KENOVA INVESTIGATIONS

OPERATION KENOVA ("STAKEKNIFE")
OPERATION MIZZENMAST (JEAN SMYTH-CAMPBELL)
OPERATION TURMA (SEAN QUINN, PAUL HAMILTON & ALLAN McCLOY)
OPERATION DENTON (THE BARNARD / GLENANNE SERIES REVIEW)

REVIEW OF WRITTEN SUBMISSIONS ON DRAFT PROTOCOL ON PUBLICATION OF PUBLIC REPORTS FOLLOWING CONSULTATION EXERCISE

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1. Introduction

1.1 On 30 September 2021, I posted the following documents online and thereby launched an open consultation exercise on the terms of a draft protocol concerning the publication of Kenova's investigation reports:

(1) an outline of the consultation exercise: https://www.kenova.co.uk/consultation-proconsultation-exercise-draft-protocol-on-publication-of-reports;

(2) a proposed draft protocol: https://www.kenova.co.uk/consultation-proconsultation-exercise-draft-protocol-on-publication-of-reports.

1.2 I invited written submissions on the draft protocol by 29 October 2021, a small number of stakeholders requested additional time to respond and we ultimately received a considerable volume of high quality submissions for which I was very grateful. It was encouraging to see such strong interest in and engagement with our work and helpful to be reminded of and challenged by the wide range of stakeholder opinions.

1.3 **Appendix A** to this note below sets out a list of those who responded and a link to a copy set of their written submissions, minus any telephone numbers, email addresses or third party names. (Four consultees asked for their names and submissions to remain confidential and the Police Ombudsman of Northern Ireland asked for her submissions to remain confidential; as promised at the outset, I have respected their wishes.)

1.4 I have carefully reviewed the terms of the draft protocol in the light of all the submissions received, made such amendments as I consider appropriate and am today publishing a final version. This note identifies the key themes and issues to emerge from the consultation exercise and outlines my position thereon and a small number of consequential changes made to the draft protocol (see parts 2-4 below). This note also deals separately with the submissions provided by the Cabinet Office and An Garda Síochána ("AGS") (see parts 5-6 below respectively). The abbreviations used in the protocol are adopted herein.

1.5 I do not intend to respond to each individual submission in turn, partly because a number of them cover similar ground and make similar points. I have also not dealt separately with points which were already expressly addressed in the text of the draft protocol itself.

1.6 Some consultation submissions concentrated on the *interim* report referred to in paragraph 1.3 of the draft and final protocol and made comments about this by reference to statements I have made about Kenova's *final* reports. The protocol sets out a process map for the finalisation and submission of the interim and final reports and this note deals with both together accordingly. The differences between the two types of report are made clear in the protocol and not every statement I have made about the final reports is necessarily applicable to the interim report.

2. Preparation and publication of reports

2.1 A number of consultees queried or disputed my power to produce or publish reports at all. The first point to note here is that I will not be publishing anything myself. Rather, I have been commissioned by PSNI to prepare and provide it with reports which it will then publish. Accordingly, the legal basis for my reports depends on PSNI having power to (1) prepare and publish public facing reports and (2) delegate the preparation of such reports to others:

(1) Chief Constables have the capacities of ordinary legal persons and therefore have a basic power to collect, disclose and publish information in the discharge of their functions unless or to the extent that they are expressly or impliedly prohibited from doing so. Part 2 of the protocol refers to various legal rules and principles which define the scope of this power and govern its exercise, but I have no doubts about its fundamental existence. Kenova's investigation reports will be published as part of PSNI's policing response to various incidents of crime and disorder during the Troubles and will help discharge the investigative obligations of the State under articles 2-3 of the ECHR. Furthermore, their publication is intended to secure community support in accordance with section 31A of the Police (Northern Ireland) Act 2000 and ensure compliance with and transparency around PSNI's response to requests made by PPSNI under section 35(5) of the Justice (Northern Ireland) Act 2002. In my view, the conduct of investigations and related reviews and the taking of steps to learn from past such exercises are all basic policing functions, particularly in the context of major and complex case-work. This is supported by the *Barnard* decision of the Northern Ireland Court of Appeal ([2019] NICA 38) which underpins and mandates the terms of reference for and our work on Operation Denton and the Glenanne Series Review.

(2) In order to ensure practical independence and public confidence, PSNI has delegated Kenova's work and the preparation of its reports to me by way of a cross-border mutual aid arrangement with Bedfordshire Police under section 98 of the Police Act 1996. My team is seconded from Bedfordshire Police, but we act on behalf of the Chief Constable of PSNI and exercise the powers and privileges of his officers by virtue of section 98(5)-(6) of the Police Act 1996. I can see no reason to doubt that these arrangements entitle and indeed oblige me to prepare the reports I have been asked to produce on behalf of PSNI. It will then publish each report in the exercise of the abovementioned powers and in pursuit of the abovementioned policing objectives.

