Armed Forces and employees of the Ministry of Defence (‘personnel’). Personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future.*

72. This statement – “good reason to be confident” – does not seem to offer much assurance. The Chief of SIS agreed, saying:

*[It] is not as fulsome and clear as I as Chief would have liked... I would have preferred that to be more categorical and to say that personnel whose actions are consistent with this guidance can be confident that they are acting lawfully or within the framework of the law.*<sup>49</sup>

73. We questioned witnesses as to why this phrase was chosen and why greater certainty could not be given. We were told that, despite all the legal expertise which has gone into drafting the Consolidated Policy, it cannot provide individual officers with a guarantee of protection from prosecution since responsibility for determining personal liability in these circumstances may only be determined by the courts. The Director General of the Security Service said:

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<sup>47</sup> Oral evidence – Home Secretary, 8 December 2009.

<sup>48</sup> During the Binyam Mohamed case, allegations were made about the conduct of a Security Service officer who had interviewed Mr Mohamed while he was detained in Karachi in 2002. The Home Secretary referred the allegations to the Attorney General for her to consider whether further action should be taken. She concluded that the appropriate course for action was to invite the Commissioner of the Metropolitan Police Service to commence an investigation.

<sup>49</sup> Oral evidence – SIS, 1 December 2009.

*Clearly the sense of this is to provide appropriate confidence to personnel without providing a kind of legally enforceable indemnity. But that's because the Attorney and the prosecuting authorities would want to be in a position to take decisions on the basis of all the facts available and in the particular circumstances. It would be nice to be in a different situation, where you had a kind of cast-iron indemnity, but that's not how the legal system in England works. So, you know, you have to live in the world we live in.<sup>50</sup>*

**J. Compliance with the guidance may not provide sufficient legal cover for personnel in every circumstance. This could leave them unnecessarily vulnerable, and might well lead to a more risk averse culture, which would have worrying implications for the protection of the UK. We strongly believe that individual officers must be given greater assurance if they are to be expected to continue doing a difficult job in demanding circumstances: further thought must be given as to how this can be provided.**

ii) *“Serious risk” of torture or CIDT*

74. As we have said previously, the legal threshold for complicity is “knowing or believing” that torture or mistreatment of a detainee will occur. The Consolidated Policy uses a lower threshold of “serious risk” in order to ensure that the safeguards are triggered before the legal bar is reached.

75. The term “serious risk” is therefore key. We were advised:

*... to seek some clarification from the Government as to what they mean by a “serious risk”, because they have introduced this test themselves voluntarily into the guidance... They have gone further than they believe they need to in order to comply with the law, and I think that they do need to clarify [what] they mean by “serious risk”, not least because the intelligence officer on the ground simply won't know, and I would have thought that it's crucially important that they do so, so that there can be no room for doubt in his or her mind as to what's intended.<sup>51</sup>*

76. We therefore questioned various witnesses as to what they thought it meant and how individual officers should interpret it, given that the Consolidated Policy does not offer a definition. The Home Secretary said:

*I don't think it would be helpful to define “serious risk” because I don't think you can actually define all the circumstances that are likely to be faced... “Serious risk” means a real risk, a real possibility.<sup>52</sup>*

<sup>50</sup> Oral evidence – Security Service, 8 December 2009.

<sup>51</sup> Legal advice to the ISC, 8 December 2009.

<sup>52</sup> Oral evidence – Home Secretary, 8 December 2009.

While the Foreign Secretary told us:

*“Serious risk” is not judged by X per cent... “serious risk” is in the eye of the beholder... We know the difference between a risk and a “serious risk”... A “serious risk” is much more likely to happen. That’s the truth.*<sup>53</sup>

Furthermore, the Defence Secretary told us: *“I don’t know whether or not that gives them a useful definition. I really don’t know.”*<sup>54</sup>

77. What is clear from this is that there is no suitable definition that even those who drew up the policy can agree on. We question how individual personnel are then expected to use their judgement and be confident that their understanding of “serious risk” is correct (or, for that matter, similar to the understanding of ministers or, potentially, the courts).

**K. Leaving individuals to determine what constitutes a “serious risk” of torture or mistreatment places an unacceptable burden on the individual officer. We believe that both the Consolidated Policy and the lower-level guidance should offer further clarification, perhaps by drawing on other phrases.**

78. The following is an illustration of the sorts of phrases which might be drawn upon to provide context and additional clarity as to what may or may not be a “serious risk”:<sup>55</sup>

100% chance		50% chance		0% chance	
Certain	Very likely	Likely	Quite likely	Possible	No chance
Knowledge		Strong suspicion		Suspicion	No suspicion
Beyond reasonable doubt		Balance of probabilities		Reasonable doubt	
Certain	Real possibility			Minimal or theoretical possibility	
More likely than not				Less likely	
Knowledge or belief		"Serious risk"		Less than "serious risk"	
↓		↓		↓	
REFER CASE TO SENIOR MANAGERS OR MINISTERS				PROCEED WITHOUT FURTHER AUTHORITY	

<sup>53</sup> Oral evidence – Foreign Secretary, 1 December 2009.

<sup>54</sup> Oral evidence – Defence Secretary, 26 January 2010.

<sup>55</sup> This is an illustrative example only, showing how Government might be able to provide further context. It is not intended to be definitive.

iii) *Prohibited techniques*

79. The Consolidated Policy includes an annex which lists those practices which “could” constitute cruel, inhuman or degrading treatment:

- d. Cruel, inhuman or degrading treatment or punishment.
- Cruel, Inhuman or Degrading Treatment or Punishment (CIDT) is a term which is used in some international treaties but is not defined in UK law. In the context of this guidance, the UK Government considers that the following practices, *which is not an exhaustive list*, could constitute cruel, inhuman or degrading treatment or punishment:
- (i) use of stress positions;
  - (ii) sleep deprivation;
  - (iii) methods of obscuring vision or hooding (except where these do not pose a risk to the detainee's physical or mental health and is necessary for security reasons during arrest or transit);
  - (iv) physical abuse or punishment of any sort;
  - (v) withdrawal of food, water or medical help;
  - (vi) degrading treatment (sexual embarrassment, religious taunting etc); and
  - (vii) deliberate use of 'white' or other noise.

In any case of doubt interviewing personnel should seek guidance from senior personnel who may take appropriate advice on whether any conduct may amount to torture or cruel, inhuman or degrading treatment or punishment.

80. The Consolidated Policy does not therefore provide a clear, unambiguous list of prohibited techniques. The Foreign Secretary said that this was because “*CIDT is not singular in its nature. There's a broad spectrum of treatments that can be qualified by the courts as constituting CIDT.*”<sup>56</sup> The Attorney General explained further:

*Cruel, degrading and inhumane treatment has a huge spectrum to it. The question then is impossible to determine unless you know the particular facts of the case. And that is why it's unhelpful to talk about hypotheticals, because [cruel, inhumane and degrading treatment] is a bit like an elephant: difficult to describe, but you know one when you see it.*<sup>57</sup>

81. The Committee's own legal advice supports this:

*Unlike torture, which has been defined in a number of different international instruments and in our own criminal law, there is no universally accepted definition of CIDT. I mean, it sounds facile, I know, but it means what it says, and all one can*

<sup>56</sup> Oral evidence – Foreign Secretary, 1 December 2009.

<sup>57</sup> Oral evidence – Attorney General, 8 December 2009.

*do is to give examples of what the court, particularly the European Court of Human Rights, has held to amount to cruel, inhuman or degrading treatment.*<sup>58</sup>

This lack of clarity can, again, only add to the burdens being placed on the individual officer.

**L. If officers are to act with confidence, they must be given more clarity. At the very least the lower-level guidance must contain examples of treatment that would likely constitute CIDT. In seeking to address this, we would refer the Government to the list of proscribed techniques listed in the Ministry of Defence's Joint Doctrine Publication on *Prisoners of War, Internees and Detainees*.<sup>59</sup>**

82. The existing published MoD material outlines a number of techniques that UK armed forces personnel are prohibited from carrying out:

209. Following allegations of inhumane treatment made by individuals detained by the police and UK armed forces in Northern Ireland in the early 1970s, the UK government has proscribed the following techniques, which **MUST NEVER** be used as an aid to tactical questioning or interrogation:<sup>15</sup>

- a. **'Stress positions'**. Forcing captured or detained persons to adopt a posture that is intended to cause physical pain and exhaustion;
- b. **Hooding**. Putting a bag over a captured or detained person's head and keeping it there, whether as part of the TQ&I process or not;
- c. **Subjection to noise**. Holding a captured or detained person in an area where there is a continuous loud and hissing noise;
- d. **Deprivation of sleep**. Depriving captured or detained persons of sleep;
- e. **Deprivation of food and drink**. Subjecting captured or detained persons to a reduced diet.

