APPENDIX A: CONSULTATION RESPONSES: DIGEST OF SUBMISSIONS

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Submission 1: An Garda Síochána

RE: KENOVA Investigation Consultation Exercise: Draft Protocol on Publication of Reports.

I refer to your letter of 29 September, which I received together with the Draft Protocol on Publication of Public Reports. Having examined the draft protocol, I provide the following views.

As noted by your cover letter, this draft protocol document is intended to be a "process map" and does not discuss the contents or outcomes of any potential reports, published or otherwise.

As you are aware, this office has previously advised that there is a legal void with regard to the exchange of information between An Garda Siochana and your ongoing analytical review under the auspices of Operation Kenova. This office was advised that the review proposed to publish data provided by An Garda Siochana as part of the review, which in effect creates a difficulty in respect of the sharing of information for this specific purpose. In order to mitigate any potential organisational risks for An Garda Siochana in this regard, the organisation is currently liaising with the Department of Justice in order to seek the advice of the Attorney General in respect of this matter.

It would appear at this juncture that an additional legal framework will be required to allow for the lawful exchange of information between An Garda Siochana and the analytical review under the auspices of Operation Kenova.

Introduction

An Garda Siochana reputational matters - Paragraph 1.3 states the "interim report" is intended to be a high-level document regarding how organisations and State Services interacted with PIRA, their agents and informants as well as patterns of State intervention or non-intervention. It appears to be a high-level report into what may generally be called "collusion".

The Draft does not specify that only UK State Services are open to such comment. While such comments on foreign services [i.e. AGS] would greatly exceed the KENOVA terms of reference, this is not actually specified.

Legal Framework

An Garda Siochana Intelligence, Tradecraft and Source Protection - Paragraph 2.1(1) Statute

- refers to British/Northern Ireland legislation only. It does not include Irish legislation for example, Constitutional Law, International Relations, Data Protection, Mutual Assistance and State Security.

Paragraph 2.1(4) "Express and Implied Undertakings" appears to give protection to sensitive An Garda Siochana information. While the Third-Party Rule is not mentioned by name, it would appear to be covered within "information sharing agreements" [albeit unwritten] and "ordinary implied obligations".

Stage 2: Representations Process

Paragraph 4 gives criticised individuals or organisations a right of response with the understanding that this is not a negotiation of what is to be published.

This could potentially lead to a situation where extremely serious allegations are made or implied against the Irish State/An Garda Siochana without any meaningful recourse available.

Stage 4: Security Checking Process

Interests of the Irish State generally - Paragraph 6 states that KENOVA will consult the UK Cabinet Office as to whether the publication of any draft report 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 any public authority".

It may be considered that these reports have significant implications for the national interests of the Republic of Ireland, given their context and subject matter. There is no provision for the defence of these interests.

Stage 6: Administration of Justice Review of interim report by PPSNl and PSNI
Administration of Justice - Paragraph 8 states that interim reports will only be published in aform that, in the opinion of the PSNI and the Public Prosecution Service of Northern Ireland [PPSNI], will not prejudice any ongoing criminal justice proceedings.

It may be prudent to include An Garda Siochana *I* the Director of Public Prosecutions as a

number of cases, particularly under Operations KENOVA and DENTON concern atrocities in this jurisdiction, which remain the subject of open investigations. The provision of assistance to KENOVA does not preclude prosecution in this jurisdiction.

Submissions

The attached draft protocol document is effectively a unilateral protocol and this office offers the following submissions:

- It is not sufficient to include only British/Northern Ireland legislation. An Irish legal framework needs to be included.
- In accordance with section 9(2) of the Crime (International Co-operation) Act 2003 "evidence furnished in response to requests will not, without the consent of the Minister, the nominated judge or the witness, be used for any purpose other than that specified in the request and evidence will be returned to the Minister when it is no longer required for the purpose requested." To date a number of ILOR's have been received by An Garda Siochana from KENOVA, which are now closed. It is our position that material provided to KENOVA via ILOR was for the purpose of criminal investigations and not for publishing in interim/final reports. Other ILOR assurances may apply.
- The decision to publish or not to publish material is of great importance. It may have far- reaching consequences for the Irish State and/or An Garda Siochana. It is therefore essential that An Garda Siochana seeks some manner of editorial rights/negotiating power [or at bare minimum, viewing rights] to relevant reports prior to the pre-publication disclosure to victims and families, so An Garda Siochana may assess any material published, against for example, the following grounds; the impact on State Security, International Relations, Article 2 ECHR, Tradecraft.
- In addition, as any draft may have potential issues for the Irish State, An Garda Siochana may have to seek further advice from the Irish Government.

Yours sincerely Commissioner Harris

Submission 2: Cabinet Office

Thank you for the opportunity to provide input to the draft protocol on publication of KENOVA reports, dated 23 September 2021. Please accept this collective response on behalf of relevant government departments and agencies, grouped around specific themes and issues. I, or relevant colleagues, would be happy to discuss any specific points arising with you or your team.

Security checking

We have a concern regarding the stages outlined at paragraphs 3 – 6 and 11 of the draft protocol. As currently drafted, the "representations" stage comes before the "security checking" stage, which seems to us to carry the potential for national security sensitive material to be seen by those it should not. We kindly request that these sections of the draft protocol be re-ordered/re-drafted to avoid this risk.

Redaction process

With regard to any redaction process that might be required, as touched upon in paragraph 7.2 of the protocol, we would request that reports just show that material has been removed rather than applying a word for word process of redactions. This would avoid potential disclosure issues and the risk that interested parties could

attempt to work out specific redacted words if that might be an intent. Similarly, if a CLOSED report or report containing sensitive information is to be shared with any associated groups, we also request that KENOVA should ensure members of those groups are suitably vetted/cleared to see the appropriate classification of material.

National security dispute resolution and NCND

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.

Legislation references

Finally, we would like to request explicit reference be included in paragraph 2.1(1) to the Security Service Act 1989, the Intelligence Services Act 1994 and "any other legislation that the Security and Intelligence Agencies might wish to reference."

General/resourcing

As you work towards report publication, it would be extremely helpful, from a government perspective, for sections of draft reports to be sent to relevant officials for security-checking over a period of time rather than as one complete (draft) interim/final report. As you will appreciate, it takes time to check and consider any national security-related material in such reports, particularly given competing operational priorities and resource constraints. Naturally, the more time we are given to review any draft(s), the better. We would, therefore, like to work with you and your team in setting realistic deadlines for this aspect of your work. In this regard, it would also be helpful for us to better understand KENOVA's anticipated timeline for these interim/final reports and how you are planning to engage with the Northern Ireland Public Prosecution Service to ensure their publication does not prejudice any future prosecutorial decisions.

I would be grateful if you could acknowledge receipt of this letter, which I am copying to Beth Sizeland, Deputy National Security Adviser, and to Operation KENOVA points of contact in the Northern Ireland Office, the Ministry of Defence, the Home Office as well as those in the Security Service and the Secret Intelligence Service.

The UK Government shares your commitment to providing victims and families with as

much information as possible, and this is the cornerstone of the proposals we published in July. As we work to bring forward legislation in the near future, and you prepare to publish your reports, it is important that continued close communication between our teams continues - to ensure that the needs of all those affected by the Troubles continues to be a key shared objective.

Submission 3: David Clements

I appreciate being included in the consultation though I don't have any comment to make, other than that I support the broad thrust of the protocol suggested.

Submission 4: Commission for Victims and Survivors for Northern Ireland

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The Commission for Victims and Survivors Northern Ireland response to the consultation on the Kenova Investigations Draft Protocol on Publication of Reports

Background

1. The Commission for Victims and Survivors for Northern Ireland (the Commission) was established in June 2008 under the Victims and Survivors (Northern Ireland) Order 2006, amended by the Commission for Victims and Survivors Act (2008). For the purposes of clarity in this response, the Commission's use of the term victims and survivors will principally relate to those who have become victims and survivors as a result of the activities associated directly and indirectly to the Troubles/Conflict.
2. The Commission is a Non-Departmental Public Body of the Executive Office (TEO). The principal aim of the Commission is to promote awareness of the interests of victims and survivors of the Northern Ireland Troubles/Conflict. It has several statutory duties that include:
    - *Promoting an awareness of matters relating to the interests of victimsand survivors and of the need to safeguard those interests;*
    - *Keeping under review the adequacy and effectiveness of law and practice affecting the interests of victims and survivors;*
    - *Keeping under review the adequacy and effectiveness of services provided for the victims and survivors by bodies or persons;*
    - *Advising the Secretary of State, the Executive Committee of the Assembly and any Body or person providing services for victims and survivors on matters concerning the interests of victims and survivors;*
    - *Ensuring that the views of victims and survivors are sought concerningthe exercise of the Commission's functions; and*
    - *Making arrangements for a forum of consultation and discussion with victims*

and survivors.[1]

3. The Commission welcomes the opportunity to provide a brief response to the consultation on the Kenova Investigations Draft Protocol on Publication of Reports. The initiation of this consultation process around the publication of the investigation reports indicates that the Kenova Team are moving into a critical phase of the process. The Commission is mindful that moving into a phase of report publication will generate an enhanced level of anticipation and expectation among all stakeholders. More importantly, it will present significant emotional challenges for the many individuals and families who lost ones as a consequence of the activities examined throughout the different investigations.

