

KENOVA



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**OPERATION KENOVA
NORTHERN IRELAND 'STAKEKNIFE'
LEGACY INVESTIGATION**

**Interim Report of
Jon Boutcher QPM**

Dedication

This report is dedicated to the many victims we have come to know, those who survived and those whom through their loved ones we feel we know, each life prematurely lost during the Northern Ireland Troubles. We remember those who have spoken so openly to us and, sadly, have passed away during our work. Each one who helped shape and inspire Kenova, we remember with great fondness and respect.

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Preface

This interim report sets out the high-level themes and issues highlighted through my Kenova Northern Ireland legacy investigations and provides a brief context and history of connected events. It highlights the continuing failure of governments, public authorities, political parties and those who fought in the Troubles to acknowledge properly the hurt inflicted on the families of those who were murdered, or to provide them with a meaningful examination of the circumstances of their deaths. Even the most uncontroversial information about what happened has been withheld from families. In many cases this remains the position today. This lack of disclosure about offences as serious as murder would not be tolerated elsewhere in the United Kingdom.

This report also highlights related institutional failings. Several high-profile investigations and inquiries have been commissioned into specific Northern Ireland legacy cases in the past. Each came up against non-disclosure and secrecy and each produced reports which were and largely remain classified 'Secret' or 'Top Secret'. The secrecy surrounding these reports has fed conspiracy theories and hampered reconciliation. Families seek information through every reasonable means available to them, including the police, elected representatives, coroners and civil courts, regulators and the media. When these efforts fail, conspiracy theories and conjecture fill the resulting vacuum and create further trauma and confusion for those most affected. Legacy families will not trust in public institutions unless and until the authorities have given them the truth, acknowledged their loss and mistreatment and provided them with an opportunity to tell their stories.

It is unacceptable that 25 years since the Good Friday Agreement (GFA) many families of those who were killed during the Troubles are still seeking information from the United Kingdom and Irish governments. A legacy investigation and information recovery process capable of providing accurate information to them is long overdue.

I recognise that establishing such a process would only be one step and one part of a much bigger picture. Police officers can gather information and evidence, investigate facts and disclose their findings, but it is for others to decide what their enquiries have proved and what should happen as a result. Furthermore, people can reasonably hold different interpretations, understandings and versions of 'the truth' as well as different views about the consequent requirements of accountability and justice.

Information about Northern Ireland legacy cases has too often been withheld and suppressed because of concerns about where it might lead in terms of criminal justice and political consequences. Some of these concerns related to issues of safety, security and public protection and may well have been legitimate. I share the view of many that prosecuting certain offences will not always be in the public interest, particularly when victims and families do not wish to reopen or revisit events and when the GFA provisions on the early release of prisoners mean sentences are curtailed.

However, a perceived need to avoid undesirable outcomes should never be allowed to pre-empt disclosure and due process. First, because this is wrong in principle and, second, because our public

institutions can and should be trusted to act in the public interest without causing harm to individuals or national security.

Where information suggesting the commission of a serious criminal offence is discovered or uncovered, it should be investigated and subjected to a criminal justice process regardless of the context. Mechanisms exist to ensure sensitive information is protected and competing public interests balanced. Crucially, it is for the independent and impartial judiciary to operate these mechanisms in public and not for the security agencies and government to do so in private

In this regard, much of the truth of what happened in Northern Ireland during the Troubles is subject to obligations of confidentiality and secrecy which exist for good reason and which should not lightly be set aside. Effective counter terrorism and counter insurgency operations require and depend on acquiring reliable secret intelligence from confidential sources, including human agents. The revelation and compromise of such sources can put individuals and the future supply of intelligence at risk, and the recruitment and retention of agents depends on trust, confidence and assurances about anonymity and secrecy. For different reasons, all sides of the conflict are sensitive about public disclosure of past secrets and, in particular, the direct or indirect identification of agents. I respect and do not dismiss these sensitivities and I recognise that they can continue to apply even after the death of the person concerned.

One aspect of this is that families whose loved ones were tortured or murdered by terrorists because they were (rightly or wrongly) accused or suspected of being state agents have often suffered particularly acute hurt and trauma, even when judged within the context of the Troubles. This group of victims and their families are unfairly forgotten and maligned; the circumstances of their loss often resulted in and were compounded by an entirely unjustified backlash from some members of their own community arising out of a sickening belief that their loved ones 'deserved to die'. For understandable reasons, many of these families prefer privacy to having their cases examined in the glare of public scrutiny. Families regularly ask me not to publicise their engagement with my team because they fear unwanted media reporting and renewed community attention. I always respect those wishes. More broadly, I think the views of families on the desirability or not of publicity or legal action should be taken into account as an important public interest consideration when taking decisions about further such steps.

All of this said, secret intelligence, the protection of sources and the preservation of law, order and national security are all means to a greater end, namely, maintaining a stable and democratic society which is subject to the rule of law and in which human rights are protected, respected and may be exercised freely. These values would be eroded if the protection of state agents rendered them immune from prosecution or if agents were allowed to become instruments of unaccountable wrongdoing or to use their status to commit crimes with impunity.

My investigations in Northern Ireland have widened extensively beyond the 'Stakeknife' cases originally commissioned and we have demonstrated that serious criminality has been tolerated and left unchecked and families from all sections of the conflict have been let down and ignored.

Living in a democratic society we would be appalled if another country acted in such a way towards victims of crime and would rightfully join international condemnation of any investigative failures. Providing a framework for informing legacy families of what happened to their loved ones remains the unwritten chapter of the GFA. We should remember that most victims were citizens going about their lawful business when they were brutally killed or were members of the security forces working to keep society safe.

It is understandable that many of these cases were not adequately investigated during the conflict itself. This may be a reflection of the very old maxim, 'In times of war, law falls silent'.¹ The times were incredibly challenging and dangerous for all concerned. Terrorist groups intimidated victims, families and witnesses. The security forces were exposed to continual threats. The then Royal Ulster Constabulary (RUC) was the most dangerous police force in the world in which to serve, such was its death toll and casualty numbers.

Given that the conflict has now ended, the law should recover its voice and the truth should be spoken aloud, first, as to the facts surrounding unsolved crimes and, second, as to the reasons why they were not solved at the time. Consciously withholding information from families after the conflict has ended is cruel and has only served to increase their trauma. Justice delayed is justice denied.

We must heal the societal divisions caused by the continuing failure to support legacy families. If we do not do this, the lessons of the conflict will be set aside and the resulting transgenerational trauma will be borne by future families. Those in authority who continue to obfuscate and lobby that legacy cases cannot be investigated and who obstruct disclosure and access to information should consider carefully how history will judge them.

I have produced this interim report in advance of (a) prosecution decisions by the Public Prosecution Service for Northern Ireland (PPSNI) on the individual cases we have investigated, (b) the outcome of any subsequent criminal proceedings and (c) the preparation of case-specific reports setting out our findings. My aim is to highlight the high level strategic issues we have encountered so that politicians, institutions, officials, families and the wider public can consider them.

In addition, and crucially, just as I benefited from the insight, help and advice from those who previously conducted Troubles related investigations and inquiries, I hope this report will be of assistance to those charged with undertaking similar such exercises in the future.

This interim report focuses on thematic and strategic issues and on organisations, rather than on specific individuals or events as its contents must not prejudice any criminal justice process. It also confirms at a relatively high level our findings in relation to (a) the activities of the Provisional Irish Republican Army (PIRA) and its Internal Security Unit (ISU) and (b) the security forces and their agents.

¹ Marcus Tullius Cicero, 'Silent enim leges inter arma', *Pro Tito Annio Milone ad iudicem oratio* (52BC). For the avoidance of doubt, I recite this as a statement of practical fact only and not one of principle. See the famous dissenting speech of Lord Atkins in *Liversidge v Anderson* (1942) AC 206,244 which was endorsed by the Lord Chief Justice of Northern Ireland Lord Lowry during the Troubles in the unreported case of *R v Gibney* (1983).

We have prepared, processed and published this report in accordance with a public protocol we consulted on in late 2021, producing a final version on 31st October 2022 (Appendix 1). The protocol provides for a representation process, security checking, administration of justice review and pre-publication disclosure to those most closely affected. I have sought to be open and transparent about this process to reassure all interested parties of Kenova's independence and our fair and evidence-based objective approach.

It is clear to me that there can be no meaningful reconciliation following the Northern Ireland Troubles unless and until victims and families know the truth of what happened, however uncomfortable that might be for those involved. Where the security forces got things wrong, as was inevitable, it is exposing those errors and demonstrating that we have learned from them that distinguishes us from the terrorists.

Kenova has demonstrated that for many families, but sadly not all, these tragic events of the Northern Ireland Troubles can be better understood by everyone particularly those who suffered such life-changing consequences. It is vital that families who suffered so much are afforded an opportunity to discover the truth after decades of being largely ignored and dismissed.

Jon Boutcher QPM

Former Bedfordshire Chief Constable

4th October 2023

Acknowledgements

I want to express my deep appreciation and gratitude to each family member who has engaged with my team. Without exception, every family we have spoken to has been let down in the past and had promises made to them that have been broken. Most worryingly, many in authority responsible for helping them discover the truth have dismissed them or even deliberately frustrated their efforts to discover what happened. This is an uncomfortable reality of Northern Ireland legacy.

When I began this work, some warned me that I would be engaging mainly with 'terrorist' families. This was indicative of the culture towards legacy cases and, as far as I could determine, few had actually engaged with these families to be able to make such an assessment. It was an early and stark example of prejudice which was both unfair and revealing.

I have heard repeatedly that memories fade over time and families are often motivated by a political agenda. I have found these claims to be manifestly untrue - families remember precisely what happened when such life-changing events occurred. They remember the song that was playing and the conversation they were having when the darkness struck as the bomb went off, they recall exactly what happened when terrorists came to their door, they remember exactly what was said when being told their loved one had been killed. For some who investigated these crimes or committed these atrocities, memories might fade, but not for the families. Meeting with and listening to legacy families, learning about their struggle to be heard, seeing first-hand their dignity and humility has been hugely humbling. Legacy families are some of the most remarkable people I have met in nearly 40 years of policing. They not only suffered the unimaginable loss of a loved one, they then experienced systemic obstruction when seeking to discover what happened. They deserve to be listened to, acknowledged and told the truth.

My sincere gratitude goes to the members of the Kenova independent governance groups who have challenged, probed and held me and my team to account. Their scrutiny has been unwavering and their role has been critical to any success we might have achieved thus far and will remain so going forward.

I must also pay particular tribute to the contribution and support of the late Sir John Chilcot, who, as a member of our Governance Board, championed Kenova and our small part in addressing the legacy of Northern Ireland's past. Living by his mantra that public service must always come before politics would benefit many in authority today.

Finally, my thanks go to each member of the Kenova team who committed wholeheartedly to the task of assisting families understand what happened in each of their cases.

Statement of Kenova Independent Governance Groups

We make this statement as members of the Operation Kenova Independent Steering Group, Victim Focus Group and Kenova Governance Board.

The Independent Steering Group and the Victim Focus Group were established at the outset of Operation Kenova in 2016, and the Kenova Governance Board in 2020. The role of the Independent Steering Group is to provide independent challenge and advice to ensure the investigation is being properly conducted and all possible steps are being taken to establish the truth. The Victim Focus Group's function is to provide independent challenge regarding victim and survivor related issues and to ensure all due regard is taken of victim and bereaved family needs. The Kenova Governance Board is responsible for ensuring the overall business functions and independent review processes established for Operation Kenova are correctly discharged, this includes ensuring that the Independent Steering Group and Victim Focus Group are able to function in accordance with their terms of reference. Operationally we are entirely independent of the Kenova team and draw on our collective and individual experience to fulfil these roles.

Each group has met either virtually or face to face every quarter, in the case of the Independent Steering Group often over a number of days. In undertaking our work, we have received detailed written and oral briefings from Jon Butcher and the Kenova team. In order to fulfil our functions, between the groups, we have met with the Republic of Ireland Minister for Foreign Affairs and Defence, Northern Ireland Minister for Justice, successive Chief Constables of the Police Service of Northern Ireland (PSNI), the Commissioner of An Garda Síochána, victims, victim groups, NGOs, those commissioned to independently review Kenova, and a wide range of stakeholders.

Through our work with Operation Kenova, and our own professional experience, we do understand that obtaining sufficient evidence to conduct a prosecution in legacy cases is very difficult. We are, however, constantly impressed by the quality of the Kenova investigations and find it remarkable that so much continues to be achieved. Despite complex investigative challenges, the first tranche of Kenova evidence files was made available to the Public Prosecution Service Northern Ireland (PPSNI) in October 2019, with further files submitted during 2020, 2021 and 2022. To date, 35 files have been submitted. We are aware of the strength of evidence in many of those cases and believe timely prosecution decisions are vital to retain public confidence.

It has been a privilege to be a member of the Kenova governance groups, and in some small way support the work of Kenova in finding the truth for victims and families. While with others we have expressed our reservations, it is our hope that the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 will provide a meaningful process that allows all those who lost family members during the Troubles to know what happened to their loved ones.

Disclosure of the truth is critical to public confidence in state institutions and the trust that citizens should properly have in those in power. Meaningful acknowledgment of the past is the only way forward to a peaceful future.

Operation Kenova Independent Steering Group:

Michael Downing: Chief Security Officer, Oak View Group/Prevent Advisors, previously Deputy Chief Los Angeles Police Department (LAPD), USA.

Nick Kaldas APM: Chair of the Royal Commission into Defence and Veteran Suicides, previously Chief of Investigations for the United Nations and Deputy Commissioner New South Wales Police, Australia.

Sir Iain Livingstone QPM: Former Chief Constable Police Scotland.

John Miller: Former Deputy Commissioner Intelligence and Counter Terrorism New York Police Department (NYPD), previously FBI Assistant Director and Chief of Counter Terrorism and Criminal Intelligence Bureau LAPD, USA.

Baroness Nuala O'Loan DBE: Member of the Independent Review of the Human Rights Act, Chair of the Daniel Morgan Independent Panel, previously the first Police Ombudsman for Northern Ireland.

Kathleen O'Toole: Chair of the Commission on the Future of Policing in Ireland, previously Seattle Chief of Police and Boston Police Commissioner USA, member of the Independent Commission on Policing in Northern Ireland (the Patten Commission).

Operation Kenova Victim Focus Group:

Levent Altan: Executive Director of Victim Support Europe.

Mary Fetchet: Co-founder of Voices of September 11th (9/11), now Voices Centre for Resilience, testified before the 9/11 Commission and United States Congress on victim issues multiple times.

Alan McBride: Coordinator of the WAVE Trauma Centre, founder member of Healing Through Remembering, member of the Northern Ireland Human Rights Commission.

Maria McDonald BL: Irish barrister, founding member of the Victims' Rights Alliance.

Sue O'Sullivan: Former Deputy Chief of Police, Ottawa, previously Federal Ombudsman for Victims of Crime, Canada.

Judith Thompson: Former Commissioner for Victims and Survivors for Northern Ireland, chaired the Forum for Victims and Survivors.

Operation Kenova Governance Board:

Harold Good OBE: Former Methodist minister. Independent witness to the decommissioning of PIRA weapons, member of the Northern Ireland Human Rights Commission, President of the Methodist Church in Ireland in 2001.

Sir Iain Livingstone QPM: Former Chief Constable Police Scotland.

Father Martin Magill: Parish Priest, St John the Evangelist Parish, Falls Road, Belfast.

Bertha McDougall OBE: Member of the Board of the Victims and Survivors Service, Commissioner for Victims and Survivors for Northern Ireland (2008-2012) and Interim Commissioner for Victims and Survivors for Northern Ireland (2004-2006).

Monica McWilliams: Emeritus Professor Ulster University, Delegate to the Good Friday Agreement Negotiations, Member of the Northern Ireland Legislative Assembly (1998-2003), Chief Commissioner of the Northern Ireland Human Rights Commission (2005-2011) and Member of the Independent Reporting Commission on Measures to End Paramilitarism (2017 to date).

Explanatory note

I write this report as Officer in Overall Command (OIOC) of Operation Kenova and the wider Kenova suite of investigations and reviews and I take full responsibility for its contents. I have no power to adjudicate upon or determine legal rights or obligations or questions of civil or criminal liability and nothing in this report purports to be or should be treated as decisive of any such matters. The findings, conclusions and recommendations set out in this report are based on the information and materials available to me and they represent my own opinions and understandings.

A full Glossary of the abbreviations used in this report is set out at the end.

The Appendices to this report are all available online and a list of links is set out at the end of this report.

In this report:

- (1) each of the previous Northern Ireland legacy inquiry reports dealt with below is referred to using only the surname of its principal author (with '1', '2' or '3' added after 'Stevens' as appropriate);
- (2) references to a (future) 'legacy structure' refer to a statutory body or unit which is legally constituted, empowered and required to carry out fact-finding investigations, inquiries or reviews into serious cases arising out of the Northern Ireland Troubles;
- (3) references to Kenova's 'stakeholders' refer to persons or organisations that have an interest in Operation Kenova and can either affect or be affected by the investigation;
- (4) references to 'security forces' refer compendiously to the police, the Army and the security and intelligence services, including MI5 and MI6;
- (5) references to the 'Force Research Unit' of the British Army or 'FRU' refer to the military human intelligence unit which operated in Northern Ireland under that and other names during the course of the Troubles;
- (6) the codename 'Stakeknife' refers to the alleged agent referred to in the Operation Kenova ToR, although the spellings 'Stake Knife', 'Steakknife' and 'Steak Knife' have been used elsewhere; and
- (7) the terms 'agent', 'informant', 'informer' and 'covert human intelligence source' or 'CHIS' should be treated as synonymous and, for convenience, the term 'agent' is generally preferred.

Executive summary

Introduction

Operation Kenova is the latest in a long line of investigations and inquiries into matters relating to the state's response to the Northern Ireland Troubles. Many of the reports produced by these inquiries remain classified as 'Secret' or 'Top Secret'. As a result, they have not been available for public scrutiny, lessons have not been learned and there have been suspicions, justified or not, of a 'cover up'.

Lord Stevens warned me, before I agreed to lead Operation Kenova, that publication of my findings might be prevented. I therefore agreed with the Chief Constable Police Service of Northern Ireland (CC PSNI) Sir George Hamilton that I would produce a public facing report after all criminal justice processes were complete.

Due to the length of time the criminal justice process takes in Northern Ireland, seeking to apply the spirit of the European Convention on Human Rights (ECHR) regarding the timeliness of investigations and mindful of the age profile of many family members, I subsequently agreed with CC PSNI Simon Byrne and the Director of Prosecutions for Northern Ireland (DPPNI) Stephen Herron that I would produce this high level interim report for publication in advance of any criminal justice outcomes.

Operation Kenova is concerned with an alleged Army agent within the Provisional Irish Republican Army (PIRA) Internal Security Unit (ISU). Therefore, this interim report focuses at a high level on the activities of PIRA and its ISU and on the security forces and their handling of agents.

I have tried to make clear where I have, and have not, found patterns of state intervention or non-intervention in the mistreatment, torture and murder of people accused of being state agents. Many victims and families have long-held beliefs, suspicions and fears about these patterns and the part they may have played in their particular cases and have been denied the truth for too long. This report effectively says to these individuals, "*you are not mad, this was happening and it should not have been*". I hope that hearing this will be meaningful to those concerned and also that the lessons I have learned in setting up and managing my investigation will be of assistance to those charged with conducting similar processes in the future.

Background

The conflict continues to have a profound impact on families and society in Northern Ireland. Between 1966 and 2006 there were 3,720 conflict related deaths and 40,000 people were injured. 213,000 people are today experiencing significant mental health problems as a result of the conflict:

- The Royal Ulster Constabulary (RUC) went from policing a society where serious and violent crime was relatively rare to becoming the most dangerous police force in the world in which to

serve.² During the course of the conflict, 302 RUC officers were killed and over 10,000 injured, with 300 left severely disabled.

- Over 250,000 armed forces personnel undertook tours in Northern Ireland under Operation Banner. Between August 1969 and July 2007, 1,441 died prematurely - 722 killed in terrorist attacks and 719 as a result of other causes.
- The RUC and British Army operated as the principal security forces in Northern Ireland, supported by MI5, and the RUC Special Branch and Army Force Research Unit (FRU) came to assume primacy for the collection and use of secret intelligence, including through the use of covert agents and informants. One theme addressed in this report is the way in which both Special Branch and the FRU withheld information from and about their agents in order to protect them from compromise and withdrawal, with the result that very serious criminal offences, including murder, were not prevented or investigated when they could and should have been.
- Meanwhile, PIRA developed into one of the most sophisticated and deadly terrorist groups in the world. Estimates differ on the number of deaths it was responsible for. The Conflict Archive on the Internet (CAIN) states that PIRA was responsible for 1,705 deaths and the book *Lost Lives* puts the number at 1,781. Infiltration by agents working for the security forces presented a key threat to PIRA and led to it setting up its ISU to investigate and interrogate suspected agents and kill or otherwise punish those it judged to be operating as such.
- The scale and nature of the violence were shocking. Terrorists targeted and murdered civilians, members of the security forces and each other; the security forces carried out counter terrorism operations collecting and exploiting secret intelligence from agents; and terrorists carried out counter intelligence efforts including abducting, torturing, murdering and disappearing alleged or suspected agents. The police responded to these crimes in a fundamentally different way to the way in which comparable crimes anywhere else in the United Kingdom would have been dealt with, partly because the security forces withheld relevant information and evidence.

Setting up Operation Kenova

Pursuant to requests for information issued by DPPNI to PSNI under section 35(5) of the Justice (Northern Ireland) Act 2002 in late 2015, I was approached by then CC PSNI, Sir George Hamilton, and asked to lead an independent investigation into the activities of the alleged agent 'Stakeknife'. At the time I was Chief Constable of Bedfordshire. I knew this investigation would be complex and take several years to complete, so before agreeing to take it on I secured the agreement of the Police and Crime Commissioner and the support of statutory and key stakeholders in Bedfordshire. I also consulted and sought advice from those stakeholders who had knowledge of legacy investigations and senior police colleagues. I was surprised how many senior colleagues tried to persuade me not to take on the investigation. The general view was that it would take many years, would be extremely difficult to resolve

² Interpol International Criminal Police Review 1983.

and would encounter many obstacles including lobbying against me personally as well as against the investigation. I was surprised and disappointed at this reaction, but it highlighted very clearly how incredibly challenging it is for legacy families to get meaningful investigations leading to outcomes they deserve. It was the resolve of these families that persuaded me to take on the investigation and it was formally announced by CC Hamilton in June 2016.

The remit as described in the Operation Kenova Terms of Reference (ToR) are to investigate:

- whether there is evidence of the commission of criminal offences by the alleged agent known as Stakeknife including, but not limited to, murders, attempted murders or unlawful imprisonments;
- whether there is evidence of criminal offences having been committed by members of the security forces in respect of the alleged agent known as Stakeknife (regard in this context will be given to the article 2 rights of victims and associated responsibilities of those forces);
- whether there is evidence of criminal offences having been committed by any other individual in relation to the cases connected to the alleged agent;
- whether there is evidence of the commission of criminal offences by any persons in respect of allegations of perjury connected to the alleged agent.

This remit is subject to a caveat for the investigative primacy of the Police Ombudsman for Northern Ireland (PONI) in connection with cases involving criminal and disciplinary misconduct by serving and former police officers. If I encounter any cases falling into this category during the course of my work, I am required to refer them to PSNI for onward referral to and action by PONI.

I learned a key lesson when co-authoring the ToR for Operation Kenova with PSNI. At the time, I believed I had taken proper account of ECHR requirements. When we announced Kenova publicly, however, I received legitimate feedback from families and their solicitors that the process had not been sufficiently inclusive as they had not been consulted. I had exclusively focused on agreement with PSNI. I now recognise the need for a much broader consultation, particularly with families and their representatives to ensure such ToR meet everyone's requirements in seeking the truth of what happened. For all subsequent Kenova investigations, I ensured that the proposed ToR were shared and discussed with families and their representatives. The National Police Chiefs' Council (NPCC) Homicide Working Group's subsequent review of Kenova dated January 2021 highlighted this lesson as good practice for independent investigations.

On agreeing to take on the inquiry, I produced a set of key principles to underpin the foundation for the investigative approach:

- An unwavering focus on victims and their families.
- Unfettered access to information.

- Transparency and openness.
- An unbiased and fair approach to everyone.

I set the **strategy** for Operation Kenova as:

“To provide effective, efficient and independent investigations that are article 2 compliant. Kenova will apply transparency wherever possible with a focus on, and due consideration for, the victims and families of the offences being investigated. The investigation applies an equal and fair approach towards all those who are engaged, treating everyone with courtesy and respect”.

I set the **vision** as:

“To be trusted by victims and their families. To establish the truth of what happened. To gain the confidence of the communities and stakeholders. To be unwavering in the search for truth with each agency, department, political party, other organisation or individual that/who might seek to prevent the truth from being established”.

There was no pre-existing template for setting up an independent legacy investigation. I consulted with those who had led previous such inquiries to learn what had worked and the challenges they faced. I had to recruit suitably experienced and accredited staff, locate secure accommodation and procure an IT system to hold classified government records. In my first press conference, I asked families to be patient in allowing me the time to put in place the investigative principles and structures that I had identified as being crucial to providing an effective, efficient and independent investigation that was article 2 compliant.

Bedfordshire Police entered into a ‘lead force arrangement’ with PSNI under section 98 of the Police Act 1996 to provide back office functions to Kenova such as recruitment, financial management, procurement, media and communications support.

I estimated that I would need between 50 and 70 staff to conduct the investigation effectively and within a reasonable timeframe. This was at a time when Her Majesty’s Inspectorate of Constabulary (HMIC) acknowledged that there was a national shortage of detectives and an increasing number of historic inquiries into malpractice and investigative failures. I also decided that no former members of the RUC, PSNI, the Ministry of Defence (MOD) or Army or the security and intelligence services would be part of the team. This was not a reflection on those organisations, rather it was to demonstrate Kenova’s absolute independence and authenticity and to avoid any concerns about bias or conflict of interest. In a reasonably timely fashion, I then recruited a sufficient number of highly skilled and vetted serving and recently retired police officers and appropriately qualified staff.

I decided to base Kenova in London. This allowed the team easy access to MOD and MI5, and the wider Whitehall stakeholder community. It was also key to facilitating the team’s recruitment, ensuring as wide a catchment area as possible from which to recruit staff. I considered that Kenova being based outside of Northern Ireland might help reassure those suspicious of PSNI influence and that it would

minimise the level of media intrusion. The Kenova office has the requisite security accreditation which is subject to regular review. I am very grateful for the support of National Counter Terrorism Policing Headquarters (NCTPHQ) in allowing us to use this office space and for providing access to the Counter Terrorism (CT) Home Office Large Major Enquiries System (HOLMES) used for managing major sensitive police inquiries. This particular system is accredited to handle material classified at up to 'Secret'. We were also able to make additional arrangements for the handling of material of a higher classification.

In addition to Operation Kenova, I have since been asked to:

- investigate the murder of Jean Smyth Campbell on 8th June 1972 (Operation Mizzenmast);
- investigate the murders of RUC officers Constables Paul Hamilton and Allan McCloy and Sergeant Sean Quinn on 27th October 1982 (Operation Turma);
- review the activities of the 'Glenanne Gang' series, which was responsible for some 127 murders during the 1970s (Operation Denton).

I have also agreed with CC PSNI to investigate a small number of further cases as a result of information coming to light when investigating potential links to the Operation Kenova ToR.

In addition, families often approach Kenova suggesting a link between our ToR and the death of their loved one and ask us to investigate it. Every case is thoroughly reviewed to assess if there is any link.

In total Operation Kenova is investigating 101 murders and abductions, Operation Mizzenmast is investigating one murder, Operation Turma is investigating three murders and Operation Denton is reviewing 93 incidents involving 127 murders.

A victim focused approach

I made clear from the start that victims and families would be at the heart of Operation Kenova. Families often had no contact with the police after the murder of a loved one. In many cases, they were not even made aware that an inquest into the death was due or had been held.

Family Liaison Coordinators (FLC) have been central to securing the trust and confidence of Kenova families. FLCs work to me and the Senior Investigating Officers (SIO) developing our family liaison strategy and coordinating the work of our Family Liaison Officers (FLO). In addition to College of Policing national accreditation, our FLOs receive additional bespoke Continuous Professional Development (CPD) relevant to enhancing their performance, as do all of our staff to improve their knowledge of the Troubles and keep their specific expertise and qualifications up to date.

Personal contact is essential to give families support, understanding and the information they deserve as well as assisting us in our investigation. I make personal contact with surviving victims and families at the start of each investigation to reassure them that Kenova is independent, listen to their concerns, answer any questions and better understand their experiences. Families have direct access to me, my SIOs, FLCs and FLOs at any time. We have found that once families have trust and confidence in us,

many have felt able to provide new and significant evidence that was not made available to previous investigations.

Managing the investigations

Cases are divided into three categories:

- **Cases within the ToR:** These cases are those that have been identified, because of intelligence or evidence, as falling within the ToR. These cases receive a full investigation.
- **Cases under consideration:** This category contains a larger volume of cases. Cases under consideration are cases where families or third parties come forward and suggest a link with the Kenova ToR. We then conduct a thorough review of all available information and evidence, keep these cases under consideration and check all new information against them.
- **Cases under review:** This is a group of cases that previous legacy inquiries have examined. We are reviewing them partly because those killed appear to have been murdered for being suspected agents. There is no known or suggested link to our ToR but we examine them further to establish if there is one.

We investigate additional cases outside of the original ToR by separate agreement with CC PSNI.

Forensics

Access to the most up to date forensic techniques in modern policing is a huge advantage when investigating legacy cases. In some cases, we have managed to recover DNA evidence from crime scenes and items given to us by families, allowing us to identify suspects connected to murders and other serious offences.

Recovering and examining exhibits from many years ago presents particular challenges, including locating them, ensuring continuity of the chain of custody or deciding on the most appropriate way to examine them. In light of these challenges, I appointed a senior forensic expert to ensure we exploit every possible opportunity using current scientific advances.

I am very grateful to the Metropolitan Police Forensic Science Service for hosting the Kenova forensic capability. This has allowed us to use existing forensic capabilities and has considerably reduced costs.

Governance

CC PSNI is accountable to the Northern Ireland Policing Board (NIPB) for the delivery of Kenova. The investigation is, however, independent of PSNI and direction and control rest with me. I was concerned at an absence in legacy investigations of meaningful independent scrutiny and therefore set up a number of governance groups to provide oversight and challenge across the Kenova investigative model. The groups are made up of people of local and international standing with huge experience in their respective fields who give their time for no payment other than the reimbursement of necessary expenses. I am hugely grateful for their support and wise counsel.

- **Independent Steering Group (ISG)** provides support to the investigation through oversight, advice and challenge, providing assurance that the cases are being dealt with as thoroughly and as comprehensively as possible. The ISG consists of internationally renowned senior policing leaders and the first PONI.
- **Victim Focus Group (VFG)** provides independent advice and challenge regarding our engagement with victims, families, intermediaries and NGOs. The group meets quarterly. Its membership comprises internationally respected practitioners with significant experience of working with victims of serious and traumatic crime and of bereavement support.
- **Kenova Governance Board** oversees the business and investigative structures of Kenova. The Board comprises executive members of the Kenova senior management team together with independent non-executive members who have significant knowledge and experience of Northern Ireland and specifically legacy matters.
- **Kenova Remuneration Committee (KRC)** provides independent oversight of recruitment, terms and conditions of service and remuneration of Kenova personnel. The Committee is made up of the Chief Finance Officer for Bedfordshire Police, a member of the Joint Audit Committee for the Police and Crime Commissioner for Bedfordshire and a member of the Kenova senior management team.
- **The Kenova Executive Group (KEG)** chaired by me and attended by the senior leadership team and investigation and case officers. This is the decision making forum for operational activity across all Kenova cases. Decisions relating to prioritisation of resources are made at a weekly tasking meeting and feed into the KEG. This takes best practice from both a traditional Gold Group process for managing major incidents and inquiries and the Executive Liaison Group format used to manage counter terrorism investigations. This hybrid was highlighted by the NPCC Homicide Working Group review of Kenova as best practice and recommended as a template for managing similar complex inquiries in the future.

European Convention on Human Rights (ECHR) compliance

When designing the Kenova investigative structure, I sought to ensure that it is fully compliant with all articles of the ECHR. With advice from independent counsel we produced a document, published on the Kenova website, setting out how we seek to achieve ECHR compliance.

Of particular importance to this investigation is article 2 which guarantees the right to life. Article 2 requires that an enhanced official investigation be conducted into any death occurring in circumstances in which it appears that the state may have breached one of its substantive obligations under article 2 by taking or failing to protect life. Such investigations must be effective, independent, prompt, open to public scrutiny and involve the next of kin. We achieve this in the following ways:

- **Independence:** Although PSNI provides the funding for Kenova, our business functions are provided by Bedfordshire Police. This ensures PSNI has no say on how the funding, once

provided, is used by the investigation. It has been raised by families, Alyson Kilpatrick BL in her independent review of our ECHR compliance, and the ISG that there is a risk that the PSNI could reduce the effectiveness of the investigation by reducing funding. We have been assured by the Northern Ireland Minister of Justice that there is no other route to fund investigations such as Kenova other than through PSNI. I should make clear that no restriction of funding has ever been made or suggested, and if it were I would challenge it at the highest level and make the position publicly known.

- **Promptness:** Families have waited far too long to find out the truth of what happened to their loved ones. Part of the role of the ISG and Kenova Governance Board is to ensure that our investigations are comprehensive and progress at pace. PSNI estimated the work would take around five years to complete. We began the investigations in earnest in January 2017 and made the first tranche of files available to PPSNI in October 2019. To date Kenova has pursued more than 12,000 lines of enquiry, taken more than 2,000 statements, interviewed some 300 people, over 40 under caution, conducted comprehensive forensic reviews in more than 80 cases and submitted 35 files to PPSNI covering in excess of 50,000 pages of evidence. We have gathered evidence from previously undisclosed official records, by engaging with families, some of whom have not previously spoken to investigators, and by harvesting new forensic evidence using cutting edge scientific techniques. This data and the successful engagement with victims, families and stakeholders demonstrates that legacy cases can be successfully investigated. This interim report has been produced to give families a high level understanding of what we have found as soon as possible.
- **Openness to public scrutiny:** The Kenova website was set up at the beginning of the inquiry and is regularly updated with appeals, media statements and related events to keep families and stakeholders updated. I report to NIPB as required by it and provide CC PSNI with quarterly reports on progress. These reports are written with care so as not to compromise the independence of the investigations. I have agreed every request to meet with legacy stakeholders and parties to explain the Kenova approach and answer questions and have also engaged with the Parliamentary Northern Ireland Affairs Committee (NIAC), the Tom Lantos Human Rights Commission (US Human Rights Congressional Committee), various academic forums and regular media questioning and victim stakeholder forums.
- **Involving next of kin:** Families are at the centre of the investigations. We have a developed family liaison strategy and we update families regularly. Families have access to me and my investigation team at any time.

Independent reviews

From the outset I decided that there was a need for independent examination and review of the investigations to reassure me, CC PSNI, NIPB, the Kenova governance groups and, most importantly, victims and families that the investigations are being conducted as effectively as possible.

In early 2017, Alyson Kilpatrick BL, then human rights advisor to NIPB, was tasked by the Board to review Kenova's compliance with the Human Rights Act 1998 and ECHR. Families and stakeholders raised a concern that NIPB might be conflicted because of perceived and historical links between political parties and those involved in the conflict. I met Ms Kilpatrick and briefed her on the various governance mechanisms and processes I had put in place to meet ECHR requirements.

I was pleased that in her 2017 NIPB Annual Report Ms Kilpatrick said that from the outset Kenova had sought full compliance with article 2 and that we had clear mechanisms in place to ensure independence and avoid any real or perceived conflicts of interest. In particular, she made favourable comments about our website, independent legal advisers and governance groups.

I subsequently appointed Ms Kilpatrick to conduct a comprehensive independent review of Kenova's ECHR compliance. She was recommended to me by several very senior legal professionals including the government appointed Independent Reviewer of Terrorism Legislation.

I also commissioned the NPCC Homicide Working Group to review our performance from an intelligence and investigations perspective and asked NCTPHQ to ensure that sensitive and complex national security elements of our investigation were properly scrutinised as part of this review.

Ms Kilpatrick published her first interim report in February 2020. She commented that the "*Operation Kenova investigation appears to be an exemplar of one which is commanded and controlled with every aspect of article 2 firmly in mind*". In January 2021 she produced her second interim report where she addressed Kenova's effectiveness and independence in the context of resources, oversight and decisions by PPSNI. She stated that she remained entirely satisfied of Kenova's article 2 compliance. In August 2021 Ms Kilpatrick produced her final report. In her covering letter she said, "*Kenova really is an exemplar of what such an investigation can and should be. It is the best I have seen in all of my experience*".

The NPCC Homicide Working Group reported in January 2021. Its report praised the structures and operating model of Kenova and the priority given to victims and families and described our overall approach as an innovative hybrid of homicide and counter terrorism investigative processes.

The VFG conducted its own independent review of our performance in relation to victim best practice and our approach to victims' rights. It published its report in August 2021. This identified several interrelated themes that had enabled us to underpin Kenova's legitimacy, build trust with families and thereby carry out effective investigations. These themes being a victim and human rights centred approach, independence, procedural fairness, transparency and public accountability together with a leadership style which embeds these principles into the investigation and appropriate resourcing.

These scrutiny reports are published on the Kenova website and presentations were given by the authors to the Kenova Governance Board on the findings of each review.

Access to information

Any investigation is only as good as the information available to it. Gaining full access to information in connection with Troubles related cases has been an issue for previous legacy inquiries. Whether a result of cultural obstruction, documents being over-classified or difficulty identifying and locating relevant material held by the authorities, access to records has been a persistent problem and a legitimate concern to families.

For Kenova to be effective, I recognised that we had to take an active approach to searching for relevant information and not rely on what was already available or what the agencies produced in response to our requests.

We have Memoranda of Understanding (MOUs) with all state agencies and departments holding material relevant to our investigations. These cover access, handling and any potential further disclosure or use, including in prosecutions. I secured agreement to appoint Kenova staff as Single Points of Contact (SPOCs) for MI5, MOD and PSNI. The role of the SPOCs is to locate and identify material and decide whether it is relevant to our investigation, rather than the organisation which it holds it making those decisions. Previously in legacy investigations, the security forces have acted as a gatekeeper, deciding on relevance and release of information for themselves. This approach has led to information not being disclosed when it should have been and I would emphasise that the issue here is disclosure to investigators for review and consideration, not publication to the outside world or use as part of a formal process. It should be remembered that security forces were on one side of the Troubles and should not therefore dictate what information an independent investigative body examining related cases should receive.

An example of Kenova's proactive search for information is evidenced by our discovery regarding the MACER database. This was an intelligence database used by the Army during the Troubles. When the Army withdrew from Northern Ireland on 31st July 2007, it handed control of MACER to PSNI as a closed archive used principally to service historic investigations, inquiries and inquests. Although PSNI now 'owned' the system, unknowingly it did not have access to all the information stored in it.

When Kenova began in 2016 my staff were given their own access to MACER by PSNI. The system administrator told them their logins gave them full access to the system. In 2017, we became aware that MOD staff had separate access to MACER. To test if we had 'full' access we carried out a search using PSNI logins and then repeated the same search using MOD logins. The results showed significant additional hits using the MOD logins which were completely invisible using the PSNI logins. No satisfactory explanation for this has been provided. As a result, Kenova staff received MOD logins codes and have been able to access records held on the MACER database that had previously been inaccessible to other investigations.

External engagement

Legacy investigations are somewhat unusual in that interested parties, affiliated to those being investigated, are part of the stakeholder community whose views influence and inform the trust and

confidence of victims and families. Occasionally, interested parties seek to undermine legacy investigations that might threaten or undermine their own narratives of the conflict. Another vitally important group of stakeholders are those who support victims and families and lobby for the uncovering of the truth in legacy cases without prejudice to one side or another. Some of these latter stakeholders were connected to the conflict but have long since advocated for all victims and their families to hear the truth regardless of background.

I meet any organisation, group or individual wishing to engage with or challenge Kenova in order to explain our operating model and avoid any misunderstanding or misrepresentation. This proactive approach has been key to securing the confidence of victims and families. Helpfully, those we have met have often gone on to become advocates for Kenova.

I was invited to provide a written submission to and subsequently to appear before NIAC for its inquiry 'Addressing the Legacy of Northern Ireland's Past'. My written evidence dealt with the Committee's questions about our approach, and steps taken to ensure our investigations are article 2 compliant, how family liaison is managed, the role and importance of our independent governance groups and the lessons we have learned which the government could apply to its new legacy investigation process. I gave evidence to NIAC on 2nd September 2020 and this gave me the opportunity to expand on my written evidence and comment on the Secretary of State's written statement of 18th March 2020.

I again gave evidence to the Committee on 21st June 2022 following the publication of the Northern Ireland Troubles (Legacy and Reconciliation) Bill and later shared with the Committee the feedback on the Bill I had provided to the Northern Ireland Office (NIO).

Questioning government statements

As the independent lead for Kenova, it is important under article 2 and for public confidence that I challenge any statement that appears to undermine the work we are doing. This includes challenging at the highest level of government.

On 9th May 2018 at Prime Minister's Questions, Prime Minister Theresa May stated, "*The peace we see today in Northern Ireland is very much due to the work of our armed forces and law enforcement in Northern Ireland, but we have an unfair situation at the moment, in that the only people being investigated for these issues that happened in the past are those in our armed forces or those who served in law enforcement in Northern Ireland. That is patently unfair - terrorists are not being investigated. Terrorists should be investigated and that is what the Government want to see*". I had previously had an opportunity to brief the Prime Minister on Kenova and had followed that up with a letter explaining the investigation in more detail. This statement to the House of Commons contradicted these previous exchanges.

I wrote to the Prime Minister on 17th May 2018 explaining that it is important to families to be reassured that we will follow lines of enquiry wherever they lead us. Kenova's success is based on victims and families' trust and confidence in how diligently we are carrying out our investigations. I was grateful to receive a response from her office dated 7th June 2018 stating, "*The Prime Minister recognises the*

great efforts you have undertaken to carry out your work professionally and independently, agrees fully that no individual or organisation is above the law and understands you are examining the role of the IRA as well as the security services as part of your investigation”.

I ensured this correction was communicated to all the Kenova families.

More recently, I was concerned that the Secretary of State stated to NIAC that “*none of [Kenova’s] investigations has yet reached the prosecution stage*” and that this might have been interpreted as a criticism or a suggestion that legacy prosecutions are no longer possible. I discussed my concerns with the ISG and, in September 2021, it wrote to the Secretary of State explaining that, at that time, 31 files had been submitted to PPSNI and the absence of prosecutions was due to the lack of resource in PPSNI than any lack of evidence provided by Kenova. It also pointed out that it is, “*constantly impressed by the quality of investigations and find it remarkable that so much continues to be achieved at such low cost compared with similar investigations in other jurisdictions and indeed the previous public inquiries that have been conducted on Troubles related matters in Northern Ireland*”.

Challenges

I have encountered a number of challenges while leading Kenova. Some, such as difficulty in accessing information and attempts to undermine me and the investigation, were expected (and were predicted by those who led previous such inquiries), others such as the length of time for prosecution decisions to be made by PPSNI, I did not expect.

In the main, I have overcome these challenges, but they have been distractions to the work of Kenova and have taken up a disproportionate amount of time to resolve.

Many of the challenges arose because of the lack of any pre-existing legacy investigation framework as Kenova has had to carry out its investigations while functioning on ad hoc and piecemeal arrangements involving multiple different organisations and individuals and without an express statutory basis or statutory powers. It is frustrating that many of the same issues confronted by my predecessors have been experienced by me and my team.

These challenges have included:

- False allegations passed to PSNI that I had released names of agents. I was able to easily refute these, but felt that this episode represented an attempt to undermine me and Kenova’s credibility.
- Having been asked by CC PSNI Byrne to take on the review of a case known as the ‘Hooded Men’, I began engaging with legal representatives to agree ToR. I was subsequently asked to pause my work on this by PSNI. Solicitors representing the parties to related judicial review proceedings then informed me that an affidavit sworn by PSNI for a forthcoming Supreme Court hearing stated that I had acted on my own initiative in seeking to progress the ToR. This was untrue. A solicitor representing the ‘Hooded Men’ made a formal allegation of perjury to PONI

regarding the affidavit and the whole episode unnecessarily consumed my time and resources and those of many stakeholders.

- Kenova has been drawn into parallel civil claims brought against PSNI, MOD, MI5, NIO and Freddie Scappaticci in connection with matters falling with its ToR because of its underlying links to PSNI. If Kenova had been constituted, authorised and funded as a freestanding legal entity under its own statutory arrangements - rather than through a 'lead force arrangement' under section 98 of the Police Act 1996 - the confusion and concern which arose from the way it became drawn into these civil claims could have been avoided.
- Despite the support of the Director General (DG) of MI5, I have had significant concerns about access to the information it holds, largely as a recipient of historical materials originating from the RUC Special Branch and FRU. I held several meetings with MI5 to raise concerns regarding access to information, its decision to classify as 'Top Secret' an accumulation of 'Secret' documents, the fact that solicitors representing former security force personnel had been given greater and unorthodox access to MI5 materials and my concern that its strategy was one of delay. Separately, in October 2018, a member of my staff was secretly recorded by a third party at a meeting and footage of this was broadcast as part of a BBC documentary. When meeting with MI5 to address my concerns about information access, it was wrongly suggested that my officer had disclosed secret information. Following these meetings and a challenging exchange of correspondence, the Deputy DG appointed an operationally experienced MI5 officer to be a new point of contact at my request. He also commissioned an independent review to examine the issues I had identified between MI5 and Kenova and this resulted in a set of measures which addressed my concerns.
- In October 2020, PONI challenged whether she could continue to disclose information to Kenova because our workforce was made up increasingly of staff working as contracted police staff. She also challenged the accountability arrangements governing complaints or disciplinary matters that might arise in connection with non-warranted contracted staff. I instructed senior counsel who advised that all Kenova staff, as they are contracted to Bedfordshire Police, are subject to Standards of Professional Behaviour even if misconduct occurs wholly or partly in Northern Ireland and the fact that some Kenova staff are not constables was not relevant. PONI did not accept this and no meaningful exchange of information occurred for some six months. To resolve the impasse, and against legal advice, I, and members of my senior team, attested as Special Constables of Bedfordshire Police. This novel solution allowed for a new information agreement between PONI and Bedfordshire Police to be agreed in October 2021. However, and without any change in the law or status quo, PONI unilaterally 'suspended' all further information sharing in May 2023. I am now facing a further process of legal debate and negotiation in order to find a solution. None of this would be necessary under a proper statutory legacy structure.

- In October 2019 we made the initial tranche of our evidence files available to PPSNI. The submission included files on five murders, three abduction cases, conspiracy to pervert the course of justice cases, perjury and two other cases of conspiracy to pervert the course of justice. The files mostly related to PIRA suspects but also contained submissions about members of the security forces. On the day the files were due to be delivered to the PPSNI office in Belfast, MI5 informed us that the building's security accreditation had expired and we therefore could not proceed. Various building upgrades and staff training were required to restore the necessary accreditation. It took until February 2020 before the office was accredited and our files could be submitted.
- The criminal justice process in Northern Ireland is slower than in England, Wales and Scotland as there are no frameworks to manage the timeliness of the court process as in the rest of the United Kingdom. Legacy cases are slower still. These additional delays mean even more frustration for victims, families and defendants alike. Kenova submitted further tranches of files to PPSNI in June 2020 and April 2021 plus four additional files: two in November 2021; another in February 2022; and a file relating to Operation Mizenmast and the murder of Jean Smyth Campbell in December 2022. PPSNI wrote to victims and families suggesting that prosecution decisions would not be made until Spring 2022. This timeframe has now been extended mainly because PPSNI does not have the dedicated resource to process these cases. Despite statements from politicians on the importance of legacy and their criticisms of slow progress, the time PPSNI is taking to make prosecution decisions is a further example of the lack of investment in staff and skills required to deal with these cases.

Previous inquiries and reports

In preparation for Kenova, I read the reports of previous inquiries into legacy matters. Where possible, I met with those who wrote these reports or who were otherwise involved in these inquiries. These previous legacy reports reflect a number of themes associated with Troubles related investigations:

- each report contains similar findings;
- they are too often over-classified as 'Secret' or 'Top Secret' meaning that the lessons they were intended to draw were not learned or subjected to public scrutiny;
- there is an unedifying history of the various inquiries facing the same challenges in obtaining information; and
- their investigators had to confront constant efforts to undermine and frustrate them.

I recognise and understand the nervousness of many in the security forces who describe legacy as 'history being re-written'. Through a fair and independent investigative process that recognises the context of the times, such concerns can be addressed. Attempts to undermine investigations and the culture of obstruction that have frustrated legacy inquiries only damage the reputation of the security forces. A continuing 'slow waltz' has become the dominant factor in most legacy cases; the terms 'slow

waltz' or 'no downward dissemination' (NDD) were used routinely by RUC Special Branch to indicate that information should be shared in slow time, if at all.

The reports I reviewed were:

Walker 1980: review of RUC intelligence gathering.

Stalker 1984: inquiry into 'shoot to kill' allegations against the RUC.

Sampson 1986: continuation of the Stalker inquiry.

McLachlan 1988: examination of Stalker/Sampson recommendations.

Stevens 1 1989: investigation into allegations of collusion between the security forces and loyalist paramilitaries.

Blelloch 1992: review of agent handling in the aftermath of the Brian Nelson case.

Stevens 2 1994: further enquiries into the Brian Nelson case.

Patten 1998: examining policing in Northern Ireland.

Stevens 3 2003: overview and recommendations report.

Cory 2003: inquiry examining allegations of state collusion in murders by paramilitaries.

De Silva 2011: review of the murder of Pat Finucane.

The Walker report appears to have led to an unhelpful separation between the intelligence gathering and law enforcement sides of policing in Northern Ireland. The report, and how Special Branch interpreted and applied it, resulted in the routine practice of intelligence not being shared with those investigating Troubles related crimes, on the basis that to share such information would risk exposing where it came from. The way senior officers in RUC Special Branch interpreted the report led to a monopoly in agent related activity across the force. It also resulted in a cabal of Special Branch self-interest that was fiercely resistant to any form of scrutiny or oversight based on claims about a paramount need for secrecy.

This interpretation and the ungoverned practices that resulted led to Stalker and Sampson's discovery of illegal and unethical conduct. Matters came to a head with the revelations at court of instructions given to RUC Special Branch officers to lie to investigators and mislead the criminal justice process.

Stalker identified that RUC Special Branch withheld information that affected the effectiveness of investigations and denied the existence of material later found to exist. He highlighted that RUC Special Branch did not appreciate the evidential value of intelligence and described resentment about his investigation. Crucially, he highlighted that there were no effective agent handling guidelines and that protecting agents' identities overrode everything else.

Sampson described a widely held belief at a senior level in RUC Special Branch that it was autonomous and its operations should not be questioned. He reported that officers operated outside the guidelines

in Home Office Circular 97/1969 and identified the need to adopt legal, workable and manageable procedures for using agents. He was concerned that RUC's Special Branch did not disclose intelligence to its Criminal Investigation Department (CID). His findings resonate with evidence I have found regarding information not being shared and actioned in order to permit agents to remain in place without coming to harm. This failure is inextricably linked to the security forces not disclosing material about agents committing serious crimes including murder.

McLachlan addressed Home Office Circular 97/1969 which stated, "*No member of a police force or public informant should counsel, incite or procure the commission of a crime*". He pointed out that the mere fact an agent was a member of a proscribed organisation breached this guideline and recommended the formulation of bespoke guidelines to reflect the Northern Ireland situation.

Blelloch's summary of recommendations relating to agent issues included changes in structures between the Director and Coordinator of Intelligence and Head of RUC Special Branch, joint reviewing of agent operations, dispute resolution processes and the need to address the guidelines for managing agents.

In Stevens 1 and 2, Lord Stevens described meeting a wall of silence when his team sought to investigate elements of RUC Special Branch with documents being removed or 'lost'. Even his team's planned arrest of a key suspect in January 1990, was leaked to the suspect. He found that security force information and intelligence material had been used by loyalist terrorist groups to target murder victims. Stevens uncovered the existence of the Army agent handling unit known as the Force Research Unit (FRU) and the mismanagement of its agent Brian Nelson. His findings included that the Army were under orders not to speak to him or his team or to hand over material. Discussions took place at the highest level of the military resulting in information being withheld from his inquiry. He described how the court was misled during Nelson's sentencing.

Set against the background of these cases and their recommendations, the Patten Commission recommended that policing in Northern Ireland take steps to improve transparency by applying a presumption in favour of openness and public accessibility. The families we work with on Kenova investigations, and many other legacy victims, have found the culture around disclosure of information has not changed as significantly as Patten recommended.

In Stevens 3, Lord Stevens defined the term 'collusion'. He also made clear that throughout his three inquiries he had been obstructed. He described this as cultural and widespread within parts of the Army and RUC. He proposed that the recommendations arising from his first report and the Blelloch report, together with the recommendations of his third report, should be independently reviewed and audited within an agreed time-frame. He made this proposal because of concerns that the recommendations from earlier reports had still to be implemented. Kenova has found that as Lord Stevens focused on Brian Nelson, identifying his role in various murders, other agents were allowed to continue to be involved in serious criminality including murder. There was no intervention from the leadership of any of the security forces.

Judge Cory's experiences and the actions of the security forces in seizing his material again demonstrated the unacceptable side of the authorities' actions in relation to legacy cases. Whilst Judge Cory was absent from his London office, representatives from MI5 attended his office and demanded that staff turn over their computer hard drives. They told the staff that it was essential in the interests of national security. Material was seized and hard drives wiped. Judge Cory ultimately had to take matters into his own hands when the government repeatedly declined to communicate with families and pass on his findings. He told families that he could not discuss the content of his reports but shared his conclusions with them.

Finally, De Silva found that agents had been responsible for serious criminality including murder. This is also a clear finding highlighted from our Kenova investigations.

These reports describe a catalogue of unacceptable practices around how the security forces used agents during the Troubles. They evidence a culture, both then and subsequently, of secrecy and resistance to fair and measured scrutiny, and of failing properly to disclose information. Most worryingly, these reports demonstrate a concerted and continued absence of effort by those responsible for leading the security forces and by successive governments to establish the truth. It is as though there is an unwritten and deliberate policy of obfuscation paralysing legacy investigations and inquiries, especially regarding the use of agents.

Interim findings

Agents were at the heart of both security force counter terrorist intelligence operations and terrorist counter intelligence activities: The use of agents by the security forces undoubtedly saved lives during the Troubles and significantly degraded and debilitated the effectiveness of terrorist groups. However, less frequently, preventable and serious crimes took place and went unsolved and unpunished as a result of steps taken by the security forces to protect and maintain their agents. We have found the following kinds of cases:

- (1) murders committed by agents, including cases in which one agent murdered another, cases in which agents were acting contrary to their instructions or tasking and cases in which it is arguable that they were acting on behalf of the state;
- (2) murders of alleged or suspected agents, including cases in which the murder was carried out as a punishment and to deter others from acting as agents and cases in which the victim was not in fact an agent; and
- (3) murders falling within (1) and (2) above which were or could have been the subject of advance intelligence and so could have been prevented; cases in which such intelligence was not passed on or properly assessed; and cases in which this was done but the security forces nevertheless decided against preventive action because this might have exposed or compromised an agent.

Some of these cases were uniquely challenging for the security forces to deal with. They had to assess risks and consequences with limited information, guidance or training. They did so under exceptionally

stressful conditions and extreme time pressure, and were sometimes presented with dilemmas which had no 'right answer', because protecting one individual might expose another. Mistakes and questionable decisions were inevitable and understandable. However, whatever the circumstances, each case should have been, and should still be, the subject of independent investigation and, if appropriate, adjudication.

The importance and limits of secrecy in the national security context: Ensuring the operational effectiveness of the security forces in the interests of national security calls for secrecy. However, there is also a public interest in ensuring that laws are not broken and that all public authorities, including security forces, operate lawfully and compatibly with human rights and this calls for external accountability and scrutiny. State agents do need to be protected through anonymity and secrecy, but that protection cannot confer *de facto* immunity or a right to act with impunity as that would be wholly incompatible with the rule of law and human rights. Agents may sometimes engage in criminal conduct, but they do not have a free licence to break the law and should not be led to believe otherwise. Furthermore, the absolutist approach to agent anonymity and protection we have encountered in some Kenova cases risked, and may well have led to, other individuals losing their lives and it undoubtedly prevented lessons being learned and improvements made.

Secrecy and accountability in practice and the 'neither confirm nor deny' (NCND) policy: NCND is described in a Cabinet Office Guidance Note as "*a mechanism used to protect sensitive information*" which "*applies where secrecy is necessary in the public interest and where this mechanism avoids the risks of damage that a confirmation or denial would create*". Various legal judgments have recognised the importance of the NCND policy, but they also stress that it is not a legal rule or principle, does not bind the courts and should not be applied on a blanket basis. There have been several cases where there has been a departure from the NCND policy and, in my view, a number of Kenova cases justify a similar departure. Despite this, NCND seems to have assumed a totemic status within government and the security forces and to have become an implacable dogma or mantra with the qualities of a stone wall. NCND should be subjected to a review, particularly as to its routine application to Troubles related cases in order to ensure it is not allowed to obscure wrongdoing by the security forces or serious criminality by agents.

Legacy cases can be investigated successfully and the truth can be uncovered: Kenova has shown it is possible to find the truth of what happened for many victims and families. In many of our cases we have discovered information that was not previously known to families and they have, in turn, provided us with vital information not previously disclosed to the authorities. However, this requires an absolute commitment to examining events thoroughly, dedication to and openness with families and an uncompromising approach towards those who seek to stop the truth from being uncovered. Some remain dismissive about legacy investigations and we should not underestimate the determination of those who seek to undermine and invalidate those seeking the truth. Such undermining is predominantly from those connected to the groups involved in fighting the conflict.

An investigation is only as good as the information available to it: For a legacy investigation to be effective it must actively search for relevant information rather than rely on what information is available at the outset. It is for investigators to decide on the relevance of information, not those holding it. It is vital that relevant records are not withheld from investigators. No investigation should be hampered by agencies failing to share sensitive information.

Families want to be acknowledged and listened to and to know the truth: The starting point for any legacy case should be to find the truth of what happened for the families affected. Families want to be heard. They want to be acknowledged, and they want a robust and independent investigation to find the truth. Some families do want a criminal justice outcome, but victims and families are generally realistic about the practicability and utility of prosecutions. Many, for a variety of reasons, do not want criminal prosecutions.

Wishes of victims and families must be taken into consideration when deciding whether or not a prosecution is in the public interest: Some families have serious concerns about the negative community reaction and personal consequences of a prosecution in their particular case. In cases where people were killed for being accused of being agents, families continue to be wrongly stigmatised and are concerned that prosecutions will re-ignite a backlash against them.

False and misleading information is often passed to families: Many legacy families are contacted through a variety of means by people who claim to know what happened in their particular case and who give them false or misleading information. These unhelpful interventions come from all sections of the community and media, including private individuals, legacy commentators, and retired members of the security forces and paramilitaries. My team regularly establishes that such information is wrong. On occasions people pass information on in good faith, for example from something they have heard. In almost every instance we have examined, the person passing on the information has no direct knowledge of events. I cannot overstate the harm that inaccurate information causes to victims and families.

Victims and families were failed by the authorities and their communities: The way in which the security forces treated many Kenova families at the time these crimes occurred was entirely unacceptable. Often the police did not contact families or, if they did, provided little or no information. There was prejudice against a number of Kenova families. Some simply perceived the victims as members of PIRA who had been murdered by their own side. The majority of families of those murdered for allegedly being agents were not involved with any kind of violence during the Troubles. The security forces failed them and the way in which some members of their own community treated them was unwarranted and inhumane. Although this did not happen in all cases, it occurred all too frequently.

Victims were not protected and terrorists were not subjected to criminal justice: The separation of intelligence from investigations that evolved during the Troubles resulted in a number of terrorists not being arrested and pursued through the criminal justice system. We have identified incidents in which the security forces were aware that someone was at risk of being kidnapped and interrogated by PIRA

and did not act on this information. They neither warned the person concerned about the danger that existed nor took action to protect them.

Families are not provided with proper disclosure: Many families whose loved ones were murdered during the Troubles have not been given even the most basic and uncontroversial information about what happened. There are many reasons for this, including the dangerous operating environment for the police to meet families. However, as families will testify, and as has been demonstrated repeatedly through previous legacy investigations, there was a strong security force culture of withholding information. The longstanding culture of not releasing information has fed conspiracy theories of wrongdoing and collusion by the security forces thereby distracting focus from the activities of the terrorists responsible for the overwhelming majority of crimes. This has had a major and adverse effect on public confidence.

The republican leadership have failed to acknowledge and apologise for PIRA's murderous activities and the intimidation of families: Members of PIRA's ISU were responsible for torture, inhumane and degrading treatment and murder, including of children, vulnerable adults, those with learning difficulties and those who were entirely innocent of the claims made against them. Allegations that individuals were working as agents were sometimes motivated by a desire to eliminate rivals and even the partners of those involved in extra-marital affairs. 'Confessions' to being agents, whether in audio recordings or in writing, were obtained through violence or deception and by making false promises to victims. None of these so-called confessions is reliable. Some who have engaged and cooperated with Kenova continue to face questioning, pressure, intimidation and threats from those opposed to cooperation with 'the state'. A core part of the activities of the ISU included physical beatings with iron bars and hammers and the shooting of victims in their legs, elbows, knees or feet, sometimes simply because they were accused or suspected of being involved in crime or anti-social behaviour. These assaults and human rights violations were perpetrated to intimidate and subjugate the community.

The absence of a legacy structure continues to stop families from discovering the truth: The lack of any independent legacy structure for all victims to have their case examined in an ECHR compliant way has created what is sometimes described in Northern Ireland as a 'hierarchy of legacy victims'. Families with legal or advocacy group support often eventually secure some type of legacy inquiry while the significant majority remain concerned about media and community attention and feel unable to access information about their cases. A single focused approach to legacy is required. One that is adequately resourced to allow it to define the outcomes that victims, families and society can expect and undertake and complete its work effectively.

Inadequacy of guidelines for managing informants: During the Troubles, the Home Office Circular 97/1969 entitled 'Informants Who Take Part in Crime' provided guidance on the management and conduct of agents and the principles they expressed were reflected in various internal directives and regulations implemented by the security forces during the Troubles. However, the guidelines were not designed or suitable for the type of conflict experienced in Northern Ireland, they could not sensibly be

followed and they were routinely ignored. The failure either to apply or recognise the inadequacy of the guidelines allowed an environment to evolve in which people were tortured or killed without efforts being made to protect them or to bring agents responsible for serious crimes to justice. This was a very serious failing as it put lives at risk, left those on the frontline exposed and fostered a maverick culture where agent handling was sometimes seen as a high-stakes 'dark art' practised 'off the books'. The absence of a legal framework to manage agent activities was discussed at Cabinet level during the Troubles, but it was not until the passing of the Regulation of Investigatory Powers Act 2000 (RIPA) that agent handling became properly regulated. This coupled with other legislative and organisational reforms mean that modern agent handling is run very differently and the mistakes of the past should not now be repeated.

The alleged agent Stakeknife

It would not be appropriate to discuss the agent Stakeknife in any detail as we await related prosecution decisions from PPSNI. However, I can make a number of observations without commenting on his identity or risking prejudice to any future criminal justice process.

The Stakeknife case has become synonymous with claims of state wrongdoing. Various myths and erroneous stories have emerged over time, emanating from misleading assessments from the FRU, or from wild public and media allegations of his murderous actions. As a consequence, many inside the security forces believe Stakeknife was better than he was, while many on the outside fear he was worse than he was. As ever, the truth lies somewhere between these two extremes.

Claims that intelligence provided by Stakeknife saved 'countless' or 'hundreds' of lives would appear to derive from FRU assessments based on unreliable and speculative internal metrics which were also used to produce similar and equally exaggerated claims about Brian Nelson. Notwithstanding this, these claims were widely accepted within the security forces and they have led many on the inside to view the case through rose-tinted spectacles and to feel defensive about Stakeknife's reputation. In reality, the claims are inherently implausible and should ring alarm bells: any serious security and intelligence professional hearing an agent being likened to 'the goose that laid the golden eggs' - as Stakeknife was - should be on the alert because the comparison is rooted in fables and fairy tales.

Stakeknife was undoubtedly a valuable asset who provided high quality intelligence about PIRA at considerable risk to himself, albeit that this intelligence was not always passed on or acted upon and, if more of it had been, he could not have remained in place as long as he did.

We cannot know every occasion when information provided by Stakeknife was used as a basis for a security force intervention which reduced risk or avoided or prevented harm and, in any event, he was not responsible for decisions about the dissemination or use of his intelligence. However, Kenova has reviewed approximately 90% of the written intelligence reports attributable to Stakeknife and my estimate of the number of identifiable individuals whose lives were saved in reliance on his information - through relocation, warning or other intervention - is between high single figures and low double figures and nowhere near hundreds sometimes claimed. Crucially, this is not a net estimate because it does not take account of the lives lost as a consequence of Stakeknife's continued operation as an agent

and, from what I have seen, I think it probable that this resulted in more lives being lost than saved. Furthermore, there were undoubtedly occasions when Stakeknife ignored his handlers, acted outside his tasking and did things he should not have done and when very serious risks were run.

Most fundamentally, even if it were possible accurately and reliably to say that a particular agent within a terrorist group did more good than harm, the morality and legality of agents doing any harm - with the knowledge of or on behalf of the state - are very different matters. As it happens, I believe files submitted to PPSNI by Kenova contain strong evidence implicating him and others in very serious wrongdoing. In my view, much of this could and would have been avoided if Northern Ireland agent running had been subject to proper regulation, control and oversight during the Troubles.

That said, the failure to confirm or publicise the true position has enabled false claims and conspiracy theories about Stakeknife to abound and we have been able to correct some inaccuracies previously reported to families without commenting on his identity. Examples include various suggestions that Stakeknife was responsible for crimes when he was not, claims that the security forces directed loyalist paramilitaries away from Stakeknife and towards other more valuable targets in order to protect him when they did not and wild nonsense about him meeting Prime Minister Margaret Thatcher and other government ministers and visiting Chequers.

Freddie Scappaticci

More than 20 years ago, public allegations were made that Freddie Scappaticci had been active during the Troubles as both a senior member of the PIRA ISU and also an Army agent code-named Stakeknife. It is well known that he was a member of the PIRA ISU and a critical person of interest at the heart of Operation Kenova, but I make no comment about the allegation that he was Stakeknife and nothing in this report can or should be taken to represent such a comment.

During the course of our inquiries we arrested Mr Scappaticci in January 2018 in relation to offences connected with the Kenova ToR. A laptop recovered from his sitting room was subsequently found to contain 329 images of an extreme pornographic nature. On 4th December 2018 he pleaded guilty at Westminster Magistrates' Court to possessing this material and was sentenced to three months in custody, suspended for 12 months.

Mr Scappaticci died in March 2023 aged 77. Since this was made public, it has been suggested to me that Mr Scappaticci is still in fact alive, whilst others have claimed that he took his own life. Speculation and rumours of this kind are unhelpful for all concerned. I have independently verified when, where and how Mr Scappaticci died and can confirm that he died of natural causes following an illness. Prior to his death, the Public Prosecution Service for Northern Ireland (PPSNI) was considering a number of Kenova files which I believe contained strong evidence of very serious criminality on the part of Mr Scappaticci. We first attempted to submit these in October 2019 and it will never be known whether an earlier decision on them by PPSNI would have resulted in prosecution and, if so, conviction.

Perjury decision

On 29th October 2020, DPPNI announced that he had decided not to prosecute four individuals in connection with perjury related allegations addressed in our first tranche of files. The decision related to an allegation that an individual committed perjury in the course of making affidavits sworn between 2003 and 2006. DPPNI concluded that although there was a reasonable prospect of proving that a false statement had been made, it could not be shown that it was material to the proceedings or that the person making the statement did not have a defence.

DPPNI had the unenviable task of explaining the rationale for his decision when confronted with advice from government lawyers as to what he could and could not say. He quite properly sought this advice in order to be as open and transparent as possible. It is my understanding that he was told that disclosing certain information would damage the prospects for recruiting and retaining agents today and therefore damage national security. I am quite certain that DPPNI could quite properly have described the rationale for the decision not to prosecute and that doing so would not have had any negative impact on agent recruitment or activity.

Conclusions

The GFA brought about a long awaited peace process in Northern Ireland stopping the continuing cycle of violence and preventing further suffering. The measures taken were brave, innovative and necessary but the compromises made could never take account of the huge sacrifice victims and families had already made. They hoped that once peace was established they would find out the truth of what had happened in their cases and that they would be acknowledged. This did not happen. Providing a framework for informing legacy families of what happened to their loved ones remains the unwritten chapter of the GFA.

An independent legacy structure that is truly victim focused is long overdue. Assuming one is established, it must have full access to records and documents. Any decisions regarding relevance must be for the legacy unit itself, not the organisations holding the material. This is integral to public confidence.

There have been a number of high profile legacy investigations and inquiries. Their reports conclusions and recommendations have largely remained classified and, therefore, out of the public domain. The consequence of this is that key lessons have not been learned and recommendations have not been put into practice that would almost certainly have saved lives. Such secrecy prevents trust being built between the authorities and the communities they serve. Reports that remain classified should be reviewed and their classification lowered to allow as much information as possible to be placed in the public domain.

Many legacy stakeholders have called for a day to acknowledge and reflect on this tragic period and many have adopted the summer solstice, the longest day, for this purpose. I strongly support such a day being set aside. A day of remembrance would allow everyone to reflect on what more we might have done and what we might still have to do in order to ensure that such loss, as experienced during

the Troubles, is never allowed to happen again. I have witnessed at first hand the positive impact of such a day on victims and families. Until we acknowledge victims and survivors and the transgenerational trauma inflicted as a result of the Troubles, society will not properly heal.

This report highlights failures of the security forces and the state and some will focus on that. We have found that too often they did not act on information to protect people who had a legal right to and reasonable expectation of protection. However, it was the PIRA leadership that commissioned and sanctioned the activities of the ISU. It was PIRA that committed brutal acts of torture and murder against those accused of being agents. The leadership of the republican movement needs to acknowledge and accept these crimes were wrong and apologise to victims and their families.

PPSNI is under-resourced for legacy and this has led to long delays in prosecution decisions being made on Kenova cases. The approach PPSNI has taken in reviewing these cases is different to what I have experienced in England and Wales. I had hoped for a collaborative approach coordinated by PPSNI with their independent counsel and Kenova case officers working through the process for recovering evidence and identifying any legal vulnerabilities or bars to prosecution. In my experience, this approach gives prosecutors the best understanding of the files while at the same time recognising each body's independence. This has not happened and there has been an unhelpful separation between PPSNI, counsel and Kenova.

In the event that decisions are made to prosecute legacy cases, navigating the Northern Ireland criminal justice system will be a further challenge as it is glacially slow. At present, legacy cases can be anticipated to take five years to come to a meaningful hearing. In any criminal case this is unacceptable, but even more so in legacy cases given the ages of many victims, families and witnesses.

There have been no convictions of the perpetrators responsible for PIRA murders of those it accused of being agents, despite there often being a rich and actionable evidential picture. In my view, this is linked to a dogmatic application of the NCND policy. Not only does this prevent disclosure of information to families, applied internally it means legacy investigations have not been able to see a good deal of relevant material and properly apply the rule of law. Some of those accused by PIRA of being agents did assist the security forces, but others did not.

Those people who did assist the authorities in tackling the threat from terrorism by working as agents did so at great personal risk. Those who recruited and handled them, the security forces within which they worked and the wider government owed them duty of care that was all too often ignored. These individuals would surely have expected the agencies they were working for to at least try to protect them and to bring to justice anyone who harmed or killed them. On too many occasions such protection was not afforded.

The security forces have a duty to uphold their values: fairness, honesty, integrity and respect for human rights. When and how an organisation responds when faced with legitimate accusations of wrongdoing, demonstrates how closely it holds those values.

The state has a duty to ensure an independent and effective investigation is conducted whenever there are reasonable grounds to assess that it has contributed to or been complicit in serious criminality. This is a founding characteristic of a well-functioning democracy. It is critically important that those who keep society safe can be trusted with the authority and powers to do so and are accountable for their actions.

Recommendations

- (1) Establish, on a statutory basis and with express statutory powers and duties, an independent framework and apparatus for investigating Northern Ireland legacy cases.
- (2) Subject all public authorities to an unqualified and enforceable legal obligation to cooperate with and disclose information and records to those charged with conducting Northern Ireland legacy investigations under a new structure.
- (3) Enact legislation to provide procedural time limits enforced by judicial case management to handle cases passing from a new legacy structure to the criminal justice system.
- (4) Review and reform the resourcing and operating practices of PPSNI in connection with Northern Ireland legacy cases.
- (5) The longest day, 21st June, should be designated as a day when we remember those lost, injured or harmed as a result of the Troubles.
- (6) Review, codify and define the proper limits of the NCND policy as it relates to the identification of agents and its application in the context of Northern Ireland legacy cases pre-dating the GFA.
- (7) Review the security classification of previous Northern Ireland legacy reports in order that their contents and (at the very least) their principal conclusions and recommendations can be declassified and made public.
- (8) PPSNI should pay due regard to the views, interests and well-being of victims and families when considering the public interest factors relevant to prosecution decisions in Northern Ireland legacy cases.
- (9) The United Kingdom government should acknowledge and apologise to bereaved families and surviving victims affected by cases where an individual was harmed or murdered because they were accused or suspected of being an agent and where this was preventable or where the perpetrators could and should have been subjected to criminal justice and were not.
- (10) The republican leadership should issue a full apology for PIRA's abduction, torture and murder of those it accused or suspected of being agents during the Troubles and acknowledge the loss and unacceptable intimidation bereaved families and surviving victims have suffered.

Part A: Introduction

1 Kenova

- 1.1 I am the Officer in Overall Command (OIOC) of the independent police investigation 'Operation Kenova' and three related investigations and reviews being conducted under the wider 'Kenova' banner. (References in this report to the 'Kenova team' and the 'Kenova suite' of cases should be construed accordingly.)
- 1.2 I served as a police officer for 35 years until my retirement as a Chief Constable in August 2019 and I spent the majority of my police career with the Metropolitan Police Service (MPS) and the Regional and National Crime Squads in a variety of roles relating to counter terrorism, counter extremism and serious and organised crime. I also worked as a police adviser within the Office for Security and Counter-Terrorism in the Home Office.
- 1.3 I have held a number of national responsibilities that have assisted me in my role as the Kenova OIOC: I was the national policing lead for the Regulation of Investigatory Powers Act 2000 (RIPA) when it provided the legal framework for covert policing; I was appointed the national lead for undercover policing following the exposure of a number of unacceptable practices and a critical HMIC report; and I was also the national policing lead for Race, Religion and Belief.
- 1.4 This interim report highlights a number of themes and issues that have emerged from the work of Operation Kenova since it was first established in June 2016.
- 1.5 Operation Kenova was formally announced and I was appointed OIOC by the then CC PSNI Sir George Hamilton in June 2016. At that time, I was serving as CC Bedfordshire Police. Subsequently, this role and the Kenova suite of cases expanded and I took the decision to retire in August 2019 so I could continue acting as OIOC on a full-time basis.
- 1.6 Operation Kenova is an investigation into allegations that an alleged security force agent known as Stakeknife committed various offences during the Northern Ireland Troubles and related allegations made against members of the security forces, other government agencies and PIRA. In particular, the Operation Kenova ToR (Appendix 2) require us to investigate:
- whether there is evidence of the commission of criminal offences by the alleged agent known as Stakeknife including, but not limited to, murders, attempted murders or unlawful imprisonments;
 - whether there is evidence of criminal offences having been committed by members of the security forces in respect of the alleged agent known as Stakeknife (regard in this context will be given to the article 2 rights of victims and associated responsibilities of those forces);
 - whether there is evidence of criminal offences having been committed by any other individual in relation to the cases connected to the alleged agent;

- whether there is evidence of the commission of criminal offences by any persons in respect of allegations of perjury connected to the alleged agent.

