Britain's Torture Policy: the Consolidated Guidance on the detention and interviewing of detainees overseas

Summary

The current version of the UK's torture policy – known as the *Consolidated Guidance on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* – was published by David Cameron on 6 July 2010. According to the then-Prime Minister, it

> *…makes clear that our Services must never take any action where they know or believe that torture will occur…*[1]

Reprieve does not believe that the policy is without flaws. However, we are alarmed by recent moves which have weakened oversight of the policy – especially given the election in the US of a President who has vowed to bring back torture that is "a hell of a lot worse than waterboarding."[2]

Given the close relationship between the US and the UK, this is a major moral and potential legal problem for the British Government and its intelligence agencies. The reputation of British intelligence demands real, effective oversight, and solid rules against complicity in torture, in order to make sure that British officials are never again tainted by association with prisoner abuses.

Reprieve believes that:

(1) The torture policy itself urgently needs updating, to close two main loopholes in the policy relating to:
   - torturers who (inevitably) lie to British officers, and
   - officers' participation in interrogations that involve cruel, inhuman and degrading treatment that is short of torture.

(2) Monitoring the UK's compliance with the torture policy should be the responsibility of an independent parliamentary committee – ideally the Joint Committee on Human Rights – and that committee should be responsible for producing a public annual report assessing the UK's compliance with the policy – and with the law on torture.

(3) The Government should immediately re-instate statutory oversight of the Consolidated Guidance, which was scrapped by the Investigatory Powers Bill.

Background

In 2010, after years of controversy about British security services' apparent involvement in the US 'rendition' and torture programme, Reprieve sued the British government to force it to publish its "torture policy": rules that are supposed to make sure no British agent gets involved in torture or cruel treatment. The changing torture policy had been kept a secret for years until Reprieve took legal action. Finally, under court pressure, the Government relented and published its policy.

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[1] See Hansard: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2014-11-27/HCWS33

[2] See: https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture

A flawed policy

The policy was better than what was previously in place. But it had real, well-established shortcomings:

1. It only required the intelligence officer to desist from interviewing detainees in situations where the officer *"know[s] or believe[s]"* torture will take place. It permits the intelligence officer to proceed where the officer believes s/he can "*mitigate the risk of mistreatment…through reliable caveats or assurances."*[3]

In reality, this failed to stop UK intelligence officers from participating in interrogations where there is a real risk of abuses taking place. It will rarely, if ever, be made unambiguously clear to UK personnel that torture is in prospect. Regimes that torture will be very sensitive to the UK's position, but rather than wholly reforming their intelligence services, they are likely simply to tell UK agents what they want to hear. This was seen repeatedly throughout the last US 'extraordinary rendition' programme, where various detailed assurances given to US and UK officials nonetheless failed to protect detainees from horrific torture.

2. It did not require the agencies to inform Ministers—nor to intervene to stop mistreatment—where the field officer knew or expected cruel, inhuman or degrading treatment (CIDT) to take place.[4] CIDT would include threats of violence, withholding of food or drink, sleep deprivation, and so on. The field officer's responsibility was only to refer to more senior personnel in the agencies. These supervisors could either override the field officer's judgment, assessing the risk to be acceptable, or decide that the risk could be mitigated through assurances. In either situation, no Minister would ever be told.

The issues raised by this policy were less stark when the US Administration expressly disavowed its prior torture programme, conceded that it had been harmful, and pledged never to repeat those mistakes. Now that the incoming Administration has vowed to revive many of the most controversial aspects of the torture programme, it is essential that Britain's torture policy be ironclad if the reputation of the intelligence agencies – and the UK's national security – is to be maintained.

Scrapping minimal oversight

The other problematic development of this year is that even the minimal oversight of compliance with the torture policy has been weakened by the Investigatory Powers Act.

The agencies' compliance with the Consolidated Guidance has until now been overseen by the Intelligence Services Commissioner – a position held by a retired judge. In 2014, the then-

[3] See p6 of the Consolidated Guidance, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf

[4] See p3 of the CG: "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." See also p6: in circumstances where the intelligence officer *knows* CIDT will take place, all that is required is to consult personnel in the intelligence services, who decide whether to refer the case to Ministers. They may decline to do so if they decide there is "no serious risk," or where there *is* a risk, "you are able to mitigate the…risk through reliable caveats or assurances". This ambiguous rule leaves ample room for complicity in abuse with no external oversight.