Response to the Consultation

4. The draft protocol appears to be a concise, well-considered process document that supports a fair and lawful approach to preparing and publishing the interim and final reports for each of the Kenova investigations. The Commission welcomes the planned 'staged and methodological approach' that will be implemented in the preparation and publication of the investigation reports.
5. The Commission notes that at Stage 7 i.e. *pre-publication disclosure to victims and survivors* the Kenova team will liaise with individuals and families either in person or in writing. Clearly, this is an extremely important and sensitive stage of the report publication process in keeping victims and survivors fully informed and supported during the disclosure of the report's findings and other related content.
6. The Commission acknowledges at Stage 8 i.e. *publication [of the reports] by the PSNI* that the final publication of the investigation reports will clearly be at the discretion of the Police Service of Northern Ireland. Having moved through the other stages of the report preparation and publication process, including the security checking process (Stage 2), submission of final reports to the PSNI (Stage 5) and pre-publication disclosure to victims and families that the report (Stage 7) it is imperative that the final

[1] The functions of the Commission relate to those set out in the Victims and Survivors (Northern Ireland) Order 2006 as amended by the Commission for Victims and Survivors Act (Northern Ireland) 2008.

reports are provided to families and other stakeholders as soon as is practically possible.

7. The Commission would like to reaffirm its continued support for the work of the Kenova investigation process. Since its establishment in 2016 the Commission have provided advice and helpful information to the investigation team and through the former Commissioner Judith Thompson as a member of the Victim Focus Group[2] an independent voice on matters supporting victims and their families throughout the investigative processes. In fulfilling its statutory duties as outlined above the Commission will continue to support individuals and families involved with the Kenova investigations. It is therefore imperative that the protocol on publication of reports continues to operate, first and foremost in the interests of victims and survivors and their families in the period ahead.

[2] The Victim Focus Group was established by Jon Boutcher at the outset of the Kenova investigation process. The VFG is completely independent of the Kenova investigation. Further information on the Victims Focus Group can be accessed here: Panels of experts | (opkenova.co.uk)

Submission 5: Committee on the Administration of Justice

Here are some specific remarks that may be of assistance.

1. In our work on the Stormont House Agreement Model Implementation bill we mapped out a number of requirements from ECHR Articles 2 and 3 jurisprudence that investigations undertaken by the HIU must encompass. We reflected these under clause 10(3) of the Model implementation bill as follows: (https://www.dealingwiththepastni.com/project-outputs/project-reports/stormont-house-agreement-model-implementation-bill)

   (3) The purpose of an investigation must be to—

   (a) establish as many as possible of the relevant facts;

   (b) identify, or facilitate the identification of, the perpetrators;

   (c) establish whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances);

   (d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority;

   (e) obtain and preserve evidence;

   (f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive);

   (g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged; and

   (h) take any other action that the HIU thinks appropriate.

2. As set out in the Explanatory Notes to our bill (para 35 available at link above) this had the effect of placing the investigative obligation under Articles 2 and 3 ECHR developed in the jurisprudence of the European Court of Human Rights (ECtHR) on the face of the legislation. Our rationale for this was for a number of reasons: "*First,*

while the jurisprudence of the ECtHR is actually clear, various elements have been disputed from time to time and, for the avoidance of doubt and to reduce vexatious legal challenges, it is better to express the investigative duty clearly and explicitly in the founding legislation of the HIU. Second, there is a risk that the HIU investigative function might be interpreted narrowly on the basis of the references in paragraphs 34 and 36 SHA to 'criminal investigation' and in paragraph 34 SHA to 'evidence relevant to the identification and eventual prosecution of the perpetrator'. These references should not prevent the HIU having broader investigative functions, covering all the processes required by human rights obligations. State involvement investigations have usually gone beyond the threshold of identifying individual criminality or misconduct to findings on institutional liability, including whether the state acted unlawfully, in particular on ECHR grounds. Third, previous investigative mechanisms, particularly the Historical Enquiries Team (HET), displayed weaknesses in investigative methodology and approach and it is therefore prudent to detail the investigative process in the legislation itself."

3. Under our model the family reports from the HIU must then disclose (see clause 15(3) of the model bill) "as much information about the investigation and its findings as the HIU believes can be made public without prejudicing the administration of justice." This included express reference to a number of the above factors set out in clause 10(3). Whist the official draft SHA legislation consulted on by the NIO (in 2018) did not follow this format it did include, at clause 17(1) that HIU family reports "must be as comprehensive as possible."

4. We would therefore urge that both of these elements are incorporated into the draft Protocol. Firstly setting out ECHR requirements for the elements for which both the investigations and its consequent reports will contain, and secondly committing to maximum permissible disclosure to families. This should include express reference in the legal framework section to the ECHR requirements, at present there is only reference to statutes which may restrict disclosure.

5. We would also urge that the Protocol is framed to state that at all stages Operation Kenova, given the independence of the operation, is the decision-maker on redactions, and whilst at certain stages a limited number of other public authorities may be consulted if and when appropriate and necessary, the ultimate decision rests with Kenova. Clearly the independence of Kenova will be compromised also if it does not have the power to make the decision to publish its own reports or if other agencies, or even the executive branch of government is able to redact reports prior to publications. At present the Protocol would allow the PPS and PSNI a veto over the publication of Interim Reports, and the PSNI over final reports, no legal obligation is cited in the Protocol to justify this.

6. As you will be aware there has long been concern regarding the 'overreach' and ambiguity of the concept of national security. This was the case with the official draft SHA legislation which promoted an alarming 'national security plus' definition, capturing and seeking to put beyond reach all material relating to covert operations. We sought the removal of the 'national security veto' from this legislation, which was resisted by government. We therefore sought to propose a solution by defining the parameters of a such a concept that could be used for legitimate redactions in what are legacy cases (rather than dealing with contemporary national security issues). In essence, in addition to redactions in the interests of justice (particularly relevant to interim reports), and duties not to put individuals at risk, we saw that in tightly defined circumstances there could be proportionate restrictions on disclosure "to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful." We considered that this formulation would encompass genuine concerns regarding the risks of disclosure of methodologies, without being so broad to harness the potential cover up of human rights violations or otherwise unlawful or embarrassing activities. Further to case law it does not cover operational methods that would be unlawful or obsolete, including the toleration, facilitation or direction of criminal CHIS conduct constituting human rights violations. The parameters and rationale of this are set out in further detail in the attached report from us from 2017. It is welcome in the protocol that the concept of national security

is not central to redactions and instead there is an onus on the public interest yet we believe this could be further codified into narrow criteria for any redactions to a report.

7. We would suggest a strict timeframe is placed into the protocol regarding the Maxwellisation process and time for affected persons to respond.

Submission 6: Colin Davidson

I am privileged that I should be included in this consultation.

The papers make for sober reading. But ultimately they show a way to a light of sorts. A light which guides us to the most sensible and sensitive way ahead. The way is difficult for many, as Jon knows, but this critical work is giving answers which were previously buried deeply and unavailable to those who needed them most.

So my input is this: keep on. And thank you from my heart and from the many in this wonderful place who care. This is the way ahead.

Submission 7: Department of Justice

I note the consultation on the draft protocol and appreciate the advance notice.

As this relates to what are operational matters, I will not be offering any comment on the draft protocol but look forward to the publication of the final version in due course.

Submission 8: Brice Dickson

Thank you for conducting a consultation exercise on the terms of a draft protocol concerning the publication of Kenova's investigation reports. The draft protocol outlines your intentions in relation to interim and final reports, the legal framework within which you are operating and your proposed eight-stage process for managing publication.

As a former Chief Commissioner of the Northern Ireland Human Rights Commission (1999-2005), a former independent member of the Northern Ireland Policing Board (2012-2020) and now, since 2017, an Emeritus Professor of International and Comparative Law at Queen's University Belfast, I have taken a keen interest in your work on Northern Ireland issues over the last number of years. In fact I was on the policing Board when you reported on your progress with your inquiries back in 2018 or 2019 I think. I applaud very much what you and your team have achieved and the reports by Alyson Kilpatrick on whether your work is compliant with Article 2 of the ECHR have been very reassuring, even if she mildly hints at the fact that your resources may not be all that you would ideally like them to be.