2.2 For the avoidance of doubt, the reports will set out my own findings and conclusions and, while I hope these will command respect, readers will be free to accept or reject them as they see fit. My reports will make clear that I have no power to adjudicate upon or determine legal rights or obligations or questions of civil or criminal liability and they will not purport to be decisive of any such matters.

3. Contents and purpose of reports

3.1 A number of consultees rightly stressed the importance of ensuring that my interim report does not prejudice any criminal justice process and some went further and contended that any such report would necessarily and unavoidably have this effect. The protocol is designed to help avoid such an outcome and I am committed to working with PPSNI, PSNI and (if and to the extent appropriate) PONI to achieve this objective.

3.2 A number of consultees also urged that the protocol should include a definition of "collusion" or outline a proposed approach to related matters. I do not think this is necessary or appropriate because the protocol is only concerned with matters of process.

3.3 I do not intend to respond in detail to other comments made about the likely contents or purpose of my reports primarily because, again, the protocol is about matters of process and will not dictate or shape my findings or conclusions. I am determined to ensure that all my reports are fair, balanced and compatible with articles 2-3 of the ECHR and I believe and trust that they will not be counterproductive.

3.4 For the avoidance of doubt, my reports were commissioned long before preparation or publication of the government paper "Addressing the Legacy of Northern Ireland's Past" (July 2021, CP 498) and the Northern Ireland Troubles (Legacy and Reconciliation) Bill.

4. Purpose and nature of security checking

4.1 A number of consultees raised concerns connected with this topic and the definition and meaning of the term "national security". Paragraph 6.1 of the draft and final protocol provides:

Once each report has been finalised, it will be necessary to consult the Cabinet Office (on behalf of HM Government) about whether publication of any of its contents would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any public authority.

4.2 For convenience, the above uses language found in the Investigatory Powers Act 2016 and other legislation and, for the avoidance of doubt, I do not think Kenova's reports could be capable of prejudicing the economic well-being of the United Kingdom. The term "national security" is generally understood to connote the security of the United Kingdom, its people, its democracy and its legal and constitutional system and their protection against threats of the kind referred to in section 1 of the Security Service Act 1989 (see *Home Secretary v Rehman* [2001] UKHL 47, [2003] 1 AC 153, paragraphs [15]-[17] (Lord Slynn)).

4.3 Beyond this, I do not think the process map set out in the protocol needs to contain a comprehensive definition of the term "national security" or that it would be appropriate for me to attempt to draft one. Most of the consultation submissions on this subject appeared to me to express or arise from a concern or anxiety that HM Government might use the security checking stage of the pre-publication process to amend or suppress unwelcome findings or conclusions. I have no reason to believe that this is likely to happen and, if it did, I would resist it. Furthermore, if anything were withheld from any of my reports on national security grounds which I did not agree with, I would make my disagreement clear.

5. Cabinet Office submission

5.1 Given the high level of interest in and submissions about national security issues, I think it would be helpful to respond more directly to the points made in the Cabinet Office letter dated 2 November 2021:

(1) Security checking: Paragraph 11.1 of the draft protocol explained why the representations stage of the process needs to come before the security checking stage and I do not think it would make sense to reverse the two or have two

security checking stages. First, it is difficult to envisage circumstances in which a draft passage which is critical of a person or body - so as to engage the representations stage - could contain sensitive information which is not already known to them (because the criticism would necessarily relate to their conduct). Secondly, if such circumstances were to arise, and the subject of the criticism were not a public authority already seized of the relevant information, this would be apparent and we would be able to take advice as appropriate. In this regard, it must be remembered that we are independent of government, we communicate with others about our work on a regular basis, without submitting every item of correspondence for security checking, and we are experienced in protecting the confidentiality of sensitive information. Thirdly, much of the sensitive information we hold is already subject to legal obligations precluding onward disclosure without the agreement of its originator. Fourthly, paragraph 2.4 of the draft and final protocol confirms that disclosure at the representations stage, "will require and depend upon recipients giving and abiding by undertakings as to confidentiality and onward disclosure or use".

(2) Redaction process: While I hope and expect that none of our reports will need to be redacted, I accept that redactions which indicate the amount of information redacted can, in certain circumstances, be revealing and therefore problematic. However, this is not always the case and much will depend on the reason for the redaction and the particular context and content. We will therefore judge the best means of applying and presenting redactions, if any, on a case-by-case basis. We do not envisage producing any "closed" reports.

(3) National security dispute resolution and "NCND": The Cabinet Office letter includes the following:

> *There is currently no detail in the draft protocol on how any disclosure dispute may be resolved in circumstances where KENOVA wishes to disclose material to which there is a valid national security objection, in either its interim or final reports. We would like to request the addition of text addressing this point. It should make clear that any national security disputes can only be resolved by the appropriate Government Minister and it is for Ministers, rather than KENOVA, to*

determine whether it is in the public interest to disclose national security sensitive information.

