

On 12 December 2018, on behalf of the Investigatory Powers Commissioner, Lord Anderson of Ipswich KBE QC hosted an invitation-only event for academics, practitioners and representatives from non-governmental public bodies (NGOs) to further discuss how the Consolidated Guidance (CG) could be improved.

Attendees were invited to consider five specific questions. These arose from the initial consultation document and the submissions received in response to it, with an additional question that was added to the agenda at the request of a number of NGOs.

The event was held under the Chatham House rule.

The questions and a very brief summary of the discussions follow below. It should be noted that the summary should not be seen as confirmation that the Commissioner endorses any particular viewpoint. All comments made at the event will be considered, along with the submissions to the public consultation, when considering the representations to be made to the Prime Minister.

Question a) What is the correct legal test to be applied in international and domestic law when officers or service personnel have to proceed where there is a risk (in the context found in the CG) of cruel, inhuman or degrading treatment (CIDT)/torture?

There was significant debate about the appropriate legal test to be applied when considering risk. Much of this focused on whether the CG should apply the term “real risk” or “serious risk”, and whether there was any significant difference between the two. There was unanimity between those participants that contributed in that the CG should be far clearer in this area and provide practical guidance to operational personnel and decision-makers on the nature and application of the test.

Question b) Ought there to be an absolute prohibition in the CG on the sharing of information where there is a serious/real risk of CIDT or torture? Is there a case for treating CIDT and torture differently?

This question raised many important issues. Many participants felt that the law was clear, particularly as regards torture and that there should be an absolute prohibition on sharing in these circumstances. Other participants raised concerns regarding how the various risks were balanced.

Question c) Is the Assurance Process as outlined in the Consolidated Guidance adequate?

While there was a lack of unanimity on the issue of whether assurances could ever adequately mitigate risk, there was significant agreement within the room that processes for obtaining and recording assurances ought to be more

formal and capable of rigorous post facto oversight. This emphasised a point which was made previously by the Intelligence Services Commissioner (ISComm) and endorsed by the Intelligence and Security Committee.

Question d) Should the Consolidated Guidance apply to rendition and, if so, what definition of rendition should be used? Should it be made clear that the CG should apply where there is risk of death?

The overwhelming position of those that spoke on this topic was that the guidance should apply to extraordinary rendition and that the document should provide a clear definition of this. As to risk of death, the issue was more complex, linking as it does to other guidance around lawful killing in conflict situations.

Supplemental question: What does effective oversight of the Consolidated Guidance look like and ought it to contain a notification requirement?

There was general agreement that effective oversight was key to compliance in this area and that the CG should be much clearer and more detailed as to what that oversight should look like. Ineffective oversight could become a veil, providing apparent reassurance but without identifying real failings and potential criminality. Regard should also be had to whether the CG should contain specific whistleblowing provisions.

The question of whether the CG should contain a requirement that persons adversely affected by the sharing of intelligence under the Consolidated Guidance ought to be notified of that sharing to permit them to take legal action was strongly argued by some participants and there was debate as to whether the current processes for bringing potential non-compliance with the CG were adequate in law.

The Commissioner was extremely grateful to all the participants, particularly those that spoke about real examples of the impact of torture and inhumane treatment and those participants who skilfully navigated national security restrictions to provide concrete examples of the challenges of operational work.