I also welcome very much your commitment to keeping the public informed about the work you are doing, so far as is compatible (I am sure) with the principles of fairness, data protection and privacy. It seems that the families of the victims of the incidents you are investigating are pleased with the way you have been keeping them up-to-date too. I certainly look forward to reading your public-facing reports which will be published at the conclusion of any relevant criminal justice process, although I am not entirely clear why it will be the PSNI that will be publishing those reports rather than your own team: the reports will not have been authored by the PSNI and to give them a PSNI branding of any kind surely runs counter to the need for your work to be, and to be seen to be, completely independent of the PSNI.

In principle I have no objection to your proposed interim report. Anything which adds to the information in the public domain about what was done during the troubles is always to be appreciated. And I note that your interim report will address 'generic, high-level themes and issues and concentrate on organisations, rather than individuals, and confirm - at a relatively high level of generality and without going into specifics – [y]our findings about what was, and

was not, happening during the Troubles as between (a) organisations, (b) the Provisional IRA and its Internal Security Unit, (c) the police, armed forces and intelligence services and (d) their agents and informants'. You say that you want to make it clear where you have, and have not, 'found patterns of State intervention or non-intervention in particular types of circumstance and address types of circumstance in which steps were, or were not, taken in relation to the disclosure of intelligence about serious criminal conduct, either prospectively before it happened or retrospectively when it was being investigated'.

This is all very laudable but, wearing my human rights hat, I wonder just how lawful it may be. I have particular concerns about Stage 6 of your process – the administration of justice review. To be honest, I find it hard to imagine that a report such as you are envisaging, even if it is at the 'high level' you describe, will not be at risk of falling foul of the rules on contempt of court and perhaps also of those on perverting the course of justice. When your interim report is published, if the PPS is still considering whether or not to prosecute some individuals based on the files you have already submitted, or worse still, if prosecutions are actually in train and a judge is conducting a trial, I would think there is a strong chance that the DPP or the judge, depending on what stage the proceedings have reached, will feel that the interim report may be a document which could sway the decision-making process on whether to prosecute and/or to convict. After all, one of the tests for deciding whether a prosecution should proceed is whether it would be in the public interest for that to happen and for there to be a conviction the judge (assuming there will be no jury) has to be convinced beyond reasonable doubt that someone committed a crime. Whatever your interim report says will, I fear, be latched on to by whichever party to the criminal justice system deems it to be more favourable to their cause than to their opponent's. They will be tempted to challenge the continuance of the proceedings on grounds of fairness or abuse of process.

It strikes me that the kind of report you are envisaging would be comparable to one that is issued by the HMICFRS, or by the Police Ombudsman, or by a public inquiry, bang in the middle of ongoing criminal proceedings which are very closely related to the subject-matter of the report. It would also be akin to a television company broadcasting a programme about some of the incidents involved, and drawing some conclusions about them at a higher level, in the course of a prosecution or trial process. Lawyers, journalists and partisan observers could make hay out of such a report and the net result may be to (unfairly) undermine the credibility of

your report but also, and more seriously, to disrupt if not terminate the on-going criminal proceedings.

Call me unduly cautious, but defendants and witnesses in criminal proceedings have strong human rights that must be protected. In fact, judges are perhaps keener to uphold the right to a fair trial than any other right (think of the John Downey 'abuse of process' judgment in 2014 and of the fact that in 2020 Cliff Richard successfully sued the BBC for breach of privacy prompted by media coverage of the raid on his home six years earlier).

I therefore conclude that, impatient though you may be to get what you want to say out there, and impatient as people like myself may be to read what you have to say, it might be wiser to wait until the criminal justice process has run its course before issuing this kind of report. At the very least, if you have not already done so, you should perhaps seek the advice of a senior barrister who has experience of challenges to criminal proceedings based on the rules of fairness.

I wish you well with the completion of your very valuable work.

Kind regards,

Brice Dickson

Submission 9: Aoife Duffy

I haven’t any specific feedback to give on the proposed process at this time – it looks sound, well-considered, and transparent

Submission 10: Aidan Falls

I would like to respond by basically stating that the term “National Security” is undefined, and that the British State amends and uses this term for its own purposes and as a means of coverup. The British State ignores its own consultation processes and now wants to impose a “Statute of Limitations” in a dictatorship manner.

Access to Truth and Justice must not be destroyed. The British State and its agents must be held accountable, and Truth and Justice delivered in a human rights compliant manner.

The British State should be investigated by an international body and held accountable in an international Criminal Court.

Submission 11: Louise Haigh

Many thanks for sharing the draft protocol and inviting my feedback, I really appreciate the open and inclusive manner in which Op Kenova operates.

I think the draft protocol is excellent and clearly defines the parameters and role for Kenova. I believe it is especially important that the consultation on national security in relation to the public interest is clear and that it is not in any sense a veto.

The only constructive suggestion I would have would be an expectation of the timeframe for the PSNI to publish the final report. As this is entirely within their gift, I believe it would be sensible to place an expectation of a number of weeks after they have received the final report, by which time they should have published it unless it is not possible for operational reasons.

Submission 12: David Hoey

RESPONSE TO **[DRAFT] PROTOCOL ON PUBLICATION OF PUBLIC REPORTS**

Reading this consultation paper, my inner alarm rang loudly. That alarm is tuned from decades of public affairs and media management in London and Belfast, numerous endeavours managing crises and reputational risk, and an in-depth engagement on contentious matters here in Northern Ireland.

The alarm centred on being unable to find any good reason to publish an interim report as described. There are several reasons why this would be wrong and problematic.

In the first instance, the Kenova team is investigating with a view to criminal prosecution. This is an evidential gathering process which will in time lead to the PPS deciding, based on the evidence provided, whether the prosecution process is appropriate. There is no part of the overall process where a musing by Kenova police officers on 'contexts' or 'narratives' around an investigation serves a useful purpose.

Secondly, the issues around dealing with 'the past' or 'legacy', or the history of the past fifty years, is highly contentious. Any interim report may well be based on the experience of the Kenova police officers arising from the conduct of their investigations: in particular, their identification of high-level themes and issues may have assisted consideration of lines of investigation they have carried out. The question arises whether Kenova police officers are best placed to produce any 'Interim Report' on such high-level themes and issues – that must surely be one for historians *after* the fact to which personal contributions from Kenova police officers would no doubt be valuable.

In any case, an 'Interim Report' as suggested, based as it would be on Kenova police officer assessment of themes and issues, would provide nothing but further contention in what is an increasingly fractious and divisive political environment in Northern Ireland presently. If there would be a time to publish a document that offers opinion on matters of public policy the appropriate point, if ever, would be when the investigation and subsequent prosecutions that may arise have reached a definite conclusion.

Finally, it would seem impossible for an interim report to do anything but create a media maelstrom around the current consideration by the PPS on the evidence before it.

Experience from my Communications career would suggest that it would be impossible, because of the media attention and the inevitable political pile-on, for the PPS to be seen to make decisions on the evidence alone. The PPS is under severe pressure already, unfairly; being accused in various quarters of following an 'agenda'. There is no reasonable way in which trust in any future PPS decisions would not be compromised in the same way should an interim report create a political environment where deeply opposing views leave it in a no-win situation. No matter that it would not be the intention of an interim report to undermine the PPS, the practical realities of the current political landscape in Northern Ireland would be to that effect. Where there is potential for part of the Legal process to be undermined it does not serve the public interest make unnecessary public pronouncements.

In summary, the proposal for an interim report would of itself gain considerable media attention. Equally, it serves no investigative purpose, with potential to increase division where calm discourse is required. Additionally, such an addition to public discourse is more likely than not to create a media and political storm. This would be seriously detrimental to the already difficult task of the PPS at a time when its full attention ought to be focused on the practical outcomes with reference to future prosecutions based on evidence.

Submitted by David Hoey LLB CIPR

20 October 2021

The 'Kenova Investigations' comprise the various operations set out in the draft Protocol that is being consulted on. The Protocol concerns the publication of an Interim Report i.e. one before prosecutions conclude.

1. Background

Operation Kenova, overall, has four commissions from the PSNI and the Public Prosecution Service (PPS). They arise mostly from the requirement of a Court that, while a police investigation or review into alleged criminality is required, the PSNI, for (disputable) legacy reasons, is not deemed sufficiently independent for the purpose.

They are:

- Kenova ('An investigation into the alleged activities of the person known as Stakeknife').
- Mizzenmast ('An investigation into the death of Jean Smyth-Campbell in 1972'. The McQuillan case at the Supreme Court concerns this death.)
- Turma ('An investigation into the murder of three RUC officers at Kinnego Embankment in County Armagh in 1982'. They were Paul Hamilton, Allan McCloy and Sean Quinn. Only the criminal aspects are apparently being investigated.)
- Denton (The Barnard/Glenanne Review, 'An analytical report on collusion in what has become known as the Glenanne Series').