Depending on the level of information that KENOVA envisages including in these reports, there are elements of paragraph 1.3 and paragraph 6.3 of the draft protocol which may raise issues of Neither Confirm Nor Deny (NCND), a principle applied by relevant departments and agencies for national security issues and owned by the Cabinet Office. If the proposed content of the reports is likely to engage the NCND principle, then we would request that reference should be made to it in the draft protocol.

First, I cannot conceive of circumstances in which we would seek to include material which is the subject of a *valid* national security objection in any report. Secondly, I agree that Kenova cannot determine the validity of such objections and accept that the government's assessment of them will always deserve special respect and weight by reason of its constitutional responsibilities and institutional competence and expertise. However, the government cannot determine the validity of its own actions - only the independent judiciary can do that - and it would not be right to suggest otherwise in the protocol. The Kenova investigations are police investigations which are independent of government and not subject to any absolute governmental right of veto or censorship. Thirdly, the "neither confirm nor deny" or "NCND" policy is simply one means of protecting sensitive information, which may or may not be relevant to security checking, and I see no need to refer to it in the protocol.

(4) Legislation references: I have included references to the Security Service Act 1989 and Intelligence Services Act 1994 in paragraph 2.1(1) of the protocol, which gives examples of some potentially relevant legislation. However, I cannot include the words "or any other legislation that the Security and Intelligence Agencies might wish to reference" because this appears to imply an exclusive right (not enjoyed by others) to refer to unspecified legislation regardless of its relevance. Any stakeholder involved in the process will be free to refer to any legislation they choose, but its applicability will depend on the circumstances.

(5) General/resourcing: We will be happy to continue to engage with all stakeholders about our progress, priorities and timings and I can confirm that we plan to engage with the PPSNI directly.

5.2 My conclusion that only one pre-publication security checking process is needed - after the representations process - has caused some disquiet within government. In order to assuage this, I will provide the Cabinet Office with a strictly confidential copy of each non-government representations pack 10 working days in advance of its formal dispatch. Should the government consider that it would be unlawful for me to send any such pack to a non-government recipient on a confidential basis, it will thus have an opportunity to take steps to prevent this from happening. I am confident that no such steps will ever need to be taken and that the exercise itself will demonstrate that the disquiet was unjustified.

6. An Garda Síochána submission

6.1 The protocol does not include any references to any Irish laws or legislation or expressly provide for consultation with AGS. This is because: the Kenova investigations are not governed by Irish laws or legislation and are not investigating and will not report on the conduct of AGS; all information obtained from AGS, including under mutual legal assistance arrangements, will be handled in accordance with relevant obligations and agreements, including in relation to consent for onward disclosure; and any factual reference to AGS in any Kenova report will be shared with it in advance as a matter of comity and courtesy and any comment it wishes to make will be taken into account.

6.2 I am extremely grateful for the ongoing support and assistance provided to Kenova by AGS and will continue to work closely with it to maintain our constructive and mutually beneficial relationship.

Chief Constable (retd.) Jon Boutcher

Officer in Overall Charge 31st October 2022

APPENDIX A: CONSULTATION RESPONSES

Written submissions received from*

1. An Garda Síochána, 27 October 2021.
2. Cabinet Office, 2 November 2021.
3. David Clements, 7 October 2021.
4. Commission for Victims and Survivors, October 2021.
5. Committee on the Administration of Justice, 29 October 2021.
6. Colin Davidson, 8 October 2021.
7. Department of Justice, 11 October 2021.
8. Brice Dickson, 26 October 2021.
9. Aoife Duffy, 7 October 2021.
10. Aidan Falls, 29 October 2021.
11. Louise Haigh MP, 24 October 2021.
12. David Hoey, 28 October 2021.
13. Malone House Group, 20 October 2021.
14. Ministry of Defence, 28 October 2021.
15. Kathleen O'Toole, 7 October 2021.
16. Pat Finucane Centre / Justice for the Forgotten, 1 November 2021.
17. Peter Smith CBE QC & Neil Faris, 28 October 2021.
18. Dr William Beattie Smith, 28 October 2021.
19. Social Democratic and Labour Party, 29 October 2021.
20. South East Fermanagh Foundation, 21 November 2021.
21. Peter Taylor, 18 October 2021.
22. Wave Trauma Centre, October 2021.

* Names and submissions of four consultees and submissions of Police Ombudsman for Northern Ireland (29 October 2021) not being published at their request (see paragraph 1.3 above).

https://www.kenova.co.uk/C%20Protocol%20Responses%20for%20publication%20with%20Logo%20(002).pdf