<sup>15</sup> PM Heath Statement to Parliament 2 March 1972 (*Hansard*). The allegations were later heard in the European Court of Human Rights in *Ireland v UK* (Application 5310/71) in 1978. The Court confirmed that use of the techniques as an aid to interrogation amounted to inhuman and degrading treatment in contravention of the European Convention on Human Rights. The ongoing proscription of the '5 techniques' is currently articulated in MOD policy (see footnote 12 above).

83. Further detailed guidance is then provided within each of those categories. For example, in relation to the prohibition on sleep deprivation, the Defence Secretary told us:

*We've got our own documentation that sits under this, that is used for the training and preparation, the briefing of people, so that they know more clearly and in more detail... in terms of sleep deprivation... what people are entitled to expect in a 24-hour period – it goes into that kind of detail.*

<sup>58</sup> Legal advice to the Committee, 8 December 2009.

<sup>59</sup> [www.mod.uk/DefenceInternet/MicroSite/DCDC/OurPublications/](http://www.mod.uk/DefenceInternet/MicroSite/DCDC/OurPublications/) See Development Concepts Doctrine Centre (DCDC). The relevant documents are *Prisoners of War, Internees and Detainees* – Joint Doctrine Publication, 1-10, which covers all types of detained people, and *Detainees* – Joint Doctrine Publication 1-10.3 which is specific to detainees. The publication clarifies that detainees are "a category of prisoner distinct from Prisoners of War and internees... who, during operations abroad not amounting to International Armed Conflict, are held by UK armed forces because they have, or are suspected of committing, criminal offences."

*Now, that isn't the kind of thing – because some of this gets into the tactics of interrogating people – that we want necessarily to see in the public domain.*<sup>60</sup>

iv) *The use of caveats and assurances*

84. In our 2007 Report on Rendition<sup>61</sup> we explained the nature of intelligence sharing, including the system of caveats and assurances used to protect intelligence or to set conditions on how it will be used when it is shared with foreign intelligence services.

85. Caveats<sup>62</sup> are routinely used to prohibit the use of the intelligence for certain purposes. The standard caveat used by SIS and the Security Service, for example, is designed to prevent intelligence being passed on to others without permission and to prevent foreign services from taking certain actions (which may betray sources or undermine operations). This standard wording says:

*This information has been communicated in confidence to the recipient government and should not be released without the agreement of the British Government. It is for research and analysis purposes only and may not be used as the basis for overt, covert or executive action.*

86. However, as we have seen from the case of Bisher al-Rawi and Jamil el-Banna,<sup>63</sup> caveats do not provide complete guarantees. While all intelligence exchanges use caveats of some form, an assessment still has to be made as to whether the foreign intelligence service concerned is likely to honour the caveat – this would take into account the track record of previous dealings with the foreign service concerned.

87. We also explained in our Report on Rendition that, in addition to routine caveats, the Agencies may also seek specific assurances in individual cases. These may be used when a particular foreign liaison service has, for example, a human rights record about which the UK Agencies may be concerned. As with caveats, there is no complete guarantee that any assurance given will necessarily be honoured. Nonetheless, most foreign intelligence services consider it important to maintain good relations with their UK counterparts and, therefore, would adhere to any assurances given.

88. Although the nature of GCHQ's work means that it is very much less likely than the other Agencies (or the MoD) either to be involved directly in the questioning of detainees or in the provision of questions to be put by others, there is nonetheless a possibility that its information, where shared with foreign liaison partners, could trigger the detention of an individual or be used during an interrogation. We have therefore included the safeguards employed by GCHQ in our consideration alongside the system of caveats and assurances used by the other Agencies.<sup>64</sup>

<sup>60</sup> Oral evidence – Defence Secretary, 26 January 2010.

<sup>61</sup> Cm 7171.

<sup>62</sup> Caveats on shared intelligence are used predominantly as a means to protect intelligence sources. For example, if intelligence was shared with a foreign liaison service and that service subsequently took action (such as arresting someone) that could reveal the source of the information and endanger that person or other operations. The protection of sources is paramount and the use of caveats is one of the methods by which this is achieved.

<sup>63</sup> ISC Report on Rendition (Cm 7171, July 2007).

<sup>64</sup> The safeguards GCHQ uses to protect its intelligence or to control how it is used are two-fold. First they have a sensitivity checking process used whenever there are concerns over legal, political or operational sensitivities which is understood by all relevant staff. This is supplemented by GCHQ's control and assurance processes which enable it to regulate the use of its intelligence reports by recipients (including foreign liaison services). These processes allow for concerns about proposed or potential actions to be referred to senior managers or, ultimately, to ministers.



**M. While the system of controls (such as caveats and assurances) used by the intelligence and security Agencies to protect how their information is used by foreign liaison services cannot offer a cast-iron guarantee, we nevertheless recommend, as an additional safeguard, that the Government considers updating the standard caveat as currently used in routine intelligence exchanges to refer specifically to detainees.**

*v) Explaining the role of ministers*

89. The Consolidated Policy, as currently drafted, states that, where an officer considers there to be a “serious risk” of torture or CIDT, then the case should be referred to senior officers. It also states that, if senior officers are unable to manage, mitigate or reduce those risks, they must then seek ministerial approval to proceed.

90. We have already set out (paragraph 62) that ministers can authorise action where there is a serious risk that torture or CIDT will result, and in certain circumstances can authorise action where they know CIDT will result. The difficult decisions therefore rest with ministers.

91. The Consolidated Policy does not, however, elaborate on the ministerial decision-making process and how they will balance the risk to the individual against the risk to the country. If the purpose of this document is to inform public debate, then this further layer must be included.

92. The Committee has taken evidence on this point and questioned ministers as to how they will decide what action to authorise. The Foreign Secretary, drawing on a range of cases that he had been involved in, explained:

*What sort of information do I have to hand when I’m assessing whether or not the relationship with a particular service carries particular kinds of risks of violating our own position? I would have in mind – number one – the relationship of that service to the law of the land in that country. I would have, secondly, to hand the history of our relationships with this service. Have we in the past asked them, for example, for assurances in respect of work we have done together, and were those assurances respected? Thirdly, I would have any comments from the service concerned about this particular case that we were trying to do together. Fourthly, I would have the benefit of any international reports on what the service was up to. Fifthly, I would also have the benefit of our own services’ knowledge of [the foreign liaison] services... There’s a sixth part of this as well, which is that many of the services that we are dealing with are not monolithic. It’s important which part of the service are we dealing with, and which part of the service will be conducting the operation, and which part of the service might be questioning somebody, because we know that different parts of different services have different ways of working. So I think that those are the main factors.*<sup>65</sup>

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<sup>65</sup> Oral evidence – Foreign Secretary, 1 December 2009.

**N.** If the Consolidated Policy is aimed at informing public debate on this issue then it must contain more information about how, ultimately, decisions will be made. This is even more essential, given that, in the light of recent cases and allegations against personnel, there will inevitably be a tendency in the future to refer more cases to ministers.

**O.** The Consolidated Policy should also make clear how ministers, in taking such decisions, must balance all the circumstances of the case. These will include: the risks to the detainee of taking action; the risks to national security of inaction; the laws, practices and track record of the detaining country; and the UK's obligations under domestic and international law.

#### *Section 7 Authorisations*

93. Any explanation of the role of ministers should include mention of Section 7 of the Intelligence Services Act 1994. This relates to ministerial authorisation for SIS and GCHQ actions overseas, and states that:

*If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.*<sup>66</sup>

94. SIS explained that, under Section 7, “a Secretary of State can authorise an action which exempts the officers or persons acting on behalf of that authorisation from any criminal or civil liability in UK courts”.<sup>67</sup> SIS also emphasised that this is “core to our ability... to operate overseas”.<sup>68</sup>

95. When we asked why there was no mention of this clause in the Consolidated Policy, the Home Office told us that that it “isn’t a Section 7 document. This is guidance. It doesn’t give [officers] exemption from the criminal and civil law. It is purely guidance”.<sup>69</sup> Similarly, the Attorney General told us that Section 7 is not mentioned and that “we shouldn’t trouble anyone about it”.<sup>70</sup> SIS expressed concern about the handling of issues relating to Section 7 because:

*If you were to refer explicitly to Section 7 authorisations in the Consolidated Guidance, it would raise the misguided understanding that Section 7 authorises SIS to carry out CIDT and torture.*<sup>71</sup>

**P.** Given that Section 7 of the Intelligence Services Act 1994 is already in the public domain, we believe that it will continue to fuel speculation and misconception about the overseas activity of the intelligence and security Agencies. We recommend that the scope and purpose of Section 7 authorisations should be addressed explicitly in the Consolidated Policy, alongside the role of ministers.

<sup>66</sup> Intelligence Services Act 1994, Section 7(1).

<sup>67</sup> Oral evidence – SIS, 1 December 2009.

<sup>68</sup> Oral evidence – SIS, 1 December 2009.

<sup>69</sup> Oral evidence – Home Office, 8 December 2009.