A fifth such inquiry, named Klina, on the Martin McAuley case and related to Turma, is being conducted by Police Scotland.

The four operations are generally referred to as 'Kenova', ongoing now for six years. We understand it has expenditure of some £5 million a year and a staff of around eighty, based in England, to deal with three police investigations and one review. They involve four particular

deaths from two events, one police investigation of a more general nature (Stakeknife), and Operation Denton (Barnard/Glenanne in which 'a review' has been tasked.

The former Chief Constable of Bedford, Mr Jon Boutcher, is the Officer in Charge of all three operations referred to in the Protocol (and also Operation Denton which is not included in the Protocol). Mr Boutcher's authority derives largely from requests by the PSNI Chief Constable under section 98 (1) of the Police Act 1996 (the Act). Under the Act, Mr Boutcher has the powers and privileges that a PSNI member has in Northern Ireland as a Constable.

Mr Boutcher has submitted substantial reports comprising 50,000 pages of evidence (the outcome of the Kenova or Stakeknife police investigation) to the PPS. Some 30 Kenova files are now under consideration. Presumably, these relate to possible offences committed by individuals whom Mr Boutcher has identified. It is not known if prosecutions have been recommended in any particular case, as we are not informed of the procedure that Kenova is using. The first decisions on any prosecutions are not expected from the PPS before at least March 2022. *The Irish News* report (below) of a speech at Feile in August 2021 refers.

It remains unclear to us why Operation Denton is not intended to be covered by the proposed Interim Report which may be why no mention of the UVF is made in the list of organisations to be reported on. We would welcome the reason for its non-inclusion and indeed a clear description of where the various Kenova commissions differ.

2. Interim Report Protocol

In the website announcement of the proposed Interim Report, Mr Boutcher stated:

"At the very outset of Kenova I made a promise to all the affected families that I would produce a public-facing report outlining our findings to give them the truth of what happened to their loved ones, including who was involved and in what capacity".

But the announcement, also states that in the draft Protocol he has:

"…laid out his plans for releasing an interim report which will address high level themes and issues concentration on findings of the three key investigations. This report will focus on what was, and was not, happening between organisations: the Provisional IRA and its internal Security Unit, the police, armed forces, intelligence services and their agents and informants. In particular the report will focus on the organisation that committed these awful murders, state

intervention or otherwise, and whether steps were, or were not, taken before serious criminal conduct was carried out or subsequent to it to prevent a full investigation".

We understand this means that it is the intention to proceed with an Interim Report, effectively pre-empting PPS decisions. He however does write, that an Interim Report "will only be possible if PPS and PSNI are satisfied that doing so will not prejudice any ongoing criminal proceedings".

3. Prejudice to criminal process and the independence of the PPS

We would be of the view that PPS and PSNI will and should object to an Interim Report, prior to the conclusion of the PPS's deliberations. It appears to be inappropriate pressure, certainly on the independent role of the PPS, to come up with the necessary charges that back up any report findings. It could therefore contaminate imminent prosecutions. In relation to the PSNI, we would assume there will be resistance to such an Interim Report on similar and other grounds.

It is indeed of critical importance that the PPS remains entirely independent in making its decisions as to whether or not prosecutions should be mounted. Inevitably, the publication of an Interim Report would be a matter of massive public interest, likely to lead to intense media and political demands that action is taken against the assumed-to-be-guilty parties. That would create unacceptable pressure on the PPS, making it difficult to resist the outcry caused by such publication.

4. Due process

Any high level examination of themes and issues will necessarily lead to the identification of those in operational command of the police, army and intelligence services at the time – some of the organisations referred to in the website announcement. This is so, whether or not individuals are specifically named in the Interim Report. This should also draw on aspects of the ECHR other than Article 2, in particular, the often competing Articles 6 and 8 on the right to a fair trial and right to a reputation. However, there is no mention of these articles in the draft Protocol or indeed on the website.

It would seem therefore near impossible to write an Interim Report on organisations that:

KENOVA

- does not prejudice any later/ongoing prosecutions, given that it will be relatively easy in the Northern Ireland context to infer who in any of the organisations is being scrutinised, and criticised or condemned; and

- avoids material damage to the reputations of those who may be named in, or who can be identified from, the Interim Report

5. 'Collusion'

Given the likelihood of allegations of collusion or the more recent accusation by the Police Ombudsman, Marie Anderson, of "collusive behaviours" by the RUC, we ask, should the Interim Report go ahead (or any later one), that there will, in advance, be a very clear statement of what these terms mean, especially as collusion is not a recognised criminal offence. We therefore request the fairer, more accurate and less tendentious use of the word 'corruption' where any criminality is alleged.

6. The proper limits of police powers and functions

It is likely that any Interim Report would identify "who was involved and in what capacity" as contained in Mr Boutcher's promise to families set out in the website announcement. In ordinary circumstances however, a police officer, having submitted files to the PPS, would simply await the outcome – and would not be seeking to issue public reports. That should not be a proper function for police officers in any liberal democracy and is effectively politicising the police.

Furthermore, there is no proper and full due process outlined for any organisation or individual, likely to be subject to Mr Boutcher's criticism. He is acting as an investigating police officer in seeking out 'evidence' but then proposes to act as adjudicator of such evidence. This is the role of the judiciary or a statutory body with the required powers clearly defined.

Any fair procedure would involve several steps and a distinction of roles in the following stages:

1. Investigation and Disclosure of Evidence – to date Mr Boutcher has been carrying out investigations as a police officer and exercising police powers for the purpose. However, he is now proposing in an Interim Report to identify and criticise organisations (and potentially individuals: either specifically or by

implication). We understand that this identification and criticism is not for the purpose of mounting prosecutions, but is of the nature of a civil public inquiry into a matter of public concern.

In our view, also, it is impermissible to rely for the purpose of any such report on evidence gathered in police investigations in breach of current procedures.

It is clear that in any civil inquiry those likely to be subjected to criticism in the inquiry's report must be provided in good time, in advance of any interview, with full details of the case that is being mounted against them and must have fair opportunity to make their defence and to challenge the 'evidence'.

2. Adjudication – as already indicated this is not a suitable or proper role for police officers: some independent assessment is required;
3. Draft Report – those to be subjected to criticism must have full opportunity to see all critical parts of the draft Report relevant to them and to make response which the adjudicator must consider before finalising the report.

Personal comments against government policy set out in the recent NIO Command Paper, 'Addressing the Legacy of Northern Ireland's Past', as were made at Feile, seem inappropriate for a police officer whose investigative job necessitates impartiality not simply responding to public opinion. They amount to undue politicisation of the role, as has happened with the Metropolitan Police e.g. Operation Midland.

7. The consultation process

The document does not seem to follow best practice in the area of public consultation arrangements. These are available at https://consultations.nidirect.gov.uk/ and recommend *inter alia* publication (by non-departmental public bodies) on the NI Executive website.

It is worth noting that MHG only became aware of the consultation indirectly. We were not advised in advance or through distribution, as is recommended, despite our longstanding involvement in the issues.

We are also concerned that it does not indicate if all responses could be made public or what effect the FOI Act will have on the process.

8. Previous representations from the Malone House Group

On a personal note, having met the Malone House Group in November 2020, Mr Boutcher kindly suggested a further meeting in a number of months. However, despite a request for such a meeting in April and a reminder in August 2021 we did not hear back. We feel this is treatment that other groups would not face and runs contrary to the openness and fairness so often expressed on the Kenova website.

This worrying non-engagement is also true of a legal opinion we submitted on the Independent Review of Article 2 Compliance carried out by Alyson Kilpatrick BL (after reference to it was made in the 2020 meeting). Mr Boutcher indicated willingness to consider any legal questions regarding that review and to pass on what we might submit to Ms Kilpatrick for her comment. Our legal opinion was sent on 9 February 2021 but no further word was heard.

The opinion in question by Peter Smith QC and solicitor Neil Faris was entitled, "The requirement of compliance with Article 2 of the European Convention on Human Rights in legacy investigations in Northern Ireland - Does Operation Kenova comply?'.

In conclusion, and for the several reasons above, we suggest that publication of any report must be deferred until after the conclusion of all related criminal justice processes.

Jeffrey Dudgeon (Malone House Group Convenor)

Submission 14: Ministry of Defence

I have distributed the draft protocol amongst the key stakeholders within the Army contingent and all have responded positively and that they are content with the logic and approach that will be followed when it comes to circulating the report. I have also fed that back to Gen Cave who may respond separately to CC Boutcher.

I offer a few minor observations/points for clarification though:

- Stage 4 Security Checking. Whilst it is agreed that it is sensible to have a central screening, some of the potential detail within a report and the security classification attached to it, can only be commented upon by the originating organisation. I imagine this will be covered off through the representations process but wanted to raise as a point for clarification.