Prime Minister took steps intended to strengthen that oversight by placing the Commissioner's role with regard to the Guidance on a statutory basis under section 59A of the Regulation of Investigatory Powers Act (RIPA).[5] Mr Cameron explained that:

> *The Intelligence Services Commissioner plays a crucial role as part of the oversight regime for the work of the Security and Intelligence Agencies…I am grateful to Sir Mark Waller for his continuing scrutiny of the Agencies and their activities, including compliance with the Consolidated Guidance.*[6]

However, the Investigatory Powers Bill as passed abolishes the position of the Intelligence Services Commissioner; and fails to even mention the Consolidated Guidance, let alone provide for its oversight. The Intelligence Services Commissioner has himself expressed concern that:

> *The IP Bill does not make provision for oversight of the Consolidated Guidance under the proposed Investigatory Powers Commissioner.*[7]

The IP Bill does provide for new judicial commissioners who ministers have said – only following questioning in Parliament – will take on the Intelligence Services Commissioner's responsibilities with respect to the Consolidated Guidance.

However, the IP Bill weakens that oversight by reversing David Cameron's move to put it on a statutory footing. An attempt in the Lords on 19 October to introduce an amendment ensuring that this would remain was described by the minister as "unnecessary."[8] The Government says that the new commissioner will adopt all the functions of their predecessors, but has refused to clarify this in the legislation.

The Commissioner's criticism of SIS ('MI6')

In September this year, the Intelligence Services Commissioner produced a report on his oversight of the Consolidated Guidance which was highly critical of MI6's failure to cooperate with both his oversight and that of the Intelligence and Security Committee (ISC).

Sir Mark Waller wrote that "SIS demonstrated a troubling tendency to be defensive and unhelpful," and "provided inaccurate and incomplete information." Sir Mark added that they "generally sought to 'fence' with and 'close down' lines of enquiry, rather than engage constructively."[9] Both he and the ISC "experienced considerable frustrations with the approach of SIS to our investigations." He concluded that "SIS urgently needs to review and improve its engagement with oversight investigations."

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[5] See 'Prime Minister puts Intelligence Services Commissioner's oversight of Consolidated Guidance onto a statutory footing - our reaction,' Intelligence Services Commissioner's website, 27 Nov 2014: http://intelligencecommissioner.com/news.asp?id=15

[6] See Written statement by the PM, 27 Nov 2014, on the Intelligence Services Commissioner: http://www.parliament.uk/documents/commons-vote-office/November%202014/27%20November/13-PM-IntelligenceServiesCommissioner.pdf

[7] See the Commissioner's 2015 Annual Report, p45: http://intelligencecommissioner.com/docs/56892%20HC%20459%20print%20file.pdf

[8] The debate can be found here, from 19:28, amendment in the name of Baroness Hamwee: http://parliamentlive.tv/event/index/aaf2089e-fa1a-477c-b02c-c2f4961c7291

[9] See Supplementary to the Annual Report 2015, para 6.15: http://intelligencecommissioner.com/docs/FPCM1042_HC_458_Accessible.pdf

Sir Mark's report also found several incidents where the Intelligence and Security Committee had been unaware of or failed to discover what he saw as important failings on the part of SIS; and in which he and the ISC had been given conflicting versions of events by SIS.[10]

In the wake of such strong criticisms of the current oversight arrangements, it is alarming that Sir Mark's position is being abolished, along with statutory oversight of the 'torture policy.'

Protecting British agencies from involvement in torture

This is neither an historic nor an academic exercise. There is every reason to believe that the deep moral issues confronted by the Agencies during the Bush administration – dilemmas that led to years-long civil cases and extensive Scotland Yard investigations—will resurface. None can claim this time that we were not warned. The Services themselves will operate better, and more smoothly, with proper policies and oversight in place. This is to protect them, as well as the British public.

Reprieve has long worked to secure accountability for UK involvement in torture, to ensure it cannot happen again. It is deeply concerning that two of the major steps the previous Government took towards this goal have since been reversed – the independent, judge-led inquiry has been shelved, and the statutory oversight of the Consolidated Guidance has been removed by the provisions of the IP Bill. It is presumably coincidental, but nonetheless concerning, that this step has been taken in the wake of a highly critical report from the Intelligence Services Commissioner, whose position is now due to be abolished.

Reprieve continues to call on the Government to establish its promised independent, judge-led inquiry into torture. As the Commissioner's recent report has shown, the current oversight arrangements are inadequate, and the Agencies are not cooperating with them. In addition, his reports shows that on several occasions, the Committee was frustrated by SIS or failed to discover important information. This strongly suggests it continues to lack the powers or independence needed to get to the truth on torture.

[10] See, for example, p18: a significant feature of SIS' IT system "was not disclosed to or discovered by the ISC;" p72: "I found the assertion that the allegations 'would have been raised with Kenyan liaison' particularly odd given that SIS had previously told the ISC this was not done;" p105: "This was not made clear to and so not pursued by the ISC and I only discovered it when I asked about it directly."
http://intelligencecommissioner.com/docs/FPCM1042_HC_458_Accessible.pdf