<sup>70</sup> Oral evidence – Attorney General, 8 December 2009.

<sup>71</sup> Oral evidence – SIS, 1 December 2009.

### ***Practical (lower-level) guidance***

96. With the changes that we have outlined in paragraphs 69 to 95 above, we consider that the Consolidated Policy will help to inform the public about the Government's policy on taking action in relation to detainees. It should provide assurance that there are proper procedures in place, in accordance with our legal and ethical framework.

97. What then remains is the separate issue of practical guidance to personnel. At a working and operational level, the organisations are very different and will have different requirements when it comes to lower-level practical guidance. The Armed Forces already have comprehensive guidance available to them in the form of Joint Doctrine Publications, which are already in the public domain. Underneath these doctrine publications are other policy documents and detailed standard operating instructions and procedures for particular military operations. These lower-level documents are necessary to cover the work of the Armed Forces in relation to capturing and holding detainees, the undertaking of tactical questioning, interrogation and debriefing, and transferring detainees to foreign services or forces. For example, the military guidance includes instructions and forms to be completed when transferring detainees to others, or when a detainee is taken ill or dies.

98. The role of the Armed Forces is, of course, very different to the work of the intelligence and security Agencies, who will therefore require their own detailed practical guidance tailored specifically to the different type of work they do.

99. The intelligence and security Agencies have told us that they will be updating their lower-level guidance and training programmes to provide detailed guidance and instructions for their staff. Thus far – and perhaps reflecting their greater exposure to detainee-related issues – only SIS has produced new draft guidance.

### ***The Secret Intelligence Service's guidance and training***

100. We have examined SIS's new draft guidance. It consists of:

- Flow charts explaining the detailed process to be followed, the factors to be considered, key decisions to be taken, and approvals required.
- Practical examples to demonstrate to staff how the guidance would be followed when dealing with particular countries and particular risks to detainees.
- Detailed instructions regarding how to assess the risks and the steps to be taken to try and minimise, or mitigate, the risk of mistreatment or torture.
- Training programmes for all staff and tailored programmes for those likely to have contact with detainees or involvement in detainee-related operations.

101. Given the damage it could cause to operational security and effectiveness, and the opportunities it might afford to those who might wish to exploit it, the Government has decided not to publish the Agencies' lower-level guidance. The Home Secretary explained:

*People [will] understand that there's more to what an officer will receive and can refer to than just this document, which we have tried to make as concise as possible.*

*So, you know, we need to be absolutely open that there are other documents that are consistent with this, that back it up. It would be very strange if that wasn't the case. We may run that risk. Yes, people might say, "Now this is public, what about making those other documents public?"*

*I think for the public, as opposed to the protagonists and perhaps some parts of the media, for the public, they will understand that, whilst you can show a bit of leg, so to speak, you can't take off the seven veils, if that's not mixing the metaphors. There will always be areas of this that must remain secret. So I think it's a risk worth running.<sup>72</sup>*

**Q. We believe it would be helpful to publish an example of lower-level guidance – such as one of the SIS flow charts which summarises the steps they must take before interviewing a detainee – to help illustrate the more practical nature of the lower-level documentation.**

102. Written guidance is only a part of the solution however. Thorough, specialised training is also essential, as are the accumulated skills and knowledge of the experienced officers undertaking the work. The Chief of SIS likened this to driving a car:

*I think this goes back to training... In the same way that a driver approaching a tricky situation doesn't whip out a copy of the Highway Code, you react instinctively on the basis of your experience and your training. That's where we will put our effort, into effective training.*

103. He then explained how SIS has updated their training programmes:

*We have had training on detainee interrogation issues as part of relevant service training, particularly for officers involved in counter-terrorism. That has been in place for over four years now. But in the light of the Consolidated Guidance, in the light of the cases that we have referred to, we have reviewed the training programme. We now have a mandatory four-day training programme for all officers who could conceivably be involved in their duties in issues relating to detainees and the questioning of detainees, and we hope, and we believe, that that training will provide the officers with the right instincts at the right time.<sup>73</sup>*

<sup>72</sup> Oral evidence – Home Secretary, 8 December 2009.

<sup>73</sup> Oral evidence – SIS, 1 December 2009.

104. The training, rather than being academic and theoretical, is designed to replicate some of the difficulties officers may face overseas:

*But the training course we do for those likely to interview detainees is... practical... We explain the policy, we explain how it is meant to work in practice, and then we do a number of role-playing exercises using their interrogation facilities... presented in terms of trying to help [personnel] resist interrogation. So they don't just have the clinical Swiss-like facility. They also have the grotty caves, and there's a number of instruments put there in role-playing exercises, to see how they deal with fast-moving situations and to give them the opportunity to withdraw from – they come into a scenario, they observe, they hear various allegations being made, and they need to react to it, and then they have a chance to be able to talk about it.<sup>74</sup>*

**R. SIS's draft guidance provides the greater clarity that personnel need if they are to undertake detainee operations, and the changes made to training programmes further reinforce this.**

**S. We commend the example set by SIS to the other Agencies who have still to revise their lower-level guidance. Such guidance should consist of clear and concise instructions, supplemented by targeted training programmes, which avoid ambiguity. We recommend the use of examples and scenarios of situations involving detainees that demonstrate how the risk of mistreatment might be reduced or managed. In addition, we believe that, where appropriate, quick-reference material, such as checklists, should be developed to assist personnel in the field.**

### *FCO Country Briefs*

105. The Consolidated Policy refers to "Country Briefs" from the Foreign and Commonwealth Office (FCO) which can be referred to for an assessment of a specific country. We understand that these documents are actually named "FCO Country Assessments (Legal Frameworks and practices in relation to detention)". To avoid any possible confusion, we recommend that reference to "Country Briefs" in the Consolidated Policy should be updated to refer to the full formal title of these briefing documents.

106. It is intended (they are still being piloted at present) that these FCO Country Assessments will form the first step in checking the risks involved in an operation involving detainees – for example, if a detainee is being held in Algeria, then the first step for any officer will be to refer to the FCO Country Assessment for Algeria.

107. In simple terms, this will provide a trigger-type warning system for each country. It will draw on a number of sources, including secret intelligence, to describe the normal standards of treatment to be expected for individuals detained in that country, in part based upon the track record of that nation's various law enforcement organisations, judiciary and intelligence agencies in relation to detainees and human rights. It will also cover topics such as how the treatment of detainees might vary according to the part of the country they are held in, the detaining organisation, or the ethnicity or nationality of the detainee. We have been told that these FCO Country Assessments will be kept under constant review.

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<sup>74</sup> Oral evidence – SIS, 1 December 2009.

**T. The Committee welcomes the development of FCO Country Assessments (Legal Frameworks and practices in relation to detention) which will provide a first step in assessing the risk of torture or CIDT to a detainee held by a particular country. We have been told, however, that this is a new process and that these documents exist for only a handful of pilot countries. We recommend that the production of these assessments for other key countries is prioritised.**

## SUMMARY

The Committee was asked to review the “*guidance to intelligence officers and service personnel about the standards that we apply during the detention and interviewing of detainees overseas*”.

The document that we have been given provides a useful guide to the policy framework within which the UK intelligence and security Agencies and MoD personnel operate. We consider that it has the potential to provide a useful addition to the public debate on this matter.

However, the real detail is in the lower-level guidance to staff, which the Government does not intend to publish. The title “Consolidated Guidance” is therefore a misnomer. That being the case, we consider that the document should be published, but that it should be clearly presented as policy, not guidance.

It is not for this Committee to rewrite Government policy, or to provide endorsement. We have, however, made some suggestions where we believe further clarification would be helpful and we hope that these comments will be given due consideration.

We hope that the finalised document will be made public as soon as possible.



## **ANNEX: LETTER TO THE PRIME MINISTER (17 MARCH 2009)**

This letter was based on information available to the Committee up to 17 March 2009. We have continued our investigations and have provided updates in our 2008–2009 Annual Report (paragraphs 143–165), our 2009–2010 Annual Report, and where appropriate in postscripts to the letter.

ISC 2008/09/103

17 March 2009

Rt. Hon. Gordon Brown, MP  
Prime Minister  
10 Downing Street  
London  
SW1A 2AA

Dear Prime Minister,

### **Alleged complicity of the UK intelligence and security Agencies in torture or cruel, inhuman or degrading treatment**

1. On 28 June 2007 the Intelligence and Security Committee sent you our report on *Rendition*. The Report – which you laid before the House in July 2007 – examined whether the UK intelligence and security Agencies had any knowledge of, and/or involvement in, rendition operations and their overall policy for intelligence sharing with foreign liaison services in this context.

2. As you are aware this Committee does not investigate individual cases – any complaints about alleged misconduct by, or on behalf of, the UK intelligence and security Agencies are properly a matter for the Investigatory Powers Tribunal, established under the Regulation of Investigatory Powers Act 2000. Our *Rendition* Report did however detail four rendition cases in order to illustrate key developments in our Agencies' awareness of the changing nature of the US rendition programme. One of these cases was that of Mr Binyam Mohamed al-Habashi, an Ethiopian national formerly a resident of the UK, who was arrested in Karachi in April 2002 and who was, at the time we wrote our Report, being held by the US in Guantánamo Bay.