- Para 11.1 The order of the representations process. I agree the proposal but maybe the statement just needs a point for clarification. As written the para contains the statement "will not involve the disclosure to those consulted of new security-sensitive information". My interpretation of this statement is that no new information (security sensitive or otherwise) will be introduced after the representation phase, but I feel it could be misinterpreted that new information will not be disclosed. I'm sure it is the former, which is fine, but may be that point needs to be made clearer.

Submission 15: Kathleen O'Toole

The draft letter is well done. As always, it reflects your authenticity, transparency and commitment to this very important work.

In terms of the draft protocol, I was struck by two practical issues that may require clarification.

1. I understand that you'll present the reports to the PSNI for publication, but remind me. Are they obliged in any way to actually publish the reports?
I certainly understand the exceptions listed, including concerns relative to ongoing investigations, but apart from the exceptions listed, do they have an affirmative duty to publish?

2. In terms of briefing victims and families in advance of publication, I noted that some may opt for written briefings. Realistically, how do you intend to manage confidentiality of that information in advance of publication? Is that a concern?

I'll defer to Nuala and other experts in that jurisdiction for legal analysis. Again these are only practical concerns that occurred to me when reading the draft.

Again, thanks to you and your team for your outstanding work.

1.3 The protocol states that, in the cases of Operation Kenova, Mizzenmast and Turma, an interim report will also be prepared for earlier publication. We would urge you to consider preparing an interim report in the case of Operation Denton also as we note that this is not being proposed in your protocol.

6.1 We are concerned about the Security Checking Process as we are fully aware of the culture of secrecy and withholding of information by State entities. A recent example is the withholding of the PONI report into the Ormeau Road bookie's, etc. We understand that the Chief Constable of the PSNI intends to take a PIIC in this case and may be exceeding his powers.

Submission 17: Peter Smith and Neil Faris

Draft 'PROTOCOL ON PUBLICATION OF PUBLIC REPORTS'

Consultation Response by Peter Smith CBE QC & Neil Faris Solicitor Belfast

28 October 2021

1. Summary

In this Consultation Response:

- *Firstly* we challenge that Mr Boutcher has lawful authority to issue any Interim Report;
- *Secondly* if such lawful authority could be conferred on Mr Boutcher, we set out how the proposals of the draft Protocol are seriously defective, in breach of essential principles of due process;
- *Thirdly* we suggest that Mr Boutcher's proposal to issue an 'Interim Report', prior to the conclusion of any criminal process, carries with it unacceptable risk and prejudice to the outcome of any such criminal process;
- *Finally* we identify material problems with other aspects of the proposals in the draft Protocol and as to how the consultation is being carried out.

We commence with an overview and then we set out our submissions on each of the above heads.

2. Introduction

In this Consultation Mr Boutcher seeks responses on his proposals to his draft Protocol, as to how he will carry out 'a staged and methodical approach' to the preparation and publication of an Interim Report addressing 'generic, high-level themes and issues'. This Interim Report on these themes and issues is apparently to be generated from his investigations (as a police officer) in Operations Kenova, Mizzenmast and Turma ('the Operations').

Mr Boutcher (formerly Chief Constable of Bedfordshire police) is the Officer in Overall Charge of all the Operations. His authority for the Operations derives from requests from the Chief Constable of the PSNI under section 98 (1) of the Police Act 1996 (the 1996 Act).

The Operations are:

- *Kenova* – this is 'the Stakeknife' investigation. Mr Boutcher was appointed in June 2016;
- *Mizzenmast* – this is the investigation into the death of Jean Smyth-Campbell in a shooting in 1972. Mr Boutcher was appointed in June 2019;
- *Turma* – this is the investigation of the killings in 1982 of RUC officers Sean Quinn, Allan McCloy and Paul Hamilton at Kinnego Embankment. Mr Boutcher was appointed in September 2019.

In a website announcement (accompanying the issue of the draft Protocol for consultation) Mr Boutcher states that there are now 30 files relating to the Operations with the Publication Prosecution Service (PPS) for consideration for prosecution.

However, it is understood that PPS has indicated it will not be in a position to announce any prosecution decisions until March 2022.

In summary, it seems that Mr Boutcher is intent on not being 'held up' by PPS and is seeking, through the Protocol, a means of issuing a report, before any prosecution decisions are made by PPS.

This is the background to Mr Boutcher's decision to issue such high level, generic 'Interim Report' on themes and issues.

We proceed to set out our objections to Mr Boutcher's proposals under the four heads as set out above.

3. The absence of lawful authority

Under the1996 Act Mr Boutcher has the like powers and privileges as a member of the PSNI has in Northern Ireland as a constable.

Mr Boutcher states in the website announcement accompanying the draft Protocol:

> "At the very outset of Kenova I made a promise to all the affected families that I would produce a public-facing report outlining our findings to give them the truth of what happened to their loved ones, ***including who was involved and in what capacity***"
>
> (*emphasis added*)

But the website announcement also states that Mr Boutcher has in the draft Protocol:

> " . . . laid out his plans for releasing an interim report which will address high level themes and issues concentrating on findings of the three key investigations. This report will focus on what was, and was not, happening between organisations: the Provisional IRA and its internal Security Unit, the police, armed forces, intelligence services and their agents and informants. In particular the report will focus on the organisation that committed these awful murders, state intervention or otherwise, and whether steps were, or were not, taken before serious criminal conduct was carried out or subsequent to it to prevent a full investigation".

But we do not see that Mr Boutcher has any lawful authority to step outside or beyond his role as a police officer. Possibly, there could be merit in an investigation and report on themes and issues that may not relate to criminal conduct on the part of any individuals or organisations but which could give useful guidance for the future – to avoid mistakes which may have been made in the past. But careful thought would have to be given to any such proposal.

In particular, any such investigation would require its own legislative base: any non-statutory investigation could not be armed with the necessary powers to compel witnesses.

In sum, Mr Boutcher's role as a police officer in the Operations is to carry out, using police powers, all necessary investigations to see if any individuals can be identified for any criminal acts and, if so, to report to the PPS so that they may make, in their independent role, decisions as to whether any prosecutions can be taken. As indicated above, it appears that Mr Boutcher has duly carried out this duty and the files he has prepared are currently with the PPS for prosecution decisions.

So Mr Boutcher's proper role is to abide the decisions of the PPS and, of course, if the PPS has any further queries for him, to carry out any necessary further enquiries to aid the PPS.

Certainly, we can see that there is room for political consideration as whether, whatever the outcome on criminal process may be, there should be an inquiry on themes and issues. But in our view, it is extremely precarious, from a constitutional perspective, that any such task should be bolted on to Mr Boutcher's proper role as a police officer, wielding police powers and carrying out police investigations to identify criminality.

In the United Kingdom we do not confer on the police adjudicatory powers (that would be the terrain of any civil inquiry into themes and issues). In particular, we do not have any political police force and we must eschew anything that would compromise our police into any political role.

In summary, it is our view that Mr Boutcher exceeds his powers as a police officer in seeking to issue 'public reports' attributing 'blame' to any organisation or individuals. That is not a proper function for police officers in any liberal democracy.

4. Due process requirements

We do not see that it is practical to resolve the conundrum we have raised in section 3 above. But in case some way is properly found to confer on Mr Boutcher any such adjudicatory role, or, in the alternative, that our advice is not followed, we would in any event have substantial criticism on procedural grounds of the process by which Mr Boutcher proposes (as set out in his draft Protocol) to proceed with his work leading to the publication of his proposed Interim Report.

It is not clear as to whether or not the Interim Report will eschew the identification of 'who was involved and in what capacity' as contained in Mr Boutcher's promise to families as set out (above) in the website announcement.

In any event, it appears to us that any 'high level' examination of themes and issues will necessarily lead to the identification of those in operational command of the police, armed forces and intelligence services as referred to in the website announcement.

The problem is that the draft Protocol lacks proper due process for any organisation or individuals likely to be subject to Mr Boutcher's criticism. It seems he is acting as an investigating police officer in seeking out 'evidence' but he then seeks to act as 'adjudicator' of such evidence.

Any fair procedure would involve several steps and a distinction of roles in the following stages:

1. *Investigation* – Mr Boutcher states in para 3.1 of the draft Protocol that 'Stage 1' is the preparation of first drafts and, simply, that 'this will be the responsibility of Kenova'. Presumably, the first drafts will be prepared on the basis of the evidence and material that Kenova has garnered in the course of the investigations in each of the Operations. But the problem is that any such expedient runs contrary to 'best practice'. Such best practice is set out in the 'Review of Maxwellisation' prepared for the House of Commons Treasury Committee by Andrew Green QC and others and dated November 2016 (the Review).

   Indeed, the draft Protocol refers to the Review at para 4.2 and states that Kenova will follow the guidance as helpfully set out in the Review.

   But the problem is that the draft Protocol ignores salient guidance contained in the Review.

   The Review contains helpful Guidelines (section (6) at pp 9 -11) and we find Guideline K to be particularly pertinent so set it out in full.

   "In order to reduce the need for a Representations Process, the Chair should consider incorporating the following procedures into any Procedural Protocols:

   i. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with advance notice of the matters which are of interest to the inquiry.

This need not take the form of a list of each question to be put to a person, but should identify the areas about which questions will be asked (with as much detail as the Chair considers appropriate in all the circumstances).

ii. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with the main documents about which questions will be asked orally or which written evidence will be expected to address. This material should be provided to the person a reasonable time prior to the giving of evidence.

iii. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, unless there is some compelling reason to the contrary, be provided with a summary of any adverse material which has been obtained and/or damaging evidence which has been given against them during the course of the inquiry. This summary should be provided to the person a reasonable time prior to that person giving evidence.

iv. Where the inquiry receives adverse material and/or damaging evidence against a person after that person has given evidence, consideration should be given to whether that person should be invited to give supplementary evidence (whether orally or in writing). "

Our concern is, that insofar as Mr Boutcher, in his Interim Report, proposes to rely, in making his findings and criticisms, on the product of his previous criminal investigations in the various operations, those subject to such criticism will not have been entitled to the protections which the Review suggests in Guideline K should be implemented.

All this might be summarised in the proposition that those likely to be subjected to criticism must be entitled to know the case that is being mounted against them and have fair opportunity to make their defence and to challenge the 'evidence'.

2. *Adjudication* – as already indicated this is not a suitable or proper role for police officers: independent assessment is required;

3. *Draft Report* – those to be subjected to criticism must have full opportunity to see all relevant critical parts of the draft Report relevant to them and to respond. The adjudicator must consider any such response before finalising the report.

This final stage is known as *Maxwellisation* (after a *cause celebre* in the Courts in London many years ago) and Mr Boutcher does refer to this in his draft Protocol. But this particular part of the process is inadequate to address the rights of those under scrutiny, absent full due process in the stage 1 investigative process.

5. Other problems

- *The legal framework (section 2 of the draft Protocol)*

We are surprised that under sub-section (2) – 'Public law' only common law obligations are specified. It is essential that the Protocol sets out the obligations under the European Convention on Human Rights *viz* Article 6 (fair trial|) and Article 8 (protection of reputation).

These must be followed in all investigations and in the preparation of Reports. These obligations rank equally with the investigative obligations under Article 2 of the Convention. It is not permissible for Kenova to ignore or subvert these essential rights.

- *Reports to be robust and accurate for families and stakeholders (section 7.4 of the draft Protocol)*

The Governance Board must be specifically responsible for ensuring that all reports are robust and accurate for those who may be the subject of specific criticism. Otherwise, Kenova will be guilty of bias and its reports will not withstand informed scrutiny and criticism.

- *Administration of justice review (section 8 of the draft Protocol)*

We are seriously concerned that the publication of any such 'Interim Report' must of its nature be capable of prejudicing any ongoing criminal proceedings. It is folly to risk any such prejudice contrary to defence rights and likely to cause the criminal proceedings to be discontinued.

Para 1.3 of the draft Protocol acknowledges that the Interim Report must not prejudice any ongoing criminal justice process. However, in his website announcement, accompanying the draft Protocol, Mr Boutcher states that there are now more than 30 files with the PPS for consideration. Presumably, therefore these files relate to possible offences committed by individuals whom Mr Boutcher has identified for prosecution.

On the other hand, para 1.3 of the draft Protocol also states that the Interim Report ' will . . . concentrate on organisations rather than individuals . . .'

Nevertheless, there is surely appreciable danger that the publication of the Interim Report containing criticism of the actions of an organisation will lead to the identification of individuals within such organisation who may have been, or may be alleged to have been, in some way responsible for the actions of the organisation so criticised. If Mr Boutcher has, in the files submitted to the PPS, recommended any of these individuals for prosecution, surely the prior publication of the Interim Report with critical findings, capable of being attributed to such individuals, will cause inevitable prejudice to their prospects for a fair trial, should the PPS initiate prosecutions.

Furthermore, it is of critical importance that the PPS must remain entirely independent in making its decisions as to whether or not prosecutions should be mounted. Inevitably, the publication by Mr Boutcher of his Interim Report would be a matter of massive public interest, likely to lead to intense media and political demands that 'action be taken' against the 'guilty' parties. That would create unacceptable pressures being put on PPS making it difficult for them to resist the insistent pressures created by the publication of the Interim Report.

To avoid all such danger to the justice process, perhaps the Interim Report might be drafted in such general unspecified terms as not to identify criticism against organisations, or capable of leading to the identification of individuals within them. But that would lead to allegations of 'cover up' contrary to the principle, declared by Mr Boutcher (in the website announcement) of commitment to 'finding and reporting the truth openly and transparently and without fear or favour towards any party.'

For these reasons we suggest that publication of the Interim Reports must be deferred until after the conclusion of all relevant criminal justice processes.

- *Pre-publication disclosure to victims and families (section 9 of the draft Protocol)*

Then there is the further problem that no consideration is given to the need for pre-publication disclosure also to those who may be subjected to specific criticism in the Interim Report. These may well be people who, in public service, themselves suffered trauma in the decades of sectarian terrorism in Northern Ireland.

Their welfare must also be considered and protected.

- *Conclusion – (section 11 of the draft Protocol)*

Para 11.1 suggests that

> "The representations process (stage 2) needs to come before the security checking process (stage 4) in case it results in changes."

Clearly, in the overall public interest (as set out in section 6 of the draft Protocol) the security checking process of stage 4 must be the final stage of the publication process. But there is at least a potential problem. The conclusions of the report might contain criticism of an individual or public authority but also some explanation of the actions of the individual or public authority by way of balance. However, if the checking process in stage 4 required (for security reasons in the public interest) the excision of the individual's explanations, then the Report would become unbalanced. It would be

unfair to that individual or public authority that their explanation for their actions would not be included in the Report.

We suggest that, before the Protocol is agreed, and the work on the Interim Report proceeds, this must be clarified so that there is a demonstrably fair outcome that balances the various factors:

- the right of the individual or public authority to have their explanation included in the Interim Report:
- the security requirements in the overall public interest; and
- that Mr Boutcher is 'committed to finding and reporting the truth openly and transparently and without fear or favour towards any party.' (as stated in the Kenova website announcement of the draft Protocol consultation)

We do not see that there is any straightforward solution to the conflicting interests we have set out but suggest that the approach of Kenova must be clarified before the work can proceed.

- *Meaning of para 11.2 of the draft Protocol*

We do not understand what this means. Please issue the necessary clarification to inform the consultation process.

Peter Smith CBE QC and Neil Faris Solicitor

Submission 18: William Beattie Smith

KENOVA INVESTIGATIONS — PROTOCOL ON PUBLICATION OF INTERIM REPORT

RESPONSE TO CONSULTATION — DR WILLIAM BEATTIE SMITH

1. I am writing in a personal capacity as a public policy analyst specialising in the ethics of conflict resolution. I have previously served as a Director in the Northern Ireland Civil Service, Principal Private Secretary to Northern Ireland's First Minister, member of the Parliamentary Boundary Commission for Northern Ireland and Senior Research Fellow in Governance and Politics at Queen's University. I have published a detailed analysis of British policies on the conflict in Northern Ireland, *The British State and the Northern Ireland Crisis* (US Institute of Peace, 2011).

2. I am concerned that the proposed publication of an interim report is a deliberate attempt to influence the debate over the Government's Command Paper *Addressing the Legacy of Northern Ireland's Past* (July 2021). This would not be an appropriate action for an impartial investigator, and risks undermining the credibility of the entire Kenova operation. Mr Boutcher has already described the Government's proposals as "a miscalculation", and has actively encouraged opposition to them from victims' groups.

3. In charting a way forward on legacy, we should all remember that an effective amnesty has already been in place across the UK and Ireland for IRA terrorists for over two decades; that the majority of informed commentators concede that the prospect of bringing further prosecutions to successful closure is tiny and diminishing; and that the republican movement is engaged in "lawfare", the aggressive use of legal proceedings to advance a

one-sided historical narrative of British injustice while concealing its own blame for murder and mayhem.

4. As former chair of the NI Human Rights Commission's Audit committee, I would add that futile attempts to deliver perfect justice would never withstand a serious cost/benefit analysis when compared, for example, with the alternative use of the same substantial sums to strengthen our struggling mental health services.

5. I recall the wise words of my Civil Service colleague Maurice Hayes. Speaking to the McGill Summer School in 2014, Senator Hayes said: "[Victims and survivors of the Troubles] deserve what most of them have not had, the best that society can offer by way of material help, psychological counselling and support, and the chance to tell their individual stories and have them recorded, and to hear the narratives of others. They are entitled to hope for as much information as possible about the circumstances in which their loved ones died, but it is surely an added cruelty to raise hopes of certainty of absolute justice and of the successful prosecution and conviction, after so many years, of those thought to have been involved… There is surely a case for drawing a line in the sand and moving on. We cannot mortgage the future to the past."

6. You have indicated that an interim report will be published only if the Public Prosecution Service and Police Service are both satisfied that this would not prejudice any ongoing criminal proceedings. I trust that they will not be. The PPS in particular must be seen to remain entirely independent in deciding whether to proceed with a prosecution. The publication of the proposed interim report would lead to intense political pressure on the PPS for action against any parties identifiable as having a case to answer. However high level it may be, any examination of overarching themes and issues will necessarily lead to the identification of individuals in key operational roles in the security services at the time. You must respect ECHR rights other than those commonly associated with Article 2, in particular Article 6 on the right to a fair and public hearing by an impartial tribunal.

7. The proposed process confuses two roles which must be kept clearly distinct. The separation of powers between investigator and judge is a long-established and vital principle of our judicial system and must be protected.

8. Given the likelihood of allegations of "collusion" or of the more recent coinage by the Police Ombudsman of "collusive behaviours" by the RUC, it is essential that any Kenova report should clearly define what these terms mean. "Collusion" is not an offence in law.

Submission 19: Social Democratic and Labour Party

SDLP RESPONSE
TO CONSULTATION ON (DRAFT) PROTOCOL
ON PUBLICATION OF PUBLIC REPORTS

INTRODUCTION

The SDLP wishes to strongly affirm the work being undertaken by Jon Boucher and his investigation teams through "Operation Kenova," "Operation Mizzenmast" and "Operation Turma" respectively ("the investigations").

The issue of article 2 and independence notwithstanding, these investigations demonstrate what might be achieved with regards to justice, truth, and accountability; are deploying new models of best practice for Northern Ireland and have rightly earned significant confidence from victims, survivors, and advocates.

The SDLP wishes to put on record its particular regard for Jon Boucher, his singular solidarity with families, his lateral approaches to building confidence and good governance and his personal dedication.

This submission seeks to interrogate less the process phases detailed in the consultation and to briefly consider points of pressure that will arise.

The SDLP does so in order to seek to protect the authority of the work of the investigations and for the confidence of victims and survivors to endure.

PROCESS MAP

The phases of process and the management of the respective phases detailed in the draft protocol is a model that is comprehensive and exhaustive. It provides for the appropriate input of relevant persons and agencies subject to the comments below. As the draft protocol states the process map outlines a "staged and methodical approach to the preparation and publication of reports."

The outlining of the process map further demonstrates how the conduct of the investigations creates "new models of best practice and good governance."

Subject to correction, the SDLP cannot recall that other agencies such as the PSNI or PONI or PPS, have published or consulted on their respective process maps in matters relating to disclosure and reports. Indeed, at a recent meeting between the SDLP leadership and the DPP when the issue of disclosure and the input of the Security Service was being considered, the Director was casual, not thinking ahead and unconvincing. This submission returns to this point below.

CONTEXT

Our past conflict "revolved around issues of law, order and justice." A profound element in the wisdom of the Good Friday Agreement was its policing, criminal justice, rights, and equality interventions to resolve these "issues of law, order and justice." Some would say one and more of these interventions have been "the greatest success of the peace process."

This is the historic context in which issues within and arising from the draft protocol should be considered. It is also the contemporary context.

The SDLP has conducted a series of engagements over the last 30 months to raise the concern that this "success" is degrading and, if so, among other consequences the capacity to better manage what may prove a coming decade of turbulence. It is around policing, operationally and structurally, that the issues are most evident, but it is not reserved to policing.

When for example the SDLP met the PPS, it was to raise a renewed concern about the good authority of the PPS, inter-alia, informed by prosecutorial decisions – to prosecute or not to prosecute - made by the PPS including in the Stake-knife perjury cases.

In this regard the SDLP notes paragraph 8.1 of the draft protocol. It is fully accepted that a report should not "prejudice any ongoing criminal proceedings." However, the SDLP would say that the PPS might view this proper standard through such a severe prism, relying as it does on the advice of a senior counsel somewhere or other, to seek to restrict the legitimate release of proper information in an interim report.

In addition, and recently, there are reports that the PSNI have – it appears belatedly - raised a potential issue of Public Interest Immunity and "Closed Material Proceedings" in correspondence with the Police Ombudsman in relation to a particular investigation.

In this regard it is important that the "responsibility" for the content of interim reports resides strictly with Kenova as stated in para. 7.1 of the draft protocol papers, that interim reports (publication and redacted versions) are submitted to the PSNI as stated in para. 7.2 of the draft protocol indicating that the responsibility for final decisions on content is unfettered and that content is rigorously tested as per the processes detailed in para. 7.3 of the draft protocol.

More widely there is the legacy Command Paper which is the wholesale subversion of the rule of law and the primacy of state and militia interests.

Public interest, national security and other mechanisms have been deployed to frustrate justice, truth, and accountability. The evidence is extensive over decades. It is ever present, and it is current.

STORMONT HOUSE

The issue of disclosure has been contested but a way forward was agreed in 2014 at Stormont House. The final text recorded at para. 37:

"In order to ensure that NO INDIVIDUALS ARE PUT AT RISK, AND THAT THE GOVERNMENT'S DUTY TO KEEP PEOPLE SAFE AND SECURE (SDLP emphasis) Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies to those that currently apply to existing bodies so to prevent any damaging onward disclosure of information by the HIU."

For the SDLP the level of agreement at Stormont House among parties and governments would not have been attained if different words and particular security concepts had entered the final text.

It was fully understood by the SDLP that the security gremlins – and not only in London - would reach in and begin to rework these words and commitments. This was then done in a comprehensive way by the British government in the post-Stormont House phases and ultimately in the provisions of the draft Stormont House legacy bill.

By way of example. Clause 26 of the Bill in relation to "identifying information given to the HIU that is subject to additional safeguards and to Schedule 9" and clause 27 in relation to "onward disclosure of information by the HIU and Schedules 10 and 11" represent the wholesale reworking of para. 37 of Stormont House.

In this regard the SDLP refers to para. 6 of the draft protocol which refers to matters being referred to the Cabinet Office:

"If contrary to public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the UK or the continued discharge of the functions of any public authority."

This travels far beyond the highlighted words of Stormont House.

Four issues arise. First if these matters are inter-alia the "legal framework" referred to at para. 2.1 and 2.2 of the draft protocol, the SDLP would argue that the test for publication should be strictly as agreed at Stormont House.

Second the SDLP considers for example, and it is in any case presumed that the standard of "contrary….to the economic well-being of the UK" is superfluous for the purposes of publication of an interim report.

Third each of these matters might be considered against a 2015 London non-paper which may detail how the Cabinet Office would assess these matters, the extravagance of interpretation and which is discussed further below.

Fourth the SDLP would request confirmation that the convention is that these matters being referred to the Cabinet Office means being referred to the National Security Council and its Secretariat of the Cabinet Office.

THE 2015 NON-PAPER and NATIONAL SECURITY

It In the course of a legacy negotiation ("Fresh Start" 2015) one political party asked the British Government to provide a paper on the definition and application of "national security." Upon receipt of the paper, it is understood that a request was made from that political party for the paper to be withdrawn. It was subsequently treated as "a non-paper."

A senior NIO official advised the SDLP that the Security Service was pleased with what had been produced. The official essentially stated that this may have been one of the few attempts undertaken that the Security Service to prepare a full document to capture its understanding of the definition and application of national security on issues of disclosure and related matters. .

The SDLP believes that the paper should be considered in relation to the consultation. As it details the scope and scale of the how the Security Service interpret and presumably deploy national security considerations, it may be a guide to what may happen in real time in relation to the content of interim reports.

It may be difficult to be that surprised at how a British Government, the Security Service and other state agencies may interpret and deploy national security and other considerations. Still the non-paper nearly surprises.

Put at its mildest, it is "a belt and braces" document. At times it reads like some sort of security brain-dump, seeking out more and more examples to reduce to writing. It is national security deliberately pressed to the extreme, even to the point of absurdity. No wonder the political party that asked for the paper was panicked.

The non-paper was 6 years ago. There may have been subsequent learning. This though cannot be assumed certainly not into the future and is not corroborated by much evidence.

So, the SDLP submits that the non-paper should be shared, its contents interrogated to better bottom out and address how some will seek to frustrate truth and suppress the content of interim reports.

KENOVA IS PIVOTAL

Operation Kenova is a pivotal investigation, pivotal on disclosure and pivotal for legacy generally. If the Command Paper or similar does not prevail, through criminal investigations and prosecutions (if any) and interim and subsequent public -facing reports, Kenova should provide a further insight into the worst of the conduct of the state and a terror militia, the depths of collusion and the brutality of summary justice.

In the view of the SDLP there are people – members or previously members of state agencies and militias - who will not want Kenova to see the light of day, to see its work or its outcomes suppressed. Indeed, the SDLP considers that it is a particular, not insignificant factor, that

informs the British Government legacy Command Paper where it is vested interests not victims' interests that have primacy.

Submission 20: South East Fermanagh Foundation

Introduction

As part of our response to the Operation Kenova, it is necessary to explain the functions of the South East Fermanagh Foundation (SEFF), and its role, both as a victims and survivors group, and within wider society.

SEFF was founded on 15th August 1998 to provide practical and emotional support in the area of South Fermanagh for a large number of individuals who had been through traumatic experiences caused by terrorism.

Over the last twenty years, SEFF's development as a provider of services for victims/survivors has somewhat evolved, and the organisation has expanded from its original geographical base. It now has staff located across Northern Ireland providing the core support needed by victims and survivors of terrorism in the Northern Ireland context.

In the last four years, additional focus has been given to developing the case of need for victims/survivors based in Great Britain and Republic of Ireland, ensuring they also have access to support services alike their Northern Ireland counterparts. SEFF now has two members of staff based in London, providing that same level of support to GB victims and survivors.

The organisation now stands at over 1,040 individual members and their associated families. The membership reflects the ethos of the organisation – those, who 'through no fault of their own' were affected in some way by the terror waged on the community in the past.

SEFF defines its mission statement as, **'Supporting Victims and Survivors, Strengthening Communities.'**

Additionally, SEFF has the following aims and objectives:

- To represent and lobby on behalf of the innocent victims and survivors of terrorism in effecting positive change for such individuals around the areas of Justice, Truth, Acknowledgement and overall Service provision.

- To develop services and programmes which improve the physical and mental health & wellbeing of the innocent victims and survivors of terrorism.

- To develop Transgenerational/Youth services which seek to educate society as to the on-going legacy of 40 plus years of terrorism.

- To improve the financial circumstances of innocent victims and survivors of terrorism through tailored welfare services and skills-based programmes.

- To develop strategic partnerships with community/voluntary/statutory sector based organisations for the purpose of ensuring quality and sustainable services are provided for the innocent victims and survivors of terrorism.

- To offer services in an accessible, localised manner which will enable the individual needs of innocent victims and survivors of terrorism to be best met.

- To provide opportunities for Volunteers to develop their skills, so enabling them to be an intrinsic part of the overall service delivery model within SEFF.

- To empower those whom we support to make the transition from 'Victim' to 'Survivor' as part of an overall process of individual healing and recovery.

- To strengthen the organisation's ties within the broader community and to develop and/or participate in initiatives which help deliver a shared future. As indicated, our values are enshrined within our vision and mission statement, and underpin everything we do, as well as *how* we do it

These values include:-

• • ***Providing the highest quality of service*** - ensuring that our work is delivered to high standards and our members are treated with equality;

• • ***Collaborative*** - working with our individual members, and with additional organisations to ensure the expressed needs of victims and survivors are addressed;

• • ***Person-centred and respectful*** - we will safeguard and protect the autonomy and decision-making rights of our members at all times to ensure that they receive an independent and impartial service that is focussed on their goals. We will ensure that our members are treated compassionately and respectfully at all times;

• • ***Inclusive*** - in ensuring that the unique nature of violence inflicted on our society is recognised and not forgotten, by working collectively on behalf of members in addition to individual support;

AND

• • ***Listening & Learning*** - ensuring that we listen to, and are guided by, the expressed will of those members who engage with us in the development and management of our organisation.

SEFF is also one of 23 groups attached to the Innocent Victims United umbrella organisation with a combined membership of over 11,500 individual victims survivors based in Northern Ireland Republic of Ireland, Great Britain and mainland Europe.

SEFF's core services for victims/survivors are listed below in diagram format; the organisation also contributes to the building of the community through a range of youth, older people and cultural diversity/good relations themed programmes.

Living Not Existing Project

SEFF Consultation Response

Overall SEFF do not have any major concerns in regards to the proposals to publish an interim investigation report in respect of Operation Kenova.

The concerns SEFF have are:

• The necessity to consult the Cabinet Office re National Security.

• The necessity to submit to seek prior approval from the PSNI prior to publication of the support.

In principal SEFF do not disagree with the factors highlighted above, and see the necessary obligation to implement such measures. However, we have realistic reservations and expectations how this will be interpreted and utilised within other cohorts to undermine the objectivity and independency of the report. This may allow the continued dismission of such investigations and reports that do not meet certain pre-determined narratives, with a resultant continued call for further investigations and public enquiries until such narratives are met.

There is a tendency to eventually succumb to this endless minority pressure in order to silence high-profile and media critics. Often innocent victims themselves are being manipulated for political or financial motives. Overall, this tends to be at the cost of the majority innocent victims overall, who do not have the access to funding to meet the costs of expensive legal actions to redress the injustices they have suffered.

Otherwise, overall SEFF welcomes the publication of the report and the format proposed.

Peter Murtagh

Submission 21: Peter Taylor

My only thought is a comment on the "Maxwellisation" process-which I'm sure you don't need. That's one of the reasons why the late John Chilcot's report took five years. Kenova has already equalled that your Draft Protocol has assiduously covered all the necessary bureaucratic and institutional bases.

I look forward to reading the content and conclusions in the finished report, suitably "Maxwelled", which I suspect may be some considerable *time* away.

Submission 22: Wave Trauma Centre

WAVE TRAUMA CENTRE RESPONSE TO OPERATION KENOVA INVESTIGATIONS CONSULTATION:

DRAFT PROTOCOL ON PUBLICATION OF REPORTS

Thank you for giving us the opportunity to participate in the consultation exercise regarding the draft protocol on the publication of Kenova's investigation reports. WAVE supports many victims and families as they engage with Operation Kenova, and we will continue to do so as the investigation reports are published.

Our sole interest is in ensuring the families are supported throughout this process, gaining clear information with the opportunity to question and clarify any details. One central benefit of Operation Kenova from its inception for families has been a recognition and validation of who their loved one was. They mattered, their death mattered and for the first time the investigation and setting out the process of how this information will be conveyed matters too. A central concern across each of the stages will be the question of redaction from the various Governmental and security organisations given the families experiences of dealing with agencies and investigations in the past. There is a need for as much transparency as possible.

The draft protocol clearly outlines Kenova's intentions regarding the interim and final reports. It is welcome that the protocol clearly sets out the purpose of the interim reports, and it is very specific regarding what will, and will not, be included in the interim reports.

The protocol goes on to outline the legal framework within which Operation Kenova and PSNI must operate to ensure they act in the public interest, and that legal obligations are complied with. The examples given under each of the 5 legal frameworks help to set out the context in a clear and easily understood manner.

The 8-stage approach to the preparation and publication of the reports is very transparent. The explanation of the purpose of, and rationale for, each stage of the process will be very beneficial for families. It is clear that the publication of the information will be delivered in a well-managed way. Based on our experience of family engagement to date it is important that the

end process of providing information is managed to the same high standard as demonstrated throughout this investigation. When families started to engage in this process their levels of trust and confidence were low. Through working through the investigative process with the Op Kenova team trust and confidence is high and families are reassured that the investigation and the outworking's of it will provide them with a greater knowledge and understanding of what happened to their loved one. If further evidential opportunities are available there is an expectation that these will be investigated and those responsible held to account if at all possible. We are concerned at any changes that may arise because of the British Governments legacy proposals.

The proposal at stage 5 of the process explains that draft versions of the reports will be shared with the Kenova Governance Board, Steering Group and Professional Reference Group. This shows that there will be close scrutiny of the reports to ensure they comply with legal requirements, as well as ensuring that the reports are robust and accurate. We believe that victims and families will be reassured by these monitoring, governance and accountability measures.

Stage 7 of the process outlines that there will be pre-publication disclosure to victims and families. This prior knowledge of the publication of the reports will be very much appreciated by victims and families. This is essential as the findings can bring issues from the time of the death once again to the fore and can take individuals and families back into the midst of their initial trauma. Careful and sensitive trauma informed management of this process is essential. It should not alter or minimise the findings however pre and post consultation support is necessary. It is important to note that to date the Operation Kenova team have demonstrated a high standard of victim centred care and practice around the investigative process. We would expect that to continue until this process concludes.

In conclusion, the protocol demonstrates a great deal of transparency and accountability in relation to how the Operation Kenova team will take the final stage of the process forward. Transparency is key for the families. The process and rationale are clearly outlined which is essential and is firmly victim centred.