1.7 These ToR are underpinned by four requests for information made by DPPNI to CC PSNI under section 35(5) of the Justice (Northern Ireland) Act 2002, and a number of additional murder files, which have together been referred to Operation Kenova for action:

(1) Request 1 - 26th January 2009 - Lynch case

Following the Northern Ireland Court of Appeal's decision to quash convictions against eight individuals in *R v Morrison & others* [2009] NICA 1, a section 35(5) request was made in relation to the conduct of security force personnel in the underlying case relating to the abduction and false imprisonment of Alexander Lynch in 1990.

(2) Request 2 - 29th January 2013 - Fenton case

The Northern Ireland Court of Appeal formally quashed the convictions against Veronica Ryan and James Martin in *R v Ryan & another* [2014] NICA 72. In advance of this, a section 35(5) request was made in relation to the conduct of security force personnel in the underlying case relating to the abduction, false imprisonment and murder of Joseph Fenton in 1989.

(3) Request 3 - 11th August 2015 - Stakeknife

In June 2015, PONI reported to DPPNI on a set of Stevens inquiry papers provided by the PSNI Historical Enquiries Team (HET) in 2012 and the Northern Ireland Attorney General also raised concerns about a murder case. In consequence, a further section 35(5) request was made in relation to the full range of offences alleged to have been committed by the alleged agent Stakeknife and any related criminal activity on the part of security force personnel.

(4) Request 4 - 22nd October 2015 - perjury

A section 35(5) request was also made in relation to a case involving related allegations of perjury, perverting the course of justice and misconduct in public office in 2003.

(5) Additional murder files

The PSNI Serious Crime Branch reopened the investigation into the 1993 murder of Joseph Mulhern in 2011 and forwarded an interim report to DPPNI in January 2016. This case was also transferred to Operation Kenova on its establishment for continued investigation together with the above section 35(5) requests. Additionally, investigations into the murders of John Bingham, Thomas Oliver and Caroline Moreland have been passed to Kenova by agreement between me and CC PSNI during the course of Kenova.

- 1.8 The above matters were transferred to Operation Kenova pursuant to a cross-border 'lead force arrangement' made between PSNI and Bedfordshire Police under section 98 of the Police Act 1996. I entered into this arrangement with Sir George Hamilton when we were Chief Constables of the two police services and it has since devolved to our successors and remains in force.
- 1.9 For completeness, my remit is subject to a caveat for the investigative primacy of the Police Ombudsman for Northern Ireland (PONI) in connection with cases involving criminal and disciplinary misconduct by serving and former police officers. If I encounter any cases falling into this category during the course of my work, I am required to refer them on to PSNI for onward referral to and action by PONI.
- 1.10 The Kenova team comprises police officers and staff employed through Bedfordshire Police. Kenova is funded by PSNI and I report quarterly to CC PSNI and as required to NIPB. However, Kenova's operational direction and control were delegated to and vested in me at the outset, first, as CC Bedfordshire Police and, after my retirement, under the contract appointing me full-time OIOC. The independence of Operation Kenova is further confirmed by its ToR which make clear that PSNI will not seek to direct, control or interfere in its investigations in any way.
- 1.11 Although not the subject of this report, the remaining cases falling within the wider Kenova suite are:

(1) The murder of Jean Smyth-Campbell (Operation Mizzenmast) (Appendix 3)

Operation Mizzenmast is the investigation into the murder of Jean Smyth-Campbell. Jean was shot dead as she sat in a car on the Glen Road in West Belfast on 8th June 1972. Following a meeting between CC Hamilton and Jean's family in June 2019, PSNI asked me to lead this investigation. This came as a consequence of the family fighting for an independent examination into the death through the Northern Ireland courts. At the time of writing this report, we have completed this investigation and I am finalising my report.

(2) The murders of RUC officers Paul Hamilton, Allan McCloy and Sean Quinn (Operation Turma) (Appendix 4)

Operation Turma is the investigation into the murders of Constables Paul Hamilton and Allan McCloy and Sergeant Sean Quinn at Kinnego Embankment, Oxford Island, near Lurgan, County Armagh on 27th October 1982. The current CC PSNI Simon Byrne asked me to lead this after a Police Scotland investigation into a separate legacy issue - concealment and destruction of evidence (Operation Klina) - identified potential investigative opportunities. At the time of writing this report, a full file outlining our findings has been submitted to PPSNI.

(3) The review of 127 murders in the 'Glenanne Gang Series' (Operation Denton) (Appendix 5)

Operation Denton is an overarching and thematic review, analysis and report exercise and not a criminal investigation as such. It relates to the criminal activities of the Ulster Volunteer Force (UVF) related 'Glenanne Gang' which operated on both sides of the border from about 1972-1978. Following a judicial review challenge, the Northern Ireland Court of Appeal held that the families affected by the Glenanne Gang series have a legitimate expectation that an independent police team provides an analytical report.³ The primary purpose of our review is to consider whether the cases as a whole suggest wider issues of collusion beyond those already established in the individual cases. However, it is important to emphasise that Operation Denton is not simply a table-top paper review of existing materials. We are seeking new information and materials from families, the security forces and other government agencies. This information collection process is extending to new witness accounts, documents, records, intelligence and forensics. Furthermore, Operation Denton's ToR require us to refer any new, investigable evidence of criminal offences to PSNI. At the time of writing this report, work on Operation Denton is progressing well and I anticipate reporting in 2024.

- 1.12 I have committed to producing public facing reports of Kenova's findings in all its cases for publication by PSNI at the conclusion of any relevant criminal justice processes. This commitment was not expressly included in Operation Kenova's original ToR, but it has been part of my remit throughout and it was formally included as one of my 'Key responsibilities' in the contract I have operated under since August 2019. I have confirmed this commitment in a number of public statements, including in evidence I gave to the Parliamentary Northern Ireland Affairs Committee (NIAC) in summer 2020. I have committed to providing public reports for Operations Mizzenmast, Turma and Denton.
- 1.13 In addition to the above, Kenova will also provide families with private 'family reports' of our findings and offer to meet with them face-to-face in order to share and discuss their contents.
- 1.14 In September 2021, I held a public consultation exercise on the terms of a draft protocol governing the publication of our reports (Appendix 1). When I published the final protocol in October 2022, I also published a review of the written submissions I had received on the draft (Appendix 6). That review dealt with a number of submissions - many supporting the reporting process and some querying or disputing my power to produce reports - and therefore made the following clear:

³ *Re Barnard's Application* [2019] NICA 38.:

[https://www.judiciaryni.uk/sites/judiciary/files/decisions/Barnard%27s%20\(Edward\)%20Application_0.pdf](https://www.judiciaryni.uk/sites/judiciary/files/decisions/Barnard%27s%20(Edward)%20Application_0.pdf)

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

- 1.15 I reiterate the above now. I am not a court, tribunal or public inquiry and I can only report what I have found likely to be the case on the basis of information and materials available to me, from my own viewpoint and as a matter of my own opinion and understanding. I cannot and do not purport to do any more than this or to be the final arbiter of any question of law or fact. I have tried to be balanced, fair and impartial, but I am not all-knowing or infallible and every reader will be free to take or leave or reject my findings and recommendations as they see fit. All my reports - including this one - should be read in the light of these caveats.
- 1.16 I began producing this interim report on Operation Kenova in advance of the conclusion of any related criminal justice processes by agreement with CC PSNI and DPPNI because of the length of time it was likely to take to reach that point.
- 1.17 My aim has been to set out my findings at a relatively high level of generality and without going into specifics as that might prejudice any prospective criminal justice process. In particular, I have tried to make clear where I have, and have not, found patterns of state intervention or non-intervention in the mistreatment, torture and murder of people accused of being state agents. Many victims and families have long-held beliefs, suspicions and fears about these patterns and the part they may have played in their particular cases. The lack of any official confirmation or denial of the true position has left them doubting themselves and even their own sanity. For many, the uncertainty has been destabilising and has extended and exacerbated their pain, suffering and trauma. I strongly believe that the state should now do what it can to bring this to an end and say, in effect, *“you are not mad, this was happening and it should not have been”*. This report aims to do just that and I sincerely hope that this will be of real meaning and benefit to those affected and also contribute to the achievement and maintenance of lasting peace and reconciliation in Northern Ireland.
- 1.18 Truth, public scrutiny and state accountability are key pillars of the ECHR which was created to protect and promote citizens’ rights and freedoms, the rule of law and democracy. The Convention underpins this report and I have endeavoured to meet its requirements. We have taken advice from senior Crown counsel to ensure that nothing contained in this report could prejudice any prosecution decisions or subsequent criminal justice process and it will not be published without the agreement of DPPNI. Although I cannot go into the details of individual cases, it is my strong view that families who have waited for so long to hear what happened to their loved ones deserve to know at least these high level findings without further delay. Bearing in mind ECHR principles on the timeliness of criminal investigations and proceedings and the age profile of many family members, it is right to produce this interim report now.

- 1.19 It is vitally important to me that we shift the focus in dealing with legacy from those who fought in the conflict to the innocent victims who were killed and injured during this awful period in our history. While I particularly recognise those in the security forces who opposed the Troubles and suffered terrible loss, no life is more important than any other and the interests of innocent victims have for too long not been given enough priority.
- 1.20 Some who fought in the conflict have not supported a comprehensive mechanism to address legacy and enable families to know what happened to their loved ones. As a consequence, the majority of victims have faced wholly unacceptable delays. Many have had no proper investigation. Where these did occur, reports are over-classified and withheld and there have been delays in the coronial process and civil courts. Inadequate disclosure of information and fears about speaking out remain ongoing problems. The state has failed many victims.
- 1.21 A quarter of a century after achieving peace, the United Kingdom and Irish governments, the Northern Ireland political parties and those involved in the conflict have still to fulfil their collective responsibility to put victims front and centre of their endeavours to address legacy meaningfully. It might reasonably be said that Northern Ireland has moved from armed conflict to a political and legal conflict over legacy. It is time to stop all such conflict and obfuscation in order to allow the next generation to heal and prosper. There is an obligation on governments to put this right and ensure that victims and bereaved families have access to investigations to establish the truth of what happened. A meaningful process to recover information and acknowledge the human loss and hurt endured during the conflict is essential if communities are ever to recover and thrive. Such a process remains the unwritten chapter of the GFA and, collectively, we owe victims and their families an apology for the failure properly to address legacy. Reconciliation is often referred to in government papers and in discussions about the Troubles. Any future legacy process should set out measures explaining how reconciliation might be achieved. One such measure should include a day of reflection.

2 'Stakeknife'

- 2.1 It has been widely reported that the security forces had a well-placed agent code-named 'Stakeknife' within the PIRA ISU during the course of the Northern Ireland Troubles. During his investigation into the Brian Nelson case, Lord Stevens became aware of the activities of Stakeknife. They were referred to the PSNI HET in March 2006 and this led to the quashing of the convictions arising out of the Lynch and Fenton cases mentioned above. Many are concerned that this agent was involved in kidnap, torture and murder with the knowledge of and possibly on behalf of the state and believe these crimes were preventable.
- 2.2 It has also been publicly alleged that Freddie Scappaticci was a senior member of the PIRA ISU and the agent Stakeknife and it is a matter of public record that a number of the allegations falling within Operation Kenova's ToR have been directed against Mr Scappaticci.

- 2.3 Mr Scappaticci died in March 2023 aged 77 without ever being charged with or convicted of any Troubles related offences and he always denied any wrongdoing or involvement with the security forces. Indeed, he brought a highly publicised but unsuccessful judicial review in 2003 to try and force the government to declare that he was not Stakeknife (see the judgment of the Northern Ireland Lord Chief Justice dated 18th August 2003 in *Re Scappaticci's Application*⁴). These proceedings in turn gave rise to the perjury related allegations already mentioned above and dealt with in more detail later in this report.
- 2.4 The security forces and the government have steadfastly refused to confirm or deny the allegations that Mr Scappaticci was an agent or that he was Stakeknife and, regardless of their truth or falsity, these allegations put Mr Scappaticci's life at such risk that he was forced to leave Northern Ireland many years before his death.
- 2.5 The truth about the identity of Stakeknife will have to be officially confirmed at some point, but I am not able to address it in this interim report and will have to leave this to my final report. That report will confirm the truth and set out the full facts and I am confident that publication will benefit and not harm the public interest. For now, it suffices to say that Mr Scappaticci was and still is inextricably bound up with and a critical person of interest at the heart of Operation Kenova.
- 2.6 Furthermore, whether the allegations made against Stakeknife are wholly or partly true or false, they have had a profound adverse impact on many people, including Mr Scappaticci and his family. Whoever Stakeknife is or was, he has not been an active source of intelligence for decades. Notwithstanding this, the government's refusal to confirm or deny the true position - for fear of discouraging the recruitment and retention of current and future agents - has created a vacuum which has become filled with a great deal of wild and inaccurate conjecture, speculation and nonsense.
- 2.7 Conspiracy theories and misinformation about the deaths of loved ones can cause families immense distress and they should be corrected, and the full truth made known, as soon as possible.
- 2.8 I became aware of the death of Mr Scappaticci in early April 2023. I sent a message to families and other stakeholders to inform them of the news, explain that we would need to work through the implications for our casework and acknowledge that others might now feel able or be encouraged to come forward with relevant information (Appendix 7). By that time, this report was at the end of the representations process outlined in our protocol on the publication of public reports and a final draft was being prepared for security checking. I have updated the

⁴ [2003] NIQB 56:

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20an%20application%20by%20Freddie%20Scappaticci%20for%20Judicial%20Review.pdf>

text to reflect the fact of Mr Scappaticci's death but have not otherwise thought it necessary or appropriate to make substantial changes.

- 2.9 It is public knowledge that Mr Scappaticci was one of the people we arrested and interviewed under caution as part of our investigation and I can confirm that he was the subject of a number of files submitted by us to PPSNI. It will never be known whether he would have been prosecuted and, if so, pleaded guilty or been convicted at trial, but it is my view that he could and should have been. I believe that we found strong evidence of very serious criminality on the part of Mr Scappaticci and his prosecution would have been in the interests of victims, families and justice.

3 Overview of strategic themes and issues

- 3.1 During the course of our work on Kenova, I have identified a number of high level themes and issues which arise across the cases we have examined. In this report I identify these and the ways in which they appear to be linked to each other and to the underlying circumstances of the Troubles. I do not comment on individual cases, as to do so could prejudice an ongoing criminal justice process.
- 3.2 During the conflict in Northern Ireland, terrorists targeted and murdered civilians, members of the security forces and each other; the security forces carried out counter terrorism operations collecting and exploiting secret intelligence from human and technical sources; terrorists carried out counter intelligence efforts including abducting, torturing and murdering alleged or suspected agents; and the police responded to these crimes in a way that would not have been tolerated in Great Britain.
- 3.3 Some reasons for this difference in approach are understandable:
- (1) The ordinary pursuit of evidence and leads was inherently problematic in communities hostile to and distrusting of the police and where individuals were often attacked, intimidated and ostracised by terrorists and their supporters should they be seen to cooperate with the security forces. In many Kenova cases, families had not previously had any engagement with the police, let alone any positive engagement.
 - (2) The security forces were operating in a challenging environment in which terrorists regularly targeted and murdered their personnel and agents and in which they themselves were subject to a much less rigorous regulatory and oversight framework.
- 3.4 Notwithstanding these difficulties, the RUC managed successfully to investigate and prosecute a great many Troubles related offences and achieve positive criminal justice outcomes.
- 3.5 Cases involving secret intelligence or agents were particularly difficult to prosecute because they were inextricably bound up with considerations of secrecy and agent-protection which

obscured the truth and made full disclosure to the defendant and in public court proceedings highly problematic if not dangerous.

- 3.6 In this regard, agents were at the heart of both security force counter terrorist intelligence operations and (therefore) terrorist counter intelligence activities. Agents infiltrating and penetrating terrorist groups provided the security forces with significant amounts of valuable intelligence. However, this was not always seen as actionable because intervening on the strength of it could point to its existence and consequently compromise where it came from and the future supply of intelligence from that particular source. Even when this was not an immediate risk, an intelligence-based law enforcement intervention could still be futile if it would ultimately entail the disclosure and compromise of a sensitive source. For this reason, the security forces often withheld, and did not act on or share with investigators, intelligence they held about Troubles related murders and other offences. Investigations and prosecutions were therefore often stymied from the outset.
- 3.7 This has been central to our work at Kenova. Agents saved many lives during the Troubles and significantly degraded and debilitated the effectiveness of terrorist groups. However, in order to protect agents, the security forces allowed preventable and serious crimes including murder to take place and go unsolved and unpunished. We have found the following kinds of case:
- (1) murders committed by agents, including cases where one agent knowingly or unknowingly murdered another, cases where agents were acting contrary to their instructions or tasking and cases where it is arguable that they were acting on behalf of the state;
 - (2) murders of alleged or suspected agents, including cases where the murder was carried out as punishment and to deter others from acting as agents, and cases where the victim was not in fact an agent; and
 - (3) murders falling within (1)-(2) above which were or could have been the subject of advance intelligence and so could have been foreseen and prevented; cases where intelligence was not passed on or properly assessed; and cases where this was done but the security forces nevertheless decided against preventive action because such action might have exposed or compromised an agent.
- 3.8 Some of these cases were uniquely challenging for the security forces to deal with. They had to assess risks and consequences with limited information, guidance or training. They did so under exceptionally stressful conditions and extreme time pressure, and were sometimes presented with dilemmas which frankly had no 'right answer' because protecting one individual might expose another. Mistakes and questionable decisions were inevitable and understandable. However, whatever the circumstances, each case should have been, and should still be, the subject of independent investigation and, if appropriate, adjudication. We have encountered cases in which, because of secrecy, no such process took place at the time.

It is unacceptable that due to information being classified as 'Secret' or 'Top Secret' these cases were denied meaningful investigation and scrutiny. This position is no longer sustainable.

3.9 I present this interim report in five Parts:

Part A: Introduction.

Part B: Context. A brief summary of the conflict and the roles played by the RUC, Army, MI5 and PIRA.

Part C: Management and Operation. This part is in three sections:

- (1) Section 1 describes our approach to Kenova's internal organisation, governance, compliance and accountability;
- (2) Section 2 describes some of the external public engagement I have undertaken to protect and maintain Kenova's credibility; and
- (3) Section 3 describes some of the challenges we have faced managing such a complex investigation, partly because there was no pre-existing independent structure for investigating legacy cases.

I hope it will be useful to those tasked with leading similar legacy investigations in the future to understand the challenges we faced setting up Kenova and benefit from some of what we have learned.

Part D: Interim findings. This focuses on organisations rather than on individuals and confirms, at a relatively high level, our findings about what was and was not happening during the conflict as between PIRA, its ISU, the security forces and their agents:

- (1) Section 1 provides an overview;
- (2) Section 2 summarises the outcome of previous Northern Ireland legacy investigations and inquiries and the reports they produced; and
- (3) Section 3 concentrates on Kenova's experience and history to date and what we have found.

Part E: Conclusions and Recommendations. This sets out my key conclusions and makes recommendations designed to assist future Northern Ireland legacy investigations and inquiries.

Part B: Context

4 Background

- 4.1 In this Part I will set out briefly the context and environment in which the citizens of Northern Ireland lived during the conflict and the roles of the RUC, Army, MI5 and PIRA. It is not intended to be a detailed history of the conflict. Many more informed commentators have written extensively on the subject. I requested an independent report on the period covering Operation Banner (name for the Army deployment in Northern Ireland from 1969 to 2007). This was produced by Professor John Gearson, Centre for Defence Studies at King's College, London and it provides a historic account of events set against the political background of the day.⁵ For the reader less aware of the operating environment at the time of the conflict, I hope the Gearson report and this section provide useful background to the offences Kenova is investigating and the environment in which the alleged agent Stakeknife is said to have operated.
- 4.2 To respect the privacy of families and avoid prejudice to any future criminal justice processes, I will not identify the names of victims accused of being agents. Their loss in such awful circumstances caused huge sadness and hurt to many. The republican movement's unjustified demonisation of these victims has left families and friends silenced and afraid because of sickening intimidation and violence. Many of those accused by PIRA of being informers were innocent of the allegations made against them. As I mentioned previously, I will provide an individual report to each family on my findings.
- 4.3 The statistics of the Kenova casework cover some 101 murders and abductions. The human tragedy behind the data is often forgotten. Those accused of being agents by PIRA suffered the most awful physical and psychological abuse. This often resulted in longstanding physical and mental health issues for those who survived. Some were banished from their homes into isolation. Often victims were entirely innocent of the accusations made against them. Countless survivors of these crimes have suffered premature deaths, self-harm and addiction. Families have become fractured. They constitute a group of victims that is forgotten by the authorities and shunned by communities. The families of those killed often suffered their own alarming intimidation and vile treatment having done absolutely nothing wrong. They were not allowed to grieve publicly. Even today, victims and families suffer the consequences of being labelled as agents or the friend or family of an agent. Since the Troubles ended, these victims and families have felt unable to pursue the truth of what happened either because of the community judgements made about them or the lack of access to an independent body to examine these crimes. To me and my team they are quite remarkable people who, notwithstanding having

⁵ J Gearson, *Operation Banner Primer: An Account of the British Military's Deployment to Northern Ireland, 1969-2007*, February 2022:

<https://thefusiliers.org/wp-content/uploads/2022/09/Kings-College-London-Op-BANNER-Final-Report-230622.pdf>

been wronged at every juncture, have demonstrated decency and humility throughout our engagement.

5 A brief history of the conflict

- 5.1 The conflict lasted almost 30 years and continues to have a profound impact on families and society in Northern Ireland. In 2017, 26% of the Northern Ireland population said either that they or a family member continued to be affected by a conflict related incident.⁶ There were 3,720 conflict related deaths leaving families mourning the loss of a loved one.⁷ 40,000 people were injured.⁸ 213,000 people are experiencing significant mental health problems.⁹ Almost 2% of the population of Northern Ireland was killed or injured; if the same had happened to the population of Great Britain, some 100,000 people would have been killed or injured.
- 5.2 Northern Ireland had enjoyed some post-war prosperity however by the late sixties, like the rest of the United Kingdom, it was experiencing a steep economic decline. During the summer of 1969 historic resentment between the nationalist and unionist populations of Northern Ireland resurfaced, resulting in violent clashes between militant sections of the two communities,
- 5.3 The Protestant majority were in political control and enjoyed better employment prospects and social amenities. The Catholic community began to protest about injustice and inequality and formed the Northern Ireland Civil Rights Association (NICRA). At first, NICRA petitioned and lobbied for its stated aims of basic freedoms for all citizens, protecting the rights of individuals, highlighting abuses of power, freedom of speech, assembly and informing the public of their rights. Later in 1968, it began to organise protest marches and other sympathetic groups were formed. The subsequent protests were met with Protestant counter demonstrations and this in turn led to interventions by the RUC.
- 5.4 NICRA joined with the Derry Housing Action Committee (DHAC) and organised a march in Derry/Londonderry in October 1968. The march was due to pass through the Protestant centre of the city but the RUC blocked it and attempted to disperse the crowd. This led to violence and clashes between police and protesters. The RUC pushed the demonstration into the Catholic area of Bogside, where the residents joined a pitched battle against the police. For some, the

⁶ *Written evidence submitted by Commission for Victims and Survivors Northern Ireland*, May 2020, paragraph 10:

<https://committees.parliament.uk/writtenevidence/5709/default/>

⁷ D McKittrick, S Kelters, B Feeney, C Thornton and D McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles*, 2nd ed., 2001, p 13.

⁸ M Smyth and G Kelly, *Final Report of The Cost of the Troubles Study*, April 1999, Appendix 1, paragraph 2:

<https://www.files.ethz.ch/isn/26033/2.pdf>

⁹ E Fitzgerald, M Given, M Gough, L Kelso, V McIlwaine and C Miskelly, *The Trans-Generational Impact of 'The Troubles' in Northern Ireland*, October 2017, p.38:

<https://www.qub.ac.uk/schools/psy/files/Filetoupload.784073.en.pdf>

- start of the Troubles is considered to be 5th October 1968. Images of alleged police brutality were broadcast worldwide, and much of Northern Ireland's population was horrified.
- 5.5 Similar demonstrations then took place in Belfast and unrest continued into 1969. By the summer of 1969 the violence had escalated to such a level that the RUC and its reserve forces were at breaking point. The first death as a result of the conflict was in July 1969. Francis McCloskey, a 67-year-old Catholic man, was found unconscious near the Dungiven Orange Hall following a police baton charge against a crowd throwing stones at the hall. Witnesses subsequently said they had seen police beating a figure in the doorway where Francis McCloskey was found, although police claimed he had been unconscious before the baton charge and may have been hit by a stone. He died the next day, 14th July 1969.
 - 5.6 The United Kingdom government sought to support the Northern Ireland government and its Prime Minister James Chichester-Clark, but was reluctant to deploy troops onto the streets of Northern Ireland. However, by 14th August 1969 the situation had worsened and as a result of a request for Army support from the Northern Ireland government, and following a meeting with Home Secretary James Callaghan, Prime Minister Harold Wilson gave authority to deploy British troops.
 - 5.7 Shortly after 17:00 hours local time, 300 troops from the 1st Battalion, Prince of Wales's Own Regiment of Yorkshire occupied the centre of Derry/Londonderry, replacing the exhausted police officers who had been patrolling the cordons around the Bogside for days. The troops were welcomed by the nationalist community who saw them as a sign of the end of the dominance of unionist led government. However, this period of goodwill was short lived. Although the Army in Northern Ireland came under the control of the Secretary of State for Defence in London, many nationalists saw it as a tool of the unionist government in Stormont.
 - 5.8 A short time later Home Secretary James Callaghan began a three-day visit to Northern Ireland and visited the troubled areas in Derry/Londonderry and Belfast for himself. On his return to London he commissioned Baron Hunt to preside over an Advisory Committee on Policing in Northern Ireland to examine the recruitment, organisation, structure and composition of the RUC and the Ulster Special Constabulary (USC), known as the B Specials. The Hunt report was published in October 1969 and as a result plans were made to stand down the USC on 30th April 1970.
 - 5.9 On 11th October 1969, loyalists shot dead Constable Victor Arbuckle on Belfast's Shankill Road during protests against the Hunt report. In December 1969, the Irish Republican Army (IRA) split into what would become the Official IRA and PIRA. In August 1970, Constables Samuel Donaldson and Roy Millar died when an abandoned car they were examining in Crossmaglen exploded. They were the first members of the security forces to be killed by the IRA during the conflict.
 - 5.10 Violence increased dramatically in the early 1970s. In 1971, the Northern Ireland government proposed and the United Kingdom government agreed the introduction of internment without

trial for suspected PIRA supporters. The majority of those detained were nationalists and because of poor intelligence many of them were not even activists.

- 5.11 1972 was the bloodiest year of the conflict during which 472 people were killed. This included 321 civilians, 100 soldiers and 16 members of the RUC. Earlier, in March, frustrated with the Northern Ireland government's failure to calm the situation, the United Kingdom government suspended the Northern Ireland Parliament and reinstated direct rule from Westminster. A new post of Secretary of State for Northern Ireland was created.
- 5.12 Beginning in the mid-1970s, PIRA shifted the emphasis of its 'Long War' from direct engagements with the Army to smaller-scale operations, including bombings in England, a change of tactic the Army described as a shift from 'insurgency' to 'terrorism'. Similarly, loyalist groups began setting off bombs in the Republic of Ireland. Paramilitary violence during the middle part of the decade (1974-1976) caused the death of some 370 Catholic and 88 Protestant civilians.
- 5.13 The Sunningdale Agreement, negotiated in 1973, led to the creation of a new Northern Ireland Assembly, with proportional representation for all parties, and the establishment of a Council of Ireland, which was to provide a role for the Republic of Ireland in the affairs of Northern Ireland. Loyalists saw this as a threat to the position of unionism and were opposed to the Republic of Ireland's involvement in Northern Ireland affairs. They called a general strike that brought Northern Ireland to a halt in May 1974 and led to the return of direct rule. Direct rule from Westminster remained in place for the next 25 years.
- 5.14 Violence continued during the 1970s. In 1976 the specially designed Maze Prison was opened, bringing with it a change in how paramilitary inmates were treated. No longer treated as prisoners of war, they were treated as ordinary criminals. Seeking a return to Special Category Status, some republican prisoners started a 'blanket protest' in which they refused to wear prison uniforms and wore only blankets. In 1978, they started a dirty protest in which inmates smeared their cell walls with excrement. Things escalated further to hunger strikes in 1980-1981 leading to the deaths of 10 prisoners including Bobby Sands - who had been elected as a Member of Parliament while on hunger strike.
- 5.15 In November 1981, the Anglo-Irish Intergovernmental Council was established. Its first meeting was at Chequers in September 1983. This led to the signing of the Anglo-Irish Agreement at Hillsborough Castle by Prime Minister Margaret Thatcher and Irish Taoiseach Garrett Fitzgerald in November 1985. Under the Agreement both countries agreed that any change in Northern Ireland's status would come about only with the consent of the majority of its population. The agreement also gave the Republic of Ireland a consultative role in Northern Ireland's political and security affairs for the first time. Finally, it stated that power would be devolved back to the government of Northern Ireland only if unionists and nationalists participated in power sharing. Opposition to the agreement led to all 15 unionist MPs resigning their seats and an increase in loyalist violence.

- 5.16 During the early 1990s, attempts to broker a PIRA ceasefire were ongoing. Prime Minister John Major had refused to enter into open talks with Sinn Féin until PIRA declared a ceasefire. PIRA saw bombing commercial targets, particularly in England, as a means to put pressure on the United Kingdom government to negotiate withdrawal from Northern Ireland.
- 5.17 On 15th December 1993, John Major and Taoiseach Albert Reynolds issued the Downing Street Declaration as a framework for all-party peace talks. It affirmed the right of the people of Ireland to self-determination and announced that Northern Ireland would only ever become part of the Republic of Ireland if the majority of its population consented. It called on all paramilitary groups to renounce violence and take part in talks.
- 5.18 PIRA declared a ceasefire on 31st August 1994 and the main loyalist paramilitary groups declared their own ceasefire later that same year.
- 5.19 In December 1994, US President Bill Clinton appointed former Senator George Mitchell as US Special Envoy for Northern Ireland. The United Kingdom government held its first official meeting with Sinn Féin. ‘Talks about talks’ about decommissioning began and continued throughout 1995 without success. An international body was set up to resolve the issue and in January 1996 the Mitchell Commission recommended that multi-party talks should include the issue of decommissioning.
- 5.20 In February 1996, PIRA ended its ceasefire with the explosion of a bomb in London’s Canary Wharf. It was proposed that Sinn Féin should be excluded from any further talks unless there was a ceasefire.
- 5.21 In July 1997, PIRA resumed its ceasefire. The Independent International Commission on Decommissioning was set up under General John de Chastelain.
- 5.22 In September 1997, Sinn Féin signed up to the Mitchell Principles of democracy and non-violence and entered all-party talks. Prime Minister Tony Blair met representatives of Sinn Féin for the first time and, in December, Sinn Féin visited Downing Street.
- 5.23 Talks continued into 1998 and in March 1998 George Mitchell had drafted a paper on relations between Northern Ireland and the Republic of Ireland calling for an agreement by 9th April. The deadline passed but negotiations continued. Finally, on 10th April 1998, the Belfast Agreement, also known as the Good Friday Agreement, was signed. Referenda on the Agreement approved it by 94% of those who voted in the Republic of Ireland and 71% of those who voted in Northern Ireland.
- 5.24 This period in the modern history of the United Kingdom has been the subject of countless accounts and commentaries from all perspectives including some not involved in the conflict. These often present the rights and wrongs of what happened from opposing positions. What is not in doubt is that this period generated the biggest threat to the safety of United Kingdom citizens and tragically the biggest loss of life and most serious harm since World War II.

- 5.25 The unfolding threat to society with its associated and tragic loss of life and destruction understandably drew myriad government interventions and tactical responses from the security forces primarily in an effort to keep people safe.
- 5.26 During the worst periods of the conflict it is clear that various provisions of the ECHR were not and could not be fully upheld due to the violence and the brutal operating environment the security forces encountered. In the main, they were dealing with inhumane acts of violence perpetrated by terrorists and they valiantly managed the consequences as best as anyone could.
- 5.27 The brutal and wanton violence the terrorist groups used across communities and towards the security forces and those in authority severely tested the norms of our democracy as well as the criminal justice system. The government and security forces overwhelmingly sought to act in the public interest and their immense sacrifice and the losses they suffered should never be forgotten.
- 5.28 Notwithstanding my admiration for the significant majority of the security forces, there were occasions when they inevitably got things wrong. At times, some of their personnel did not uphold the values and ethics that underpin such organisations, comply with the rule of law or ensure the administration of justice. Whenever such failings occur, it is vital that we do not shy away from investigating them - we must demonstrate our accountability and be held to the highest standards. This defines and separates the security forces from the terrorists.
- 5.29 I have briefly set out the changing landscape the authorities encountered, from a predominantly safe and tranquil Northern Ireland with an unencumbered police force, to a place that presented the most serious violence known to the United Kingdom in modern history. A relatively quiet police force was transformed into the most dangerous in the world in which to serve and, consequently, the Army embarked on its longest continuous deployment in British military history.
- 5.30 This brief summary does not include every injustice suffered across communities during the Troubles. It is merely intended to orientate to some small degree the history and context of these times.

6 Role of the Royal Ulster Constabulary (RUC)

- 6.1 The RUC officially came into existence on 1st June 1922 following the partition of the island of Ireland under the Government of Ireland Act 1920 and Anglo-Irish Treaty of 1921. At the start of the Troubles, it was a 3,000 strong force for the whole of Northern Ireland. Sporadic activity by the IRA meant the RUC had to be constantly vigilant against terrorist attacks throughout the mid-twentieth century, but, in general, crime was low level and serious crime, like murder, was rare. The civil rights campaign at the end of the 1960s, and the beginning of the conflict put tremendous strain on the RUC. Initially, it struggled to maintain order on the streets, and on the

14th August 1969 the Inspector General of the RUC requested military aid and the Army was deployed to aid it by Home Secretary James Callaghan.

- 6.2 In addition to dealing with public order, the RUC had to contend with a rapidly increasing number of deaths. From a relatively peaceful country at the end of the 1960s, violence escalated rapidly to 472 people being killed in 1972. No police force in the world could have dealt with this level of murder. The security situation, including paramilitaries targeting police officers, meant that normal investigative methods for securing scenes, forensic examination, interviewing witnesses and house to house enquiries were almost impossible. Members of the nationalist community often felt too frightened to engage with the police for fear of reprisals from some republicans. Kenova has found that victims' families often had very limited, if any, contact with the police after the murder of a loved one.
- 6.3 In 1976, the then Secretary of State for Northern Ireland, Merlyn Rees, set out the government's policy of 'Police Primacy'. This gave the RUC lead responsibility for tackling the threat of terrorism in Northern Ireland. After the 'Way Ahead' paper of 1976, the Army was to act 'in support of the RUC'. The precise nature of this 'support' was not well defined. In large areas of Northern Ireland, the RUC could operate freely, and so the question was largely academic. However, in the most difficult areas, such as West Belfast and South Armagh, the RUC could not operate without very considerable Army support.
- 6.4 In 1983, Interpol data showed that Northern Ireland was the most dangerous place in the world to be a police officer, the risk being twice as high as El Salvador which was the second most dangerous. During the course of the conflict, 302 RUC officers were killed and over 10,000 injured, with 300 left severely disabled.
- 6.5 In 1999, HM The Queen awarded the RUC the George Cross for bravery. This honour had only been awarded collectively once before, to the island of Malta. In 2022, it was awarded to the NHS following the Covid 19 pandemic.

7 Role of RUC Special Branch

- 7.1 The lead for intelligence on Irish republican terrorism in Northern Ireland during the Troubles passed from the Army to RUC Special Branch during the course of 1973 and 1974. At this time, Special Branch did not have the resources or structure needed to deal with the massive increase in violence that was occurring. In 1969, Special Branch numbered around 60 officers whose primary concerns were the political activities of members of the IRA and communist groups. There was little threat to life and the activity they monitored was predominantly subversion rather than terrorism. The conflict dramatically increased the number of staff and the range of skills Special Branch needed. Addressing this was inevitably a slow process. By 1972 the entire Special Branch had only 161 personnel.

- 7.2 In addition to the intelligence developed by Special Branch, it received reports from other agencies including the Army, MI5 and other Special Branches throughout the United Kingdom.
- 7.3 On 16th January 1980, the then CC RUC, Sir John Hermon, asked MI5 to review the RUC's intelligence gathering practices. The review was undertaken by Sir Patrick Walker (then a Senior MI5 Director and later its DG) who made a number of recommendations to improve the exchange of intelligence between Special Branch and the Criminal Investigation Department (CID).¹⁰
- 7.4 As I will discuss later, Kenova has identified occasions when the authorities did not act on vital intelligence about cases involving kidnapping, torture and murder. Such was the risk to human and technical sources that their protection was seen as paramount, even if it meant potentially life-saving information not being disseminated for action. These decisions were made secretly within the organisational bubble of Special Branch and were not subjected to independent oversight or review.
- 7.5 To manage the operational response to intelligence, the RUC set up Tasking and Coordination Groups (TCGs). These groups, headed by a senior Special Branch officer, had a 24/7 capability to respond to intelligence at very short notice. The TCGs were to review intelligence received and decide on the appropriate operational response. With no legislative framework governing how they obtained intelligence or its management and dissemination, balancing the risks to agents and the threats to potential victims was left entirely to internal practices and procedures. There are limited records of the TCG decision making process with those involved commenting that limited time was available to document their work.

8 Role of MI5

- 8.1 MI5 priorities have changed over recent decades from a focus on counter intelligence to counter terrorism.¹¹ The change has been gradual. The first step in creating an independent counter terrorism branch began in 1976 but was not fully implemented until 1984.¹²
- 8.2 The lead for intelligence investigations in Great Britain on Irish republican terrorism sat with MPS Special Branch and in Northern Ireland the RUC had this responsibility. It was not until 1992 that MI5 took over this lead in Great Britain and it only assumed the lead for counter terrorism in Northern Ireland in 2007. So, in addition to its role protecting the United Kingdom

¹⁰ P Walker, *Report on the Interchange of Intelligence between Special Branch and CID, and on the RUC Units involved, including those in Crime Branch*, March 1980:

<https://www.kenova.co.uk/6.%20D13484%20Walker-Report-1980.pdf>

¹¹ C Andrew, *The Defence of the Realm: The Authorized History of MI5*, 2nd ed., 2010, p 600.

¹² *Ibid.*, p 683.

against terrorism and other national security threats, MI5's role during the conflict was largely supportive of the RUC and Army.

- 8.3 In 1972, MI5 and MI6 established the Irish Joint Section in response to an urgent request from government for more intelligence from Northern Ireland. MI6 initially had a larger role in running the Joint Section because MI5 was not ready for a major role in Northern Ireland. William Whitelaw, the then Secretary of State for Northern Ireland, established the post of Director and Coordinator of Intelligence (DCI) in Belfast to act as his personal security adviser and his main link with CC RUC and the Army's General Officer Commanding (GOC) in Northern Ireland. The DCI did not have an operational responsibility. The role was not to direct intelligence operations but rather to liaise and coordinate. Initially, there was no one of sufficient seniority in MI5 willing to fill the role so it went outside the Service before MI5 took it over in 1973.
- 8.4 The DCI was represented inside the Army by an MI5 officer with the title Assistant Secretary Political (ASP). The ASP role was to ensure that MI5 views were represented at military headquarters and that it was kept informed of developments relating to the Army's collection and exploitation of intelligence. The ASP was also responsible for providing operational security advice to Army intelligence on agent running activities including, where appropriate, agent resettlement. However, several of the previous DGs of MI5 Kenova interviewed stressed to me that the Service did not perform any leadership, controlling or authorisation role in relation to the work of the Army agent running unit, the Force Research Unit (FRU).
- 8.5 The DCI also had a representative at RUC Headquarters known as DCI Rep Knock. The DCI Rep Knock's role was to liaise between MI5 and the RUC and support national security warrant applications to authorise technical surveillance operations. DCI Rep Knock's office processed applications based on an intelligence case provided by the RUC and commented on the necessity and proportionality of the proposed action.
- 8.6 MI5 maintained a small number of intelligence analysts who were responsible for preparing and disseminating Northern Ireland related reports and assessments for government and policy makers outside of the intelligence community, but within the NIO, Number 10 and Whitehall departments. This group acted as the forum for delivering strategic intelligence inside and outside of Northern Ireland from the RUC, Army, MI5, MI6 and GCHQ.
- 8.7 Agent running in Northern Ireland was primarily conducted by the RUC and Army. MI5 only sought to recruit agents who could provide strategic intelligence or intelligence about threats against Great Britain or British interests overseas.
- 8.8 MI5 provided specialist support to the RUC by installing and maintaining technical surveillance devices, but it did not receive the raw intelligence from such devices as a matter of course. MI5's role was to provide the required technical expertise and equipment. The RUC owned the intelligence produced, whether strategic or tactical, and controlled its exploitation and dissemination.

9 Role of the British Army

- 9.1 During the first period of military deployment in Northern Ireland from August 1969 until the summer of 1971, the issues the Army dealt with were characterised by widespread public disorder, marches, protests, rioting and looting. At this time, there were three battalions based in Northern Ireland. By the summer of 1972, this had increased to 28,000 soldiers and over the duration of Operation Banner more than 250,000 service personnel undertook tours in Northern Ireland. Between August 1969 and July 2007, 1,441 died prematurely - 722 killed in terrorist attacks and 719 as a result of other causes.
- 9.2 The summer of 1971 until the mid-1970s is often described as a classic insurgency phase. Both the Official IRA and PIRA were structured in militaristic form. Both had companies, battalions and brigades and headquarters staff. Protracted firefights were common.
- 9.3 The Army responded using experience of counter insurgency tactics learned in other theatres overseas, for example, the Mau Mau uprising in Kenya. The Army brought these experiences and deployed them on the streets of Northern Ireland, particularly in Operation Motorman which was conducted from 31st July to 1st December 1972 with the aim of retaking republican controlled 'no-go' areas in Belfast, Derry/Londonderry and other urban centres. This marked the beginning of the end of the insurgency phase. The Official IRA declared a ceasefire in 1972 and PIRA began a process of transforming itself into a terrorist organisation based on a cell structure.

Army intelligence gathering

- 9.4 Surviving documents show that the Army was handling agents in Northern Ireland from at least 1971 onwards. Its use of agents referred to as 'turned terrorists' began with a unit known as the 'Fred Force' which supplied intelligence on paramilitary activities. Its members were also deployed, in disguise, at vehicle check points identifying those with paramilitary affiliations. The 'Freds' dealt with the recruitment and deployment of agents and ran alongside the Military Reaction Force (MRF).
- 9.5 The MRF was formed in 1971 and consisted of two separate units based at Palace Barracks. Its members operated in plain clothes using unmarked vehicles and were tasked with proactively going up against PIRA using agents and 'front companies' - such as a mobile laundry service and a massage parlour - to gather intelligence. Due to the MRF being involved in a number of controversial shootings and compromised operations, it was disbanded in 1973 and succeeded by the Special Reconnaissance Unit or 14 Intelligence Company and later the FRU.
- 9.6 The Army also formed a Special Military Intelligence Unit (SMIU) to support RUC Special Branch agent handling operations.

- 9.7 For the Army, the mission in Northern Ireland was a completely new experience that required new thinking and it sometimes struggled to meet this challenge and recognise the social, economic and political differences between Northern Ireland and theatres overseas. This deployment would become the longest in Army history, some 37 years.

Development of Army intelligence structures and the Force Research Unit (FRU)

- 9.8 The Army took the decision to develop its own intelligence capabilities rather than rely on the RUC. It developed early intelligence operations such as the Fred Force, and by 1972 many Army operations in Northern Ireland had some form of intelligence gathering function or were intelligence led.
- 9.9 The Army acted in support of the RUC and was involved in many aspects of intelligence, including recruiting and running agents. In 1982, the Army's various intelligence functions were centralised into the FRU.
- 9.10 Many in the RUC believed that there was no requirement for the Army to have its own intelligence gathering apparatus. But the Army believed that many individuals who provided intelligence on paramilitary groups would never have dealt with the RUC because of its perceived sectarian bias.
- 9.11 The relationship between the FRU and the RUC sometimes lacked coordination and clarity. This confusion was exacerbated by institutional rivalry between the different organisations and parts of the intelligence community. This rivalry became most apparent in the often strained relationship between the FRU and RUC Special Branch.

10 Role of the Provisional Irish Republican Army (PIRA)

- 10.1 The IRA split into 'Official' and 'Provisional' factions in December 1969. PIRA issued its first public statement on 28th December 1969 stating: "*We declare our allegiance to the 32 county Irish republic, proclaimed at Easter 1916, established by the first Dáil Éireann in 1919, overthrown by force of arms in 1922 and suppressed to this day by the existing British imposed six county and twenty six county partition states. We call on the Irish people at home and in exile for increased support towards defending our people in the North and the eventual achievement of the full political, social, economic and cultural freedom of Ireland*".
- 10.2 PIRA was an organisation based on intimidation and violence towards society in general, the security forces especially, and indeed often the very people it claimed to represent and protect. Throughout the Troubles, PIRA did not take full responsibility for all its actions and was not honest with those it claimed to be fighting for.
- 10.3 In January 1970, the PIRA Army Council adopted a three stage strategy: defence of nationalist areas; followed by a combination of defence and retaliation; and finally launching a guerrilla campaign against the Army. The Official IRA was opposed to this campaign as it felt it would

lead to sectarian conflict which would undermine its more Marxist strategy to unite workers from both sides of the sectarian divide.

- 10.4 PIRA's strategy was to use force to cause the collapse of the Northern Ireland unionist government and to inflict such heavy casualties on the Army that public opinion would force its withdrawal. In October 1970, PIRA began a bombing campaign against economic targets. That year there were 153 bomb attacks and the following year over 1,000. As a result of the escalating violence, on 9th August 1971, the government introduced internment without trial in Northern Ireland. 342 suspects were detained in the first 24 hours. However, this only served to unite opposition to the government and increased the level of violence. In the seven months prior to internment, 34 people had been killed. From the introduction of internment to the end of 1971, 140 were killed, including 30 soldiers and 11 RUC officers. Internment boosted PIRA recruitment.
- 10.5 On 22nd June 1972, PIRA announced a ceasefire in anticipation of talks with the government on demands including British withdrawal, removal of the Army from sensitive areas, release of republican prisoners and an amnesty for fugitives. The government refused these demands, the talks broke up and PIRA ended its ceasefire. In late 1972 and early 1973 arrests on both sides of the border depleted PIRA's leadership. This led to PIRA bombing London in March 1973, as the Army Council believed bombs in England would have a greater impact on British public opinion. PIRA followed this with an intense period of activity in England that left 45 people dead by the end of 1974.
- 10.6 Following a ceasefire over Christmas 1974 and a further ceasefire in January 1975, PIRA issued a statement in February 1975 suspending 'offensive military action'. Its leadership and government representatives then participated in a series of meetings through the year. PIRA violence occurred during the ceasefire, with bombs in Belfast, Derry/Londonderry, and South Armagh. PIRA was also involved in sectarian killings of Protestant civilians, said to be in retaliation for sectarian killings by loyalist paramilitaries. In August 1975, it started a gradual return to the armed campaign and the ceasefire ended in September 1975 when PIRA set off 22 bombs across Northern Ireland.
- 10.7 In 1977, PIRA developed a new strategy called the 'Long War'. This would remain its strategy for the rest of the conflict. The strategy accepted that the campaign would last many years and it included increased emphasis on political activity through Sinn Féin. A republican document of the early 1980s stated, "*Both Sinn Féin and the IRA play different but convergent roles in the war of national liberation. The Irish Republican Army wages an armed campaign, Sinn Féin maintains the propaganda war and is the public and political voice of the movement*".
- 10.8 The 'Long War' saw PIRA tactics change from the bombing campaigns of the early 1970s, to more attacks on members of the security forces. Its new strategy saw it begin to use armed propaganda, using the publicity from attacks such as the assassination of Lord Mountbatten and the Warrenpoint ambush to focus attention on the nationalist community's rejection of

'British rule'. PIRA aimed to keep Northern Ireland unstable in order to frustrate the government objective of installing a power sharing government as a solution to the Troubles.

- 10.9 Electoral successes connected to the 1981 hunger strike and Sinn Féin's increased electoral participation ran in parallel with PIRA's armed campaign. This 'Armalite and ballot box strategy' was named after a speech by Danny Morrison (former senior member of PIRA and former Sinn Féin Publicity Director) at the Sinn Fein annual conference on the 31st of October 1981 in which he said, *"Who here really believes that we can win the war through the ballot box? But will anyone here object if with a ballot paper in this hand and an Armalite in the other we take power in Ireland?"*
- 10.10 PIRA was responsible for more deaths than any other organisation during the conflict. Two detailed studies of deaths during this period by CAIN and 'Lost Lives' differ slightly on the numbers killed by PIRA and the total number of conflict deaths. According to CAIN, PIRA was responsible for 1,705 deaths. Of these, 1,009 were members or former members of the security forces, while 508 were civilians. According to 'Lost Lives', PIRA was responsible for 1,781 deaths. Of these, 944 were members of the security forces, and 644 civilians including 61 former members of the security forces. The civilian figure also includes those employed by security forces, politicians, members of the judiciary and alleged criminals and agents. Most of the remainder were republican or loyalist paramilitaries, including over 100 PIRA members accidentally killed by their own bombs or murdered for allegedly being security force agents.
- 10.11 Republican terrorists were responsible for 60% of the overall Troubles killings, loyalists for 30% and the security forces for 10%. Overall, PIRA was responsible for 87-90% of total security force deaths during the conflict.
- 10.12 During PIRA's campaign in England, it was responsible for at least 488 incidents causing 115 deaths and 2,134 injuries. It also carried out attacks in Belgium, the Netherlands, the Republic of Ireland and West Germany.
- 10.13 Between 275 and 300 PIRA members were killed during the conflict.

Agents and the PIRA Internal Security Unit (ISU)

- 10.14 PIRA's ISU, often referred to as the 'Nutting Squad', had several functions:
- vetting new recruits;
 - reviewing failed or compromised operations for any evidence of security breach;
 - investigating, interrogating and debriefing suspected agents;
 - killing or otherwise punishing those found guilty by PIRA 'court martial'.
- 10.15 PIRA's response to those who were supposed to have informed against it was torture and murder. Statements from republican leaders supported these actions. After PIRA murdered someone it accused of being an agent, republican leaders would routinely grandstand and

intimidate the victims' families. The ex-Sinn Féin President Gerry Adams said at a news conference held close to the family home of a man murdered for allegedly being an agent that he, *"like anyone else living in West Belfast [knew] that the consequence for informing is death"*.¹³ Martin McGuinness, PIRA leader, echoed this view in a TV interview with Peter Taylor for BBC Spotlight, after the murder of another alleged agent when he said, *"If republican activists go over to the other side, then they more than anyone else are absolutely and totally aware what the penalty for doing that is"*. Mr Taylor asked *"Death?"* and McGuinness replied *"Death, certainly"*.¹⁴

- 10.16 The PIRA Green Book (IRA training and induction manual for new volunteers) stated that after an ISU investigation, a court martial would take place, consisting of three members of equal or higher rank than the accused, plus a member from PIRA General HQ or its Army Council acting as an observer. The observer, although not always present, would inform the Army Council who would then ratify the death sentence. PIRA usually killed alleged agents by shooting them in the head, hence the ISU becoming known as the 'Nutting Squad'. It left many of its victims' bodies in public to deter other potential agents.
- 10.17 In addition to these murders, there is a group of people known as 'the disappeared' who paramilitaries killed and secretly buried between 1972 and 1985. Despite excellent work and extensive searches by the Independent Commission for the Location of Victims' Remains, the bodies of four people of the 17 on the Commission's list - Joe Lynskey, Seamus Maguire Columba McVeigh and Captain Robert Nairac - have not been found, prolonging the grief and trauma for their families.
- 10.18 Kenova has established that some of those alleged by PIRA to be agents were not working for the security forces. Indeed, the motivation behind allegations that some people were agents was often linked to PIRA hierarchal disputes, clashes over PIRA criminal activities and, on occasion, even intended to eliminate partners for those involved in extra-marital relationships.
- 10.19 We also have evidence that PIRA took violent and punitive action against women and children in their family homes while detaining and torturing loved ones suspected of being agents.
- 10.20 Some of the PIRA senior leadership who commissioned the ISU would later be active in seeking fairness and human rights protections. There is a stark contrast between their public position and the wanton use of torture and murder against people from their community who were often innocent of the accusations made against them.
- 10.21 PIRA used torture, inhumane behaviour and murder as a deterrent against people working with the security forces. It was often unconcerned as to the actual involvement of its victims in assisting the security forces. Strategically and fundamentally what it was doing was about

¹³ BBC, 'Inside Ulster', 15th April 1987.

¹⁴ BBC, 'Pop goes Northern Ireland', 1988, series 3, episode 3.

deterrence. Those involved in the ISU and the leadership that commissioned and oversaw its activities should find a way to acknowledge without further delay the impact their crimes had on victims and families and issue a public apology.

- 10.22 The audio recordings and written statements of some ISU victims in which they apparently admit assisting the security forces should be disregarded. These people were under extreme duress, suffering physical mistreatment and torture to extract confessions. The ISU made some false promises that, should they confess to assisting the security forces, it would stop mistreating them. Victims were encouraged to attend Sinn Féin fronted press conferences to criticise the security forces for recruiting agents as propaganda exercises. Typically, PIRA did not usually live up to its undertakings and executed many of those who made admissions in a vain attempt to stay alive, not necessarily because they had assisted the security forces in any way.
- 10.23 Some in the republican movement consider that these activities were legitimate acts of warfare. They were not. Having examined in detail what the ISU did to its victims, no one should be in any doubt that these crimes amount to some of the worst atrocities of the conflict. The republican leadership gave carte blanche to the ISU to commit acts of torture and murder, there was no internal accountability whatsoever.
- 10.24 The public comments leaders of PIRA and Sinn Féin made about the ISU's conduct, and of the consequences of being an agent, created an environment in sections of the nationalist community in which victims' families suffered significant intimidation. Not only did these families lose loved ones, they often faced humiliation and violence themselves. These family members were entirely innocent of any wrongdoing on anyone's interpretation of events. This intimidation and violence included acts against children, those with known learning difficulties and the elderly. When families sought to grieve and bury their loved ones they were often callously mocked and further intimidated.
- 10.25 Many accounts of the conflict refer to the valour of those involved, claiming heroism and bravery. The families of those caught up in the ISU's activities had their lives changed forever, but demonstrated incredible bravery during these times and continue to do so today. It is of significant concern that elements in Northern Ireland, of all ages, still intimidate and marginalise individuals and families who have been labelled, often wrongly, as enemies within their community because of the ISU's actions.
- 10.26 Without exception, the families we have engaged with through Kenova have conducted themselves with humility and grace despite the horrific acts that PIRA perpetrated against their loved ones. I appeal for everyone to stop labelling, accusing, belittling and intimidating the families of those the ISU murdered because of often incorrect accusations. The next generation has done nothing to deserve the treatment to which some are still subjected. These families have done nothing wrong.

11 Law and policy on the recruitment, handling and use of agents

- 11.1 The use of agents by the security forces in Northern Ireland was not the subject of any meaningful, effective or enforceable legal or policy framework during the course of the Troubles.
- 11.2 Home Office Circular 97/1969 dated 12th May 1969 on 'Informants Who Take Part in Crime'¹⁵ contained non-statutory guidance which: prohibited police officers and their agents from counselling, inciting or procuring the commission of crimes or any agent provocateur role; and restricted them to secondary and minor participation in crimes planned by others, provided this was essential to the frustration and arrest of the principal criminals. This was later incorporated into 1977 and 1986 versions of the Home Office's 'Consolidated Circular to the Police on Crime and Kindred Matters' and supplemented by more detailed ACPO Guidance in 1995, 1999 and 2003.
- 11.3 Home Office Circular 97/1969 was itself a classified document and the guidance it contained was expressly confined to its subject matter and reflected pre-existing 1960s police practice in connection with ordinary evidential criminal investigations and the use of criminal informants; pre-dated the Army's deployment to Northern Ireland and the terrorist phase of the Troubles and did not apply to the RUC, the Army or MI5; was drawn up and agreed at a Central Conference of Chief Constables held on 6th March 1969 in response to judicial criticisms from the Court of Appeal about the non-disclosure of informant involvement in criminal proceedings;¹⁶ and was produced without any input from Parliament, government, the Law Officers, prosecuting authorities, non-police security forces or the RUC, albeit that it was subsequently endorsed by the Home Secretary.
- 11.4 Most importantly, while the RUC had some regard to Home Office Circular 97/1969 as a yardstick, there was a widespread acknowledgment within government and all of the security forces that the guidance it set out was wholly unsuited to the management of agent handling operations in Northern Ireland. Agents in PIRA and other terrorist groups, particularly those with access to the most valuable intelligence about plans and activities, were inevitably very heavily involved in the commission of very serious criminal offences, not least membership of proscribed organisations. Their use as agents was essential in the fight against terrorism, but it was also incompatible with Home Office Circular 97/1969.
- 11.5 This point was made in the following terms in the De Silva report of 2012:

"It is clear to me that the running of agents in Northern Ireland during the Troubles required these individuals to be heavily involved in activity that could, prima facie, amount to serious criminal acts. It was necessary, for example, for an agent to participate in discussions about individuals that a paramilitary group intended to

¹⁵ Home Office Circular 97/1969, *Informants Who Take Part in Crime*, May 1969:

<https://www.kenova.co.uk/10.%20D13669%20Home%20Office%20Circular%2097%20of%201969.pdf>

¹⁶ *R v Macro* [1969] Crim LR 205.

*murder, in order to gather intelligence through which such attacks could be prevented by the security forces. The active involvement of an agent in giving advice and providing information in such discussions did, on the one hand, have the potential to amount to participation in a conspiracy to murder but, on the other hand, represented in many cases the only possible means by which such conspiracies could be thwarted. No agent could choose to opt out of such discussions without drawing immediate suspicion and thereby exposing themselves to potential interrogation and execution”.*¹⁷

11.6 In lieu of any national legal or policy framework, the Army and MI5 produced their own internal guidance documents which purported to exclude the use of criminal agents while simultaneously contemplating that this might be appropriate:

- Army agents were supposedly recruited, handled and used in accordance with military orders and instructions including 'Instructions for source control and handling in Northern Ireland' issued from 1977 and 'Military Directives' issued from 1981 on the aims, concept of operations and command and control of agent operations, the recruitment and handling of agents and the dissemination of intelligence;
- from at least 1969, MI5 had internal instructions on agent handling which required reference to its Legal Adviser in cases where criminal activity was contemplated or had occurred and this was incorporated into its 'Manual of Investigation' from 1978.

11.7 Indeed, the RUC and MI5 and the Stalker, McLachlan and Stevens 1 reports all called for a proper set of bespoke guidelines for the management and use of agents in Northern Ireland.¹⁸ A retired RUC ACC told my team that he even raised the issue directly with Prime Minister Margaret Thatcher when she visited Northern Ireland. However, these calls were resisted within government during the 1980s until an NIO working group was finally established in 1989 and produced draft guidelines in 1990. These were endorsed by the Secretary of State for Northern Ireland and adopted by the RUC, the JSG (as successor to the FRU) and MI5 in 1992, but they were not more widely approved by the Cabinet or Law Officers.

11.8 Following the production of the Blleloch report later in 1992, an interdepartmental working group chaired by John Chilcot, then NIO Permanent Secretary, was established to review again the need for guidance. This working group recommended the enactment of a statutory framework in mid-1993, but the recommendation was not heeded as attention focused on the ceasefires and peace talks of that era and a hope that the need for agent running operations in Northern Ireland might soon diminish. Indeed, a legislative framework was not forthcoming until the

¹⁷ D De Silva, *The Report of the Patrick Finucane Review*, December 2012, HC-802, paragraph 4.6: <https://www.gov.uk/government/publications/the-report-of-the-patrick-finucane-review>

¹⁸ The Stalker, McLachlan and Stevens1 reports are all classified as 'Secret' or 'Top Secret'.

enactment of RIPA in 2000 which was effectively mandated by decisions of the European Court of Human Rights coupled with the entry into force of the Human Rights Act 1998.

- 11.9 The lack of any legal or policy framework to guide FRU and RUC agent handlers in particular and of any associated oversight or supervisory mechanisms were very serious failings: they put lives at risk, left those on the frontline exposed and fostered a maverick culture where agent handling was sometimes seen as a high-stakes 'dark art' practised 'off the books'. This culture was well captured by the journalist Mark Urban in the title of his Troubles related book 'Big Boys' Rules'¹⁹ and, while it may sound glamorous, and I would not deny the courage and bravery of many of those involved, it was inherently unsafe. To the extent that there were any 'rules', they were formulated informally by those on the ground, apparently without regard for the requirements of the ECHR, the rule of law or Home Office Circular 97/1969.
- 11.10 The lives of agents and those rightly or wrongly suspected of being agents were at constant risk from the counter intelligence activities of PIRA and its ISU. Indeed, the wide pool of people who might be suspected of being agents extended to any member of the republican community who was arrested and then released by the RUC. PIRA routinely interviewed such individuals in order to ascertain whether they had been recruited as or invited to become an agent. It followed that an RUC decision to arrest or release an individual (often taken in complete ignorance of whether they were an actual or suspected agent) could put them at very great risk.
- 11.11 Notwithstanding these risks, the operational priority for the security forces was the continued acquisition of counter terrorist intelligence and this meant the protection of established agents from compromise. If acting on intelligence about a risk to life might bring its source under suspicion or blow their cover, the intelligence would often be withheld or, at least, not acted upon.

12 Northern Ireland legacy processes in place when Kenova was commissioned

Police Service of Northern Ireland (PSNI)

- 12.1 In September 2005, the then CC PSNI Sir Hugh Orde set up the HET to review outstanding cases and provide a report to families. In the 10 years until it was closed down, the HET reviewed 1,615 cases. It had three objectives:
- to work with families of those who had been killed;
 - to ensure that cases were conducted to modern policing standards; and

¹⁹ Mark Urban, *Big Boys' Rules*, 1996.

- to carry out its work in such a way that the wider community had confidence in the outcomes.
- 12.2 In 2013, Her Majesty’s Inspectorate of Constabulary (HMIC) concluded that the HET was not reviewing all cases consistently and that some involving deaths caused by members of the security forces were being “*reviewed with less rigour in some areas*” than cases where there was no such involvement.²⁰
- 12.3 CC PSNI Sir George Hamilton consequently closed the HET and established the PSNI Legacy Investigation Branch (LIB) in January 2015. Its principal function is to investigate Troubles related homicides between 1969 and 2004, it uses a case sequencing model to decide how cases are allocated and it continues to have a significant caseload.
- 12.4 The LIB is made up of four teams which review and, where there is the opportunity to pursue lines of enquiry likely to lead to a prosecution, investigate cases. In response to a 2018 Freedom of Information request asking how many legacy cases the PSNI had open and how many victims these open cases covered, PSNI responded that the former HET and subsequently LIB had a total of 929 cases with 1,184 victims. Understandably, PSNI prioritises its resources to meeting the challenges of the day. As a result, and given its level of staffing, the current CC PSNI Simon Byrne has estimated that it would take around 20 years to finish investigating legacy cases.
- 12.5 As part of my preparation for setting up Kenova I considered the HMIC report and the HET structures. I spoke to those who led the HET and the authors of the HMIC report. Both the HMIC report and the HET’s subsequent closure remain much debated issues. Some commentators claim that political motivation lay behind the negative report on the HET and that it was closed down because it was getting too close to identifying some who committed offences during the Troubles. I have found no substance to these claims. The HET’s operations appeared well-intentioned, but the unit did not receive the support it needed or benefit from the full disclosure that it should have done from other organisations. This applied with respect to both ECHR compliance and when it came to the rigour of its processes for retrieving information. Most worryingly, PSNI was among the organisations not to disclose fully the material it held to the HET.

The Police Ombudsman for Northern Ireland (PONI)

- 12.6 PONI has responsibility for investigating wrongdoing by police officers - including retired police officers - in Northern Ireland. This includes criminal wrongdoing and misconduct. PONI has a branch specifically examining cases that occurred during the Troubles. This unit appears to have an extraordinarily large backlog of cases and is significantly under-resourced. This is not

²⁰ HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, July 2013, p 100:

<https://www.justiceinspectors.gov.uk/hmicfrs/publications/hmic-inspection-of-the-historical-enquiries-team/>

a criticism of the unit or of PONI who face many competing demands. The previous PONI Dr Michael Maguire said in March 2019, *“In 2012 when I was appointed I had circa 170 legacy complaints - the vast majority involving allegations of serious police misconduct or criminality - and less than 40 staff. Today I have over 430 complaints - the vast majority involving allegations of serious police misconduct or criminality - and less than 30 staff”*.²¹ Dr Maguire described having to apologise repeatedly to legacy families for the time it takes to review their cases.

- 12.7 Dr Maguire recommended establishing a single independent body to investigate all legacy cases with adequate funding to provide the skills and resources necessary and a legislative basis allowing it to compel complete disclosure from agencies holding relevant material.

Public Prosecution Service for Northern Ireland (PPSNI)

- 12.8 PPSNI understandably focuses its resources on dealing with present day cases, but is also responsible for taking independent prosecutorial decisions on legacy files. It does not have a sufficiently resourced specialist unit capable of dealing with the high volume of extremely complex legacy casework which it faces. Inevitably, this leads to frustrating delays for victims and their families. When prosecutions do take place in legacy cases, systemic delays mean that administering justice proceeds at a glacial pace which serves neither victims nor their families. It is somewhat ironic that Kenova arose out of requests for information made by DPPNI to CC PSNI under section 35(5) of the Justice (Northern Ireland) Act 2002 and yet the files submitted pursuant to these requests have not been actioned in a timely fashion.
- 12.9 It is significant that no specialist or bespoke legacy division exists as part of PPSNI akin to, for example, the specialist Counter Terrorism Division (CTD) at the England and Wales Crown Prosecution Service (CPS). PPSNI has not had the funding to deliver the legal process to achieve best and timely outcomes for families in Northern Ireland.
- 12.10 At the time of writing, Kenova has submitted 35 files for PPSNI to consider. This amounts to over 50,000 pages of evidential material. These cases involve recurring legacy legal issues and present specific legal challenges that need to be dealt with by legacy subject matter experts. Most of the cases are more than 25 years old, and some almost 50. Among the challenges will be admissibility of evidence and hearsay. Dealing with these cases needs a dedicated expert group of lawyers to give victims, families and the public the assurance they are entitled to that matters are being handled properly and expeditiously. As already mentioned, a number of these files related to Freddie Scappaticci who has now died and the delay in taking prosecution decisions on them means victims and families will never know what their outcome might have been.

²¹ M Maguire, *What Does Independence Mean?*, March 2019:

<https://www.policeombudsman.org/Media-Releases/2019/Dr-Maguire-addresses-Imagine-Belfast-Festival-of-I>

- 12.11 It is easy to criticise prosecutions that do not continue because of defects in the way in which evidence is gathered. However, this is an example of the consequence of failing to invest in legacy at the investigation and prosecutorial level. Crucially, this means more disappointment and trauma for victims and families and it is inherently unfair to those accused in such cases. An example of the excessive timeline for legacy cases is the Soldiers A and C case. Joe McCann was shot on 15th April 1972, the decision to prosecute Soldiers A and C was taken in December 2016 and the case discontinued in May 2021.²² The decision to discontinue the case reflected the court's analysis of the failure of different investigative processes properly to provide for the legal protection of the accused. This excessively long time period is representative of the significant delays in the legacy criminal justice process.
- 12.12 PPSNI informed me that between January 2012 and May 2023 its office took prosecution decisions in 43 legacy cases: 23 related to alleged republican paramilitary activity, decisions were taken to prosecute in nine cases, two of these were ongoing, three had resulted in convictions, two had resulted in acquittals and two had been discontinued; eight related to alleged loyalist paramilitary activity, decisions were taken to prosecute in four cases, two of these were ongoing and two had resulted in convictions; six involved former soldiers, 17 of whom were reported in relation to Bloody Sunday, decisions were taken to prosecute in five cases, one of these was ongoing, one had resulted in conviction, one had resulted in acquittal (Soldiers A and C) and two had been discontinued, in one case because the defendant died; seven involved police officers and none of these resulted in a decision to prosecute. (The grand total is 43, not 44, because the Bloody Sunday file encompassed suspects in the republican and military categories.)
- 12.13 PPSNI would benefit from an improved case management system which includes strict timelines for submitting prosecution and defence cases and ensures associated court compliance. An improved criminal justice system incorporating strict timelines would be to everyone's benefit from victims, families and suspects to the wider criminal justice system itself.
- 12.14 There are significant legal and practical obstacles to bringing cases from so many years ago to the criminal courts today. The possibility of gathering and presenting the best evidence declines significantly over time. Fading memories, ill health or death among witnesses and suspects as well as incomplete records all impact the prospect of worthwhile prosecutions. Admissibility arguments and abuse of process will inevitably play a part in criminal proceedings relating to events from so long ago. It is important that all those with an interest in addressing the legacy of Northern Ireland's past are realistic about the scope for prosecutions.

²² *R v Soldier A and Soldier C* [2021] NICC 3:

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/The%20Queen%20v%20Soldier%20A%20and%20Soldier%20C.pdf>

Coroners Service for Northern Ireland

- 12.15 Legacy inquests come within the jurisdiction of coroners in one of two ways. First, when a death has been reported directly to the Coroner. Second, when a death has been referred to the Coroner by the Attorney General under section 14 of the Coroners Act (Northern Ireland) 1959.
- 12.16 In Northern Ireland, Coroners inquire into deaths which appear to be:
- unexpected or unexplained;
 - a result of violence or misadventure;
 - a result of negligence, misconduct or malpractice on the part of others;
 - from any cause other than natural illness or disease for which the deceased was receiving medical treatment;
 - such as to require investigation by reason of their circumstances.
- 12.17 In February 2016 the then Lord Chief Justice of Northern Ireland Sir Declan Morgan announced that 56 legacy inquests relating to the Troubles could begin in September 2016 and would be completed within five years. A review into the killing of 97 people found that all could proceed to inquest. Sir Declan told journalists, *“If we are given the necessary resources and we obtain the full cooperation of the relevant statutory agencies, I am confident that it should be possible to hear all of the remaining legacy cases within 5 years”*.²³ Sir Declan explained that the Coroners Service was not funded to carry the weight of cases and that a new legacy inquest unit was needed. The lack of political agreement and the later collapse of the Northern Ireland executive delayed the plan, once again disappointing legacy families.
- 12.18 On 28th February 2019, once funding had been made available, Sir Declan Morgan announced another Five Year Plan to address legacy inquests commencing in April 2020. The legacy caseload at that time was 54 cases relating to 95 deaths.
- 12.19 On 20th November 2019, Mrs Justice Keegan as the then Presiding Coroner for Northern Ireland made a statement on legacy inquests setting out Year One of the Lord Chief Justice’s Five Year Plan for legacy inquests.²⁴ In April 2020, the unprecedented situation with the Covid 19 pandemic and the associated containment measures meant more delay to the legacy inquest process.

²³ The Irish News, *Legacy inquests could be completed in five years, says Lord Chief Justice*, 12th February 2016:

<https://www.irishnews.com/news/northernirelandnews/2016/02/12/news/legacy-inquests-could-be-completed-in-five-years-says-lord-chief-justice-416917/>

²⁴ Keegan J, *Statement in Relation to Legacy Inquests*, 20th November 2019:

<https://www.judiciaryni.uk/sites/judiciary/files/media-files/Presiding%20Coroner%27s%20Statement%20in%20relation%20to%20legacy%20inquests%20-%2020%20Nov%202019.pdf>

- 12.20 In January 2021, Mr Justice Huddleston, the new Presiding Coroner, produced a 'Legacy Inquests Case Management Protocol'.²⁵
- 12.21 As I have already touched on, Kenova families have spoken to me of inquests into the deaths of their loved ones taking place without them being made aware the proceedings were even happening. As a general routine in Troubles related cases, the presiding Coroner would open the inquest with limited information available and an open verdict would be the typical outcome, notwithstanding that the deaths were caused by terrorists or, in a minority of cases, the security forces.
- 12.22 It is important to note that in a number of inquests involving Kenova cases, the RUC stated during proceedings that the victims had not, prior to their deaths, assisted the security forces. Making a public statement that the deceased was not an agent represented a departure from the usual NCND line, but was often done without the officer involved knowing whether the victim had or had not been an agent. I address the NCND policy in Part D of this report.
- 12.23 Following a request from the Attorney General of Northern Ireland, who was acting in response to an application made by the victims' families, Mrs Justice Keegan presided over the inquests into the killings in Ballymurphy between 9th and 11th August 1971. She delivered her findings on 11th May 2021. The events the inquests examined happened at an early stage during the Troubles and this demonstrated that, properly configured, such inquests can provide families with answers about what happened to their loved ones even so long after the event. The Coroner's findings were clear: the victims had been entirely innocent of any wrongdoing. She explained that in a historical inquest not all evidence would be available and not every question would be answerable, but that there could be an effective and proportionate investigation if everyone involved accepted that impediments could arise and perfection would be hard to achieve.²⁶

13 Government legacy policies and proposals during the lifespan of Kenova

- 13.1 Over recent years there have been several different proposals for dealing with legacy and giving families the information they so desperately want and deserve. I outline briefly below the policies and proposals since 2014. This period (2014-2023) covers the time since we set up Kenova and the changing government approach to legacy that victims and families have had to deal with. Many of these strategies claim to put victims and families at their heart but too often that has not been borne out.

²⁵ Huddleston J, *Legacy Inquests Case Management Protocol*, January 2021:

https://www.judiciaryni.uk/sites/judiciary/files/media-files/Legacy%20Inquests%20-%20Case%20Management%20Protocol_0.pdf

²⁶ Keegan J, *In the matter of a series of deaths that occurred in August 1971 at Ballymurphy, West Belfast* [2021] NICoroner 6:

<https://www.judiciaryni.uk/judicial-decisions/2021-nicoroner-6>

- 13.2 The Stormont House Agreement (SHA) was published on 23rd December 2014 when Theresa Villiers was Secretary of State for Northern Ireland.²⁷ It followed many weeks of talks between the five main political parties in Northern Ireland and the United Kingdom and Irish governments. It described a new way of dealing with what happened during the conflict, putting the needs of victims and survivors first. As part of the SHA there were to be four new legacy institutions:
- a Historical Investigations Unit (HIU), an independent unit to investigate conflict related deaths;
 - an Independent Commission on Information Retrieval (ICIR) which would enable family members to seek and receive privately information about conflict related deaths of their relatives;
 - an Oral History Archive (OHA) which would collect recorded memories and stories about the conflict in one place;
 - an Implementation and Reconciliation Group (IRG) which would include representatives of the United Kingdom and Irish governments and the five main political parties in Northern Ireland and work to promote reconciliation and anti-sectarianism.
- 13.3 The majority of Northern Ireland political parties, apart from the Ulster Unionist Party, supported the SHA. First Minister Peter Robinson described the Agreement as a “*monumental step forward*”²⁸ and Deputy First Minister Martin McGuinness called it a “*remarkable achievement*” and a “*fresh start we need to seize with both hands*”.²⁹
- 13.4 Theresa Villiers said, “*the Stormont House Agreement represents a genuine and significant step forward for Northern Ireland*”.³⁰
- 13.5 The late James Brokenshire succeeded Theresa Villiers in July 2016. In turn Karen Bradley succeeded him in January 2018.
- 13.6 A public consultation ran from May to October 2018 to examine the legacy institutions proposed in the SHA. The NIO received over 17,000 written responses. I responded on behalf of Kenova, setting out what we had learned at that stage. I made clear that, given the passage of time, the likelihood of