#### *Report on Rendition:*

3. Mr Mohamed had alleged that between April and July 2002, whilst in detention in Pakistan, he was mistreated and that a British official who interviewed him during this period told him he was going to be tortured. He had alleged that on 21 July

2002 he was the subject of an 'extraordinary rendition' to Morocco, where he was tortured and interviewed using information that had been provided by the British Government, and also that subsequently, on 21 January 2004, he was the subject of a further 'extraordinary rendition' to the US-controlled detention centre at Bagram, Afghanistan, where he suffered further mistreatment. He had accused the Government of complicity in his torture.

4. During our 2006/7 inquiry we found that a Security Service officer had interviewed Mr Mohamed on one occasion for approximately three hours while he was detained in Karachi. The interviewing officer denied telling Mr Mohamed that he would be tortured, and reported at the time that no evidence of abuse was observed and no instances of abuse were mentioned by Mr Mohamed. The Service did not seek assurances as to Mr Mohamed's treatment – the Committee concluded that this was understandable given the then lack of knowledge of US behaviour, but it was nevertheless regrettable.

*Subsequent developments:*

5. On 28 May 2008 Mr Mohamed was charged with terrorist offences under the US Military Commissions Act of 2006. Evidence against Mr Mohamed included confessions he made during detention in Bagram, Afghanistan between May and September 2004 and at Guantánamo Bay prior to November 2004. Mr Mohamed contended that this evidence was inadmissible because it was obtained as a result of a two year period of detention between April 2002 and May 2004 whilst he was being held incommunicado and subjected to torture and cruel, inhuman or degrading treatment (CIDT) at the hands of the Pakistani and Moroccan authorities, assisted by the US Government.

6. In support of his case at Guantánamo, his lawyers launched two cases, one in the US and one in the UK. In the US a *Habeas Corpus* case was lodged in the District Court to force the release, by the US authorities, of US-sourced intelligence material which Mr Mohamed's defence team believed to be exculpatory. In the UK Mr Mohamed sought an order against the Foreign Secretary for the disclosure of information in confidence to his lawyers on the basis that it may support his argument that his confessions were obtained by torture or CIDT.

7. In May 2008, the Security Service wrote to the Intelligence and Security Committee informing it that, in the course of reviewing its records in preparation for the Judicial Review of the Foreign Secretary's decision not to release papers to Mr Mohamed's lawyers, they had discovered information that had not been shared with the Committee during our rendition inquiry. The Service first wrote on 22 May and then again, with further information on 30 June 2008, and SIS wrote on 14 August and 2 October 2008. Their letters informed the Committee that information had been provided to the Security Service and SIS by US liaison on \*\*\* May 2002, \*\*\* days before the Security Service officer interviewed Mr Mohamed. This information made it clear that Mr Mohamed had been intentionally deprived of sleep while in

detention in Pakistan for the purposes of his interrogation by US authorities. The interviewing officer said – on oath – that he could not recall whether or not he was aware of this information prior to the interview. There is no record that the Security Service took any action on receipt of this information: they continued to provide US liaison with background information, and questions to be put to Mr Mohamed, up until October 2002. (There is no record of the UK passing further information regarding Mr Mohamed to the US after this date.)<sup>75</sup>

8. In October 2008, after pressure from the UK Government, the US authorities agreed to an exceptional disclosure of all the documents at issue in the Judicial Review to Mr Mohamed’s lawyers through his *Habeas Corpus* case in the US.

9. On 21 October 2008, following the resignation of the prosecutor in the Military Commission (due to concerns that exculpatory evidence was being suppressed in a different case), the Convening Authority dismissed all charges against Mr Mohamed, pending a review. The possibility of new charges being brought against Mr Mohamed had not been ruled out at that stage.

10. On 4 February 2009, the High Court issued its Fourth Judgment in relation to the Judicial Review. The documents in questions having already been provided to Mr Mohamed’s lawyers, this judgment was focused not on ensuring justice for Mr Mohamed, but on the public interest in the relevant documents being released into the public domain. The judgment – although scathing in its condemnation of the US refusal to allow the papers to be made public – agreed with the Foreign Secretary’s assessment that release of classified US documents into the public domain by a UK Court would damage the UK’s intelligence relationship with the US. However, following clarification by the Foreign Secretary, that the US did not threaten to “break off” intelligence cooperation with the UK, Mr Mohamed’s lawyers applied to the Court to have the Judgment reopened. We await the outcome of this development.

#### *Implications for the UK/US relationship:*

11. On this issue, we have since seen letters that assert, forcibly, that the US/UK intelligence relationship would be damaged if the material was to be made public. A letter from \*\*\*:

“\*\*\*  
\*\*\*”

and

“\*\*\*  
\*\*\*”

The letter concludes:

“\*\*\*  
\*\*\*  
\*\*\*”

<sup>75</sup> Postscript: the Committee’s subsequent investigations (after this letter was sent) unearthed additional documentation showing that the Security Service continued to provide US authorities with background information, and questions to be put to Mr Mohamed, up until April 2003 (and information relating to him continued to be received from the US into 2004).

12. \*\*\* the Foreign Secretary has told us that the US has previously protected UK intelligence from court disclosure, and that therefore this is very much a reciprocal arrangement (although we note that at the time of writing the Foreign Office has not yet provided us with the background facts on this last point).

13. Given the implied consequences of compelled disclosure of the documents, and the importance of US intelligence to the UK's ability to protect itself from the terrorist threat, we conclude that it is indeed necessary for the documents to be withheld from the public.

*4 February High Court judgment: Lord Justice Thomas and Mr Justice Lloyd Jones:*

14. The judgment of 4 February 2009 made several references to the Intelligence and Security Committee. Despite Foreign Office and Cabinet Office officials having had sight of the judgment in draft form, the facts about the Committee were not checked. This is regrettable, since they are wrong and as a result there is now misleading information about this Committee in the public domain.

15. The judgment refers to the Committee having been supplied with the 42 documents<sup>76</sup> at issue (paragraph 88). At the time of the judgment we had not been given the documents – they were only provided to us on 9 February 2009.

16. The judgment also refers to the remit of the Intelligence and Security Committee (paragraph 89), stating that:

*“we understand that with the agreement of the Prime Minister, [the Committee] has extended its remit to [investigate particular cases].”*

It therefore concludes (paragraph 90) that the ISC will conduct a further investigation. This is, of course, not the case since individual allegations are, as we have already mentioned, a matter for the Investigatory Powers Tribunal to investigate.

17. Despite the remit of the Tribunal, this Committee considered nevertheless that some of the issues raised by the case, and the allegations arising from it, were so serious that they went right to the heart of how our security and intelligence Agencies operate – the policies they implement and the procedures they follow.

18. It is this aspect that is absolutely within the remit of this Committee, and it is this that we have been considering since we received the letter from the Director General of the Security Service in May last year. This letter contains our findings.

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<sup>76</sup> Postscript: there were, in fact, 46 relevant documents supplied to the Committee.

*Provision of information to the Committee:*

19. During our investigation into rendition, we discussed the case of Mr Mohamed with Eliza Manningham-Buller, the then Director General of the Security Service. On 23 November 2006, in evidence to the Committee, she told us:

*“... at the beginning it was thought [Mr Mohamed] was [a British national], we were told by [the US] that they were going to move him to Afghanistan and we know that he was moved to Guantánamo. He has claimed that on the route there he was held in Morocco and that while in Morocco he was tortured... We do not know whether that happened... When we knew he was in custody, because he had information we believed relevant to the UK from having lived here, we passed the Americans questions and photographs to put to him, although we did not know where he was. Some of the questions match those which [Mr Mohamed] claims were put to him under torture... It is therefore possible... that the questions and the intelligence being put to him might have gone from \*\*\* to the Moroccans without our knowledge of it... That is a case where, with hindsight, we would regret not seeking proper full assurances at the time...”*

20. Based on this evidence, we concluded in our Report that:

*“There is a reasonable probability that intelligence passed to the Americans was used in Mr Mohamed’s subsequent interrogation. We cannot confirm any part of Mr Mohamed’s account of his detention or mistreatment after his transfer from Pakistan. We agree with the Director General of the Security Service that, with hindsight, it is regrettable that assurances regarding proper treatment of detainees were not sought from the Americans in this case.”*

21. On 22 May 2008, the new Director General of the Security Service, Jonathan Evans, wrote to the Committee to say that the Service had uncovered some additional information regarding Mr Mohamed’s case, which had not previously been submitted to the Committee. The information had been discovered when the Service undertook searches in response to the Judicial Review.

22. The Committee questioned why this information had not been uncovered when the Service was reviewing its records in response to our rendition inquiry. The Service has told us that searches conducted to meet their disclosure obligations in legal proceedings are more thorough:

*“These searches are designed to unearth every mention, for example, of a particular name, or organisation, even if the piece of intelligence containing the key words is not significant. [These] searches include soft copy records contained in a number of Service databases. In [Mr Mohamed’s] instance, the... search, completed on 12 May 2008, unearthed a considerable amount of additional material – three times as much as was on his original hard copy [Personal File]. These included the ‘sleep deprivation’ telegrams, about which we alerted the Committee in DG’s letter of 22 May...”*

23. The Committee further questioned the Director General in evidence on 3 March. He said that he cannot explain why the two key documents (which mention sleep deprivation) were overlooked – administrative or clerical error was the best explanation he could offer.

24. There is no convincing explanation as to why the information contained in these two key documents, which might implicate the Service in cruel, inhuman or degrading treatment, was not made available to this Committee.

25. It is clearly very worrying indeed that such vital information was overlooked and not provided to the Committee. Had the Service treated the Committee's enquiries with the same rigour as they did when legal disclosure was called for, and indeed had their records been fit for purpose, then this information would have come to light during our original inquiry.

26. The state of the Agencies' records has been a matter of concern for this Committee since 2007. You may recall that we criticised government record-keeping in our Rendition Report and we also raise concerns about Agency record-keeping in our *Review of the Intelligence on the London Terrorist Attacks on 7 July 2005* (which is currently with you, awaiting publication):

*"MI5 believe that they keep a fully adequate record of their work and decisions. In the course of this Review, however, we have found that new information has come to light, sometimes as a result of current MI5 investigations, but often because of the questions we have asked and the specific issues we have pursued with them... This has suggested to us that, whilst MI5 might keep adequate records of what they do, they are not always easy to search and retrieve."*

27. That we were not provided with all the relevant information in Mr Mohamed's case is yet another example of the problems caused by poor record-keeping, which reinforces our earlier concerns. We questioned the Security Service about their records and Jonathan Evans told the Committee:

*"Service systems in place at the time [of your rendition inquiry] should have located this information. That they did not, shows that there was a fault with our processes or record-keeping."*

28. We have been told, repeatedly, that steps are being taken to improve the Agencies' record-keeping. However, in the meantime we are being told that information provided to the Committee may not be complete. This is demonstrated by a recent letter from SIS to the Committee, regarding allegations that UK Agencies had been involved in the rendition, from Somalia to Ethiopia, of a number of individuals. The information provided by SIS was accompanied by a caveat:

*"However, as demonstrated in the recent Mr Mohamed case, it cannot be ruled out that searches carried out using different search parameters, for example, in connection with any future court proceedings in the UK, might unearth additional information."*

29. This Committee believes that the use of such a caveat is completely unacceptable. It undermines the ability of the Committee to do the job it was established by statute to perform.

30. The Agencies must conduct thorough research in support of any information provided to the Committee. When information emerges after the Committee has reported on a matter, it damages trust in this Committee, undermines our credibility and harms democratic accountability. It gives fuel to those who argue that the ISC does not have sufficient authority to conduct its inquiries and supports their calls for full public or judicial inquiries. Indeed a letter from Andrew Tyrie MP to the Committee of August last year said in relation to this case:

*“... if it were to transpire that you are unable to rely on information provided to you by the Agencies then the value of the Committee would be called into question.”*

31. If all branches of Government cannot keep this Committee properly informed, oversight of the Agencies will inevitably be played out through the courts, as we have seen in this case.

*The case: Binyam Mohamed*

32. Binyam Mohamed was detained as he attempted to depart Karachi using forged travel documents. \*\*\* suggested that he had been involved in terrorist training camps in Afghanistan, had contact with Al-Qaida while there, and was involved in the early stages of a plot to detonate a “dirty bomb” in the US.

33. The significance of the potential threat posed by Mr Mohamed is clear and was accepted by Lord Justice Thomas and Mr Justice Lloyd Jones – the summary of conclusions from their open judgment of 21 August 2008 stated:

*“The court has no doubt that on the basis of [the available] information the Security Service were right to conclude that [Mr Mohamed] was a person of great potential significance and a serious potential threat to the national security of the United Kingdom. There was therefore every reason to seek to obtain as much intelligence from him as was possible in accordance with the rule of law and to cooperate as fully as possible with the United States authorities to that end.”*

34. Intelligence is not evidence and Mr Mohamed is, rightly, to be presumed innocent until proven guilty. It is not for this Committee to judge his guilt or innocence. The only relevance of these matters to our inquiries is that it shows that the Security Service were right to seek to obtain intelligence from an individual who was assessed to pose a serious threat to the UK.



*The case: the interview in May 2002*

35. Given what the Security Service knew of Mr Mohamed, their decision to seek to interview him, as we have just explained, was completely justified. However, before that interview took place, we now know – from the 46 documents released to the court and to this Committee – that the Security Service (and SIS) had been informed that Mr Mohamed had been deprived of sleep. This is, rightly, a matter of serious concern.

36. There were \*\*\* telegrams, sent prior to the interview on 17 May 2002, which specifically referred to sleep deprivation \*\*\*. One of these documents – \*\*\* which was sent to \*\*\* people in the Security Service and to \*\*\* SIS \*\*\* – clearly sets out what was happening, and even what it was designed to achieve:

“\*\*\*  
\*\*\*  
\*\*\*”

37. The issue of whether to launch a full criminal investigation into the actions of the individual officer who conducted the interview in Karachi in May 2002 (“Witness B”) is currently being considered by the Attorney General. The key question is whether or not the officer was aware of the sleep deprivation before he interviewed Mr Mohamed. He has said – on oath – that he cannot recall whether or not he saw the telegrams prior to interviewing Mr Mohamed. Lord Justice Thomas and Mr Justice Lloyd Jones chose not to believe his testimony and concluded that *“the probability is that Witness B read the reports either before he left for Karachi or before he conducted the interview”* but that if “Witness B” had not seen them himself, then other copy addressees should have made him aware of them.

38. Given the Attorney General’s current investigation, we have not sought at this time fully to explore whether the officer in question would have had time to see the telegrams mentioning sleep deprivation before departing for Pakistan to conduct the interview. We may return to this matter after the Attorney General has reached her decision and after any action which may arise from that, but we did not wish to delay informing you of our other findings in the meantime.

39. We do however wish to bring two observations about the interview in Karachi to your attention at this time.

40. The first is that, whether or not the interviewing officer committed a criminal offence, we strongly believe that the sole focus on the individual officer is unfortunate. He was not the only individual to whom the telegrams were sent, and some of these other copy addressees should, equally, have realised that Mr Mohamed was being mistreated and taken action. In our view, if there was a failure, the organisation as well as individuals should be held to account.

41. That brings us on to our second observation, which relates to the attitude of the Security Service as a whole. It has been apparent in our dealings with the Service that there is generally a very strong sense of ethics, in addition to a keen observance of the law. However, as we have probed this case, we became concerned as to whether it might indicate a failure to recognise the seriousness of sleep deprivation. We know that guidance issued to officers prior to May 2002 did not make explicit that sleep deprivation constituted Cruel, Inhuman or Degrading Treatment. The fact that the telegrams mentioning sleep deprivation were copied to as many as \*\*\* officers, none of whom remarked on the mistreatment, indicates that it was, in early 2002, not considered by the Agencies to be a serious breach of human rights and therefore may have, in certain circumstances, been discounted.

42. In assessing whether this case was indicative of wider problems, we have looked at other cases both before and after May 2002. Our Report into *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, published in March 2005, contained an Annex listing these, but to summarise those incidents involving SIS or Security Service officers:

- i. In two separate incidents in January and March 2002 SIS officers were told of detainees being \*\*\* – they referred the matter back to London but no further action was taken because each incident was assumed to be a one-off.
- ii. In April, June and July 2002 three separate references to mistreatment (time spent in isolation, hooding and sleep deprivation) were reported back to London by officers (SIS in the April case and Security Service in the June and July cases) and in each case the matter was raised with the US.
- iii. In June 2003, there were two separate incidents (hooding and unacceptable living conditions) – in one case the SIS officers took no action (saying they were unaware that hooding was unacceptable) but in the other SIS raised concerns with the US and the problem was resolved.
- iv. In 2004 there were four further incidents (possible contravention of Geneva Convention, concerns about mental health, hooding, and sub-standard conditions). In the one case involving the Security Service, concerns were raised with the US at a high level and action taken; in two cases involving SIS, concerns were raised with the US at a high level and action taken; in the remaining case – also involving SIS – the SIS officer said that he was not aware of rules regarding hooding but steps were taken to ensure the individual was released.

43. This list shows that in all cases (other than Mr Mohamed's) where a Security Service officer became aware of mistreatment – in June and July 2002 and February 2004 – they took action.

44. More generally, across both Agencies, these cases show a lack of understanding in early 2002; a growing realisation and concern later in 2002 and in 2003; and then greater understanding in 2004 when, in all but one case, the incidents were raised at a senior level. They demonstrate, as we have said before, that the Agencies were slow to appreciate what was happening and that in the two cases in early 2002 there does appear to have been a tendency to discount reports of mistreatment such as \*\*\*. It was not until the three cases in late spring/early summer that they were treated with the seriousness they deserved and action taken.

*The case: passing of questions in October 2002*

45. Questions surrounding the Security Service interview of Mr Mohamed are unresolved at this point. However, there is a further allegation, related to the detailed questions passed to \*\*\* later that year for use in Mr Mohamed's interrogation, which is potentially far more serious.

46. In our 2007 Rendition Report, we said:

*"There is a reasonable probability that intelligence passed to the Americans was used in [Mr Mohamed's] subsequent interrogation. We cannot confirm any part of [Mr Mohamed's] account of his detention or mistreatment after his transfer from Pakistan."*

47. The documentation we now have still does not provide any information as to Mr Mohamed's actual whereabouts in October 2002. Mr Mohamed and his lawyers allege that he was in Morocco at this time.

48. Whilst our Agencies did not know where he was being held, crucially they did know that he was in the custody of \*\*\*.<sup>77</sup>

i. On 12 August 2002, the Security Service asked SIS to check whether Mr Mohamed had arrived at Bagram – they had been told by \*\*\* (on 15 July) that he was to be transferred there. They reported – with some surprise – that \*\*\* was now saying they had no information on his whereabouts. In response to the Security Service request to see if Mr Mohamed had arrived at Bagram, SIS said on 28 August that *"there was no record of [him], which probably means he has not arrived at the facility yet"*.

ii. \*\*\*  
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<sup>77</sup> Postscript: the courts have said that Mr Mohamed, at this time, was in the custody of a third country and not yet in US custody.

- iii. On \*\*\* September 2002, the Security Service received a report of another interview with Mr Mohamed carried out in late September 2002. This telegram includes the following text:

“\*\*\*  
\*\*\*  
\*\*\*”

49. These exchanges, from August and September 2002, make it perfectly clear that the Security Service knew that Mr Mohamed was being held by \*\*\*,<sup>78</sup> even if they did not know who, and that \*\*\*.

50. Despite the fact that the Service had no information on where Mr Mohamed was and therefore no information as to how he was being treated, on 25 October 2002 the Security Service nevertheless decided to provide the US with a significant amount of background information, detailed questions and photographs to be used in Mr Mohamed’s interrogation.

51. We said in our *Rendition* Report that it was regrettable that assurances as to proper treatment “*were not sought from the Americans in this case*” (emphasis added). However we are now aware that the Security Service knew that Mr Mohamed was in the custody of \*\*\*.<sup>79</sup> The fact that, as we have previously accepted, the Agencies did not at this time consider that the Americans might use torture or CIDT does not therefore offer an excuse.

52. If the Security Service questions were used during Mr Mohamed’s interrogation then the Service is, albeit indirectly, implicated in however Mr Mohamed was treated by his custodians. Mr Mohamed has alleged that it was these questions that he was being asked when he alleges he was being tortured in Morocco.

53. Whether the Service should have passed questions to be put to a detainee when they did not know where he was being held, and could not make any assessment or seek any assurances as to his treatment, whether they should have sought ministerial approval before doing so, and indeed whether ministers should have then approved such action in such circumstances, is not an operational matter, but one of policy.

### *Policy questions*

54. The case of Mr Mohamed is therefore significant not just in itself, but far more importantly in terms of what it shows about the policies of the security and intelligence Agencies in 2002, and the issues it raises about the policies that they should now be following. It brings into sharp focus some very difficult ethical questions that go to the heart of how the UK as a country responds to the terrorist threat.

<sup>78</sup> Postscript: the courts have said that Mr Mohamed, at this time, was in the custody of a third country and not yet in US custody.

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55. The UK must not be involved in the torture or mistreatment of an individual. That is inviolable – not just in terms of law, but in terms of our own ethical standpoint as a country. To do otherwise reduces us to the level of those from whom we are seeking to protect ourselves.

56. However, the threat we face – an enemy that is bent on carrying out attacks designed to cause maximum fatalities to innocent individuals and is organised to the extent that it briefs its followers on how to resist interrogation – is a severe one. The events of 11 September 2001 and 7 July 2005 have provided harsh evidence of this. Our Agencies must therefore take every opportunity, and follow up every intelligence lead, if they are to be able to protect British citizens.

57. The issue is how to reconcile the need to obtain vital intelligence to protect the British public, with the need to ensure that an individual's human rights are not infringed.

58. When the UK is acting alone then the issue should not arise – our Agencies, military and police are clear as to the absolute prohibition on torture or CIDT. However, in tackling international terrorism, the UK cannot act in isolation but must engage with foreign liaison services. Explaining the international dimension, Eliza Manningham-Buller, the previous Director General of the Security Service, said in the course of the 2005 House of Lords Appeal on cases related to the Anti-Terrorism, Crime and Security Act 2001:

*“Al-Qaida and its affiliates pose a uniquely transnational threat which requires an international response. This has led to increased co-operation between governments, including on security/intelligence channels. The need for enhanced international cooperation to combat the threat from Al-Qaida and its affiliates was recognised and has been emphasised since September 2001 in, for example, Security Council resolution 1373.”*

59. This Committee made the same point in our *Rendition* Report, saying:

*“intelligence-sharing relationships with foreign liaison services are vital to counter the threat from international terrorism”.*

However, dealing with foreign liaison services can lead to difficult situations – this is most evident when another country has an individual in detention who our Agencies believe may have intelligence relevant to a threat to the UK.

60. Detainees can be a vital source of intelligence. Our *Rendition* Report in 2007 talked of individuals held in detention providing:

*“important intelligence that has helped to prevent attacks on the UK”*

and referred specifically to the case of Khaled Sheikh Mohammed:

*“an illustration of the huge amount of significant information that came from one man in detention in an unknown place”.*

The problem is that if detainees are not in our custody, we cannot be absolutely sure of how they are being treated.

61. As Eliza Manningham-Buller made clear in evidence to the court in 2005, our Agencies do not always know where the detainee is being held or how they are being treated – and even when they ask are often not told. In the case referred to previously she told the Law Lords:

*“Most credible threat reporting received by the Agencies requires immediate action. Often there is no specific timescale attached to the reporting, but public safety concerns dictate that the Agencies work from a position of possible imminence. The need to react swiftly to safeguard life precludes the possibility of spending days or weeks probing the precise sourcing of the intelligence before taking action upon it, especially when such probing is in any event unlikely to be productive.”*

She continued on to describe the Meguerba case from 2002/3 (known as the Ricin plot), which illustrates this point in real terms, since intelligence from a detainee in Algeria led directly to the prevention of an imminent terrorist attack:

*“Meguerba was already known to the Security Service and the police. The reporting required urgent operational action and was also relied upon for the purposes of immediate legal action... In those circumstances, no inquiries were made of Algerian liaison about the precise circumstances that attended the questioning of Meguerba. In any event, questioning of Algerian liaison about their methods of questioning detainees would almost certainly have been rebuffed and at the same time would have damaged the relationship to the detriment of our ability to counter international terrorism.”*

This highlights how the operational imperative can take priority over checking that detainees are being properly treated.

62. Given the importance of obtaining intelligence from detainees, but also the difficulty of confirming how they are being treated, can we rely on other countries to uphold an individual’s human rights, as the UK would? Unfortunately the case of Mr Mohamed has shown that even our closest allies are capable of what we would describe as CIDT. Our questioning of the Director General of the Security Service, the Chief of SIS and the Foreign Secretary reveals that there are only a very small number of countries who they would be relatively confident would never use torture or CIDT.

63. Therefore, if the UK is to avoid any possible involvement in torture or CIDT, however indirect, then we could only share intelligence with a handful of countries, at most. Effectively this would leave the UK isolated and incapable of protecting itself. It is clear therefore that the need to protect the UK may not always be compatible with the need to guarantee that an individual’s human rights will not be infringed.

64. There is a balance to be struck between gathering and exploiting as much intelligence as possible in order to protect our citizens, and the possibility that our actions might lead, albeit inadvertently, to the mistreatment of detainees. How, then, do we minimise the risk of the latter?

*Direct contact with detainees:*

65. The first step must be to ensure that all those who may potentially come into contact with detainees know what is expected of them. We do not believe that in early 2002 officers had been made fully aware of what they might encounter, what they should look out for, and what they should do in such circumstances. However, staff involved in questioning detainees in the custody of foreign liaison services have since been issued with guidance, and we covered this in our Report into *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*.

*Wider intelligence sharing and passing of questions:*

66. The second step is to minimise the risk of UK actions resulting in mistreatment. Since 2002 guidance to staff on the system of safeguards used has been revised (in 2004 and again in 2006). We saw this guidance during our rendition inquiry. It makes clear that where there is a possible risk of mistreatment then caveats must be used and assurances sought (and assessed on the basis of what is known about the organisation and whether the assurances have any foundation), and where these are not thought sufficient then ministers should be consulted.

67. Assessing the soundness of an assurance is an inexact science. There is therefore always a potential risk that an individual will be mistreated. We therefore consider – in the light of what we know now – that it is essential that such cases are referred to ministers: this is a political, policy decision that can only be taken by those in charge. It is not right to delegate authority on such a crucial matter.

68. Once the case is referred to a minister, it is for them to make a judgement. In our opinion, if it is certain that mistreatment would result from our actions, then approval cannot be given and potentially useful intelligence will be lost. If there is a possible risk that an individual may be mistreated then this needs to be assessed and weighed against the intelligence that may be gained and the potential lawfulness of the proposed action.



*Realistic expectations:*

69. There are some who argue that to take action (such as passing questions to be put to a detainee or providing background information on a detainee) without a 100% guarantee of acceptable treatment would be to facilitate mistreatment and that any risk of mistreatment is unacceptable. This ignores the reality of the situation, which, as we have set out above, can come down to the safety of a country versus the potential mistreatment of an individual.

70. Professor A C Grayling of Birkbeck College, writing in *The Independent* earlier this year, described this dilemma accurately:

*“Do we abide by normal standards of human decency in times of danger or is it justifiable to use harsher methods of getting information to safeguard the public?... The crux is whether an individual’s human rights can be put into temporary abeyance in the interests of thousands at risk... Would it be acceptable to mistreat someone who knows the whereabouts of a bomb in the centre of a city? The utilitarian view in ethics says that torturing one person to save many is justified. The deontological view in ethics says that torture is unacceptable even in the extremist circumstances. Real life does not seem to fit well with such a stark contrast.”*

71. We are fully aware of the difficulty of such a decision in each and every case. The Foreign Secretary told us: *“the threat to life weighs on you in deciding what to do”*. Those who believe that there is a neat solution here and that the UK can be protected from the terrorist threat at the same time as being completely confident that the UK will never be involved, however indirectly or inadvertently, in an individual’s mistreatment, should recognise the dilemma.

*Recommendation:*

72. The reality of the situation should be made clear publicly. This is a matter of Government policy, not Agency operation, and therefore it is not for this Committee to explain or defend. We recommend that a statement is made by the Government which sets it out in simple terms. We believe that the Government should, indeed must, be explicit in setting out the position and have confidence that the British public will understand the dilemma and the difficulty of the decisions that must be taken.



**KIM HOWELLS**

## **GLOSSARY**

CIDT	Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
FCO	Foreign and Commonwealth Office
GCHQ	Government Communications Headquarters
ICCPR	International Covenant on Civil and Political Rights
IPT	Investigatory Powers Tribunal
ISC	Intelligence and Security Committee
MoD	Ministry of Defence
SIS	Secret Intelligence Service
UNCAT	United Nations Convention Against Torture

## LIST OF WITNESSES

### *Ministers*

The Rt. Hon. Alan Johnson MP – Home Secretary

The Rt. Hon. David Miliband MP – Foreign Secretary

The Rt. Hon. Bob Ainsworth MP – Defence Secretary

The Rt. Hon. Baroness Scotland of Asthal QC – Attorney General

### *Officials*

#### SECRET INTELLIGENCE SERVICE

Sir John Sawers – Chief, SIS

Other officials

#### SECURITY SERVICE

Mr Jonathan Evans – Director General, Security Service

Other officials

### *Non-Government Witnesses*

The Rt. Hon. Sir Peter Gibson – Intelligence Services Commissioner

Nic Ash – ISC Legal Advisor

Philip Havers, QC – Counsel

**ADDENDUM: LETTER TO THE PRIME MINISTER (12 APRIL 2010)**

IN CONFIDENCE



*The Chairman: The Rt. Hon. Dr Kim Howells, MP*

**INTELLIGENCE AND SECURITY COMMITTEE**

Ground Floor, 35 Great Smith Street, London SW1P 3BQ

Telephone: 020 7276 1215 Facsimile: 020 7276 1212

ISC 2009/10/101

12 April 2010

The Prime Minister  
10 Downing Street  
London  
SW1A 2AA

*Dear Gordon*

**REVIEW OF THE GOVERNMENT'S DRAFT  
GUIDANCE ON HANDLING DETAINEES: SUPPLEMENTARY INFORMATION**

On 5 March 2010, the Intelligence and Security Committee sent you its Report entitled "*Review of the Government's Draft Guidance on Handling Detainees*". It was intended that the Report would be published, along with the finalised Guidance, before the debate in the House on 18 March.

In the intervening period, however, the Foreign Secretary sought an opportunity to discuss further with us some of the issues in our Report before it was published. It is absolutely crucial, in our opinion, that the finalised Guidance sets out clearly, and in detail, the legal, moral and policy framework within which personnel must operate when dealing with detainees overseas, and that it provides them with the real practical guidance that they need. As you are aware from our Report, we concluded that the draft that we were asked to consider did not achieve this.

Therefore, we felt that it would be appropriate to hold further discussions with the Foreign Secretary. As a result, we agreed to meet the Foreign Secretary and the Home Secretary on 6 April 2010, in order to allow them the opportunity to provide further evidence.

The Foreign Secretary explained that our Report had *“raised some very, very important questions... about the guidance that we established. In a way, it spoke to... one part of the relationship between the Committee and the Government, which is that you are able to probe and challenge, and sometimes expose”*. He said that: *“essentially what you said was that the guidance in its entirety was confused... And you said: look, this is not just a drafting thing, this is actually a fundamental issue that the Government needs to come to terms with”*. He explained that as a result: *“we have rewritten the whole thing, because of the worries that you raised for us”*.

The Committee welcomes the news that the Guidance is being rewritten: our Report made clear that we had concerns as to both its original direction and its purpose. We are glad that our review was of use in this process and hope that the final document will be of greater practical use to personnel as a result.

The Foreign and Home Secretaries told the Committee that, as a result of specific comments and recommendations contained in our Report, they had, in particular, revisited the key section of the guidance (paragraph 8 in the draft). The Home Secretary acknowledged that: *“Your report... pointed out... that paragraph 8 was a ‘fudge’... I think what you focused our mind on is that actually this is not one of those occasions where fudge would be helpful. We need to be much, much clearer, particularly as this... is guidance for agents in the field. And for them, clarity is all important.”* The Foreign Secretary explained that this crucial section of the document had now been completely rewritten in an *“attempt to provide the common-sense explanation to officers about what they should do in different circumstances”*. During the evidence session, they shared with us the latest draft of this section.

The Committee considers that this new version – while still not finalised – is now heading in the right direction by providing far more detail, and in much clearer language. It also now has the benefit of a simpler *“traffic light”* system that should provide the guidance to personnel that was lacking in the original draft. The Foreign and Home Secretaries made clear that this version is still *“work in progress”*, and we agree that there are still a number of areas that require further thought, and some potential inconsistencies to iron out. We hope that the next Committee will be given an opportunity to consider the final draft of this section, and of course the rest of the document when it has been amended.

The Foreign Secretary then turned to the key question of his earlier evidence on the nature of the prohibition on torture and on cruel, inhuman, or degrading treatment (CIDT). Our Report includes the evidence, in paragraphs 59 to 64, that we were given previously by the Foreign, Home and Defence Secretaries.

The Foreign Secretary indicated that *“we want to go through... and try and explain with more consistency than perhaps I did in my own evidence or that you found between the evidence of the three ministers and the officials who came before you, and make sure that we get absolutely clear for you what our position is”*.

The Home Secretary explained that: *“when David and I came here [previously] we were still getting our minds around some of the complexities of this... it has been a difficult process... we were still thinking through some of these issues, particularly around CIDT and torture and how you would encapsulate that in a set of guidance”*.

The Foreign Secretary then clarified his current thinking on authorising action which might result in torture as follows:

- (a) If you “*know or believe there is torture, you must not proceed*”.
- (b) If there is a serious risk of torture: “*First of all, ministers have ways of reducing risks that are not available to officers on the ground. For example, I can phone up my opposite number in the country concerned, about a particular case and seek mitigation of the risk. So the first thing is that there are actions available to me, to reduce the serious risk of torture to a manageable level. Secondly, there is obviously also a judgment to be made and confirmed about whether or not “serious risk” is indeed the right designation to give to the circumstances at issue. So for those two reasons at least, we think it is right [for personnel] to refer up. And I think the first one, that ministers have at their disposal the ability to try and reduce the serious risk, is very important.*” He concluded “*if indeed we believed that there was a serious risk of torture and that it could not be mitigated, I can’t conceive that we could go ahead*”.

We interpret the Foreign Secretary’s use of the word “mitigate” in this context to mean minimise or reduce the risk.

The Foreign Secretary then clarified his current thinking on authorising action which might result in CIDT:

- (a) If you know or believe that there will be CIDT, he said that “*the case of ‘know or believe that there will be CIDT’ is very, very difficult indeed*”. He explained that “*first of all, there is the mitigation point – that ministers have at their disposal means of seeking mitigation of CIDT. Secondly, because there is no agreed and exhaustive definition of what constitutes CIDT, it is right to refer to ministers to see whether or not they agree that it is indeed CIDT.*”
- (i) On his first point, when asked how you could mitigate when you know or believe that there will be CIDT, he said “*if you know or believe CIDT is going to take place, I can get on the phone to my opposite number and seek to mitigate it and say that ‘we need special arrangements, we need a special Memorandum of Understanding... we are willing to have this division do it, of your Intelligence Agencies, but not this division’. So there are a range of mitigating circumstances*”.

Whilst we welcomed this explanation, we consider that further thought is needed in this area if it is not to give rise to an inconsistency. If there is believed to be scope to seek to “mitigate” known or believed CIDT through special arrangements, then logically there must also be scope to seek to “mitigate”, or prevent, known or believed torture through special arrangements. However, under the new draft guidance personnel are not given the option to refer known or believed torture to ministers, and therefore ministers will not have the opportunity to assess whether it might be possible to make special arrangements.

- (ii) On his second point, the Foreign Secretary explained that since *“there is no absolute definition of CIDT”*, there are therefore *“questions of judgment about whether or not it constitutes CIDT”*. He concluded that, whilst he could not preclude that it might be lawful to proceed, *“that is something that needs to be decided around the Foreign Secretary’s table, according to the circumstances of the day”* and *“in the case where you knew or believed that CIDT was going to go ahead, it is very hard to conceive of circumstances where you could”*.
- (b) Where there is a serious risk of CIDT, he said *“I wanted to choose my words carefully on that and get them on the record: In any case, refer to ministers, where there is an outstanding serious risk of CIDT. They would have to consider the scale of the risk, the type of mistreatment, the nature of the consequences that would follow from UK action. We cannot preclude that there may be circumstances in which it would be lawful for the UK to proceed with an operation, notwithstanding that serious risk being committed by a third party”*. He added *“the presumption against is very, very strong; and the case would have to be genuinely exceptional in respect of the serious risk of CIDT, to make it lawful for ministers to go ahead”*.

When questioned as to what might be considered when assessing the risks he explained that they would take into account *“the history of the organisation that we were dealing with, the value of any assurances that we would have from that organisation, the circumstances of the particular case that we were dealing with; those and other factors would go into a judgment of the scale and nature of the risk that was being run that CIDT might occur”*.

It was helpful to hear the Foreign Secretary elaborate how thinking had been developing on the policy that they are now trying to encapsulate in the document. It is a complex area, however, and we remain of the view that the document must contain as much of the detail as possible, and set it out as clearly as possible.

The Committee has set out in its Report, by way of background, the extent to which different countries are bound by international treaties and legal instruments which prohibit CIDT. This forms part of what is a very complex legal background and we believe – given the complexity – that it is essential to set all these factors out. The Foreign Secretary has previously told the Committee that foreign law is not a critical factor in ministerial decision-making, and this is reflected in footnote 38 in our Review which clearly states that *“We have been told that, in deciding whether or not to authorise action, the FCO does not draw a distinction between those countries where CIDT is outlawed and those where it is not”*.

The Foreign Secretary told us on 6 April that he was concerned that the Government’s position on this matter be reflected accurately. He was anxious that, in mentioning foreign laws, our Report might imply that the Government takes foreign laws into account in its decision-making, when it does not. We assured the Foreign Secretary that the Committee is aware that *“the foreign law is not the critically relevant consideration for our [FCO] purposes”*. We regard this as being covered adequately by our footnote, referenced above.

There is a difference of opinion as to whether the distinction between sets of countries should be mentioned at all. The Committee’s position remains that the distinction is part of the overall



context, and therefore it cannot be ignored, or mention of it omitted. It is precisely these complex issues which must be explained fully and clearly in the document if it is not to create more confusion.

We are grateful to the Foreign Secretary and Home Secretary for coming to give us further evidence and providing some of the clarity that we felt was missing previously. It was reassuring for the Committee to hear that the critique of the draft Guidance that we offered in our Report has led to the document being rewritten in several key respects, and also, more importantly, that it has helped ministers to develop their own thinking.

In order to provide a full account of the Committee's deliberations and conclusions on the draft Guidance, this letter should be taken to form an addendum to our Report and published with it.

A handwritten signature in black ink, appearing to read 'Young Kim', written in a cursive style.

**KIM HOWELLS**

## ANNEX D: CODE WORDS

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In many instances throughout this Report, it is not possible to reveal publicly the names and nationalities of the detainees involved, or other geographical indicators such as where an operation took place. To make the Report more readable, however, rather than simply redacting those details that cannot be disclosed, we have substituted them with code words. No significance is intended by, nor should be inferred from, the matching of code words to the real names they have been substituted for.

### *Detainees' names*

It is not possible to disclose the name of detainees in the majority of the Report. This is to protect personal identities and to safeguard against damage to operations – sometimes, revealing details about past operations can still have damaging consequences for operations currently being conducted or which may be mounted in the future. The code words used this Report are on the left; the names on the right are the names by which the individual is principally referred to in Agency records disclosed to this Inquiry.

QUAIL .....	***	ROCK PTARMIGAN .....	***
RAVEN .....	***	SPARROW .....	***
RAZORBILL .....	***	SWALLOW .....	***
REDSHANK.....	***		

### *Geographic indicators*

Some geographic indicators cannot be revealed in the Report in order to protect personal identities, maintain liaison relationships with overseas organisations and safeguard against damage to operations. The list below applies to the nationalities of detainees, the location of incidents and to various countries' governments and intelligence, security and law-enforcement bodies. Code words are not used consistently for the same geographic indicator in order to provide protection.

BANBURY .....	***	LOCHGILPHEAD .....	***
BEACONSFIELD .....	***	MAIDENHEAD .....	***
BLACKPOOL .....	***	MAIDSTONE .....	***
BOURNEMOUTH .....	***	MOLD .....	***
BRIGHTON .....	***	MONMOUTH .....	***
HASTINGS .....	***	MORECAMBE .....	***
LEAMINGTON .....	***	NAIRN .....	***
LEDBURY .....	***	NEWENT .....	***
LINLITHGOW .....	***	NORTHAMPTON .....	***

NORWICH.....	***	PEEBLES .....	***
NOTTINGHAM.....	***	PERSHORE .....	***
OAKHAM .....	***	SCARBOROUGH .....	***
OMAGH .....	***	SKEGNESS .....	***
OXFORD .....	***	TOWCESTER .....	***

### ***Operational names***

We have also substituted a code word where it has been necessary to refer to a sensitive operational detail, such as an intelligence operation or a process, in order to protect classified information. This is indicated by a footnote in the Report where these instances occur.

## ANNEX E: WITNESSES AND CONTRIBUTORS

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### *Ministers*

The Right Hon. Theresa May MP – Home Secretary (to 12 July 2016)

The Right Hon. Amber Rudd MP – Home Secretary (to 29 April 2018)

The Right Hon. Philip Hammond MP – Foreign Secretary (to 12 July 2016)

The Right Hon. Boris Johnson MP – Foreign Secretary (from 13 July 2016)

### *Commissioners*

The Right Hon. Sir Mark Waller – Intelligence Services Commissioner  
(to 31 December 2016)

The Right Hon. Sir John Goldring – Intelligence Services Commissioner  
(designate, at the time)

### *Officials*

#### *Secret Intelligence Service (MI6)*

Mr Alex Younger CMG – Chief

Other officials

#### *Security Service (MI5)*

Mr Andrew Parker – Director General

Other officials

#### *Government Communications Headquarters (GCHQ)*

Mr Robert Hannigan CMG – Director (to April 2017)

Other officials

#### *Defence Intelligence*

Air Marshal Philip Osborn CBE – Chief of Defence Intelligence

Other officials

#### *Cabinet Office*

Mr Patrick McGuinness CMG, OBE – Deputy National Security Adviser (to January 2018)

## ***Others***

Mr Iain Livingstone QPM – Deputy Chief Constable, Police Scotland

Professor Ruth Blakeley (University of Sheffield) and Dr Sam Raphael (University of Westminster) – The Rendition Project

Ms Rebecca Hilsenrath, Chief Executive, Equality and Human Rights Commission

## ***Written submissions in response to call for evidence***

Amnesty International

All-Party Parliamentary Group on Extraordinary Rendition

Equality and Human Rights Commission

A joint submission from nine non-governmental organisations: The Aire Centre; Amnesty International; Cage; Justice; Liberty; Freedom from Torture (Medical Foundation for the Care of Victims of Torture); Redress; Reprieve; and Rights Watch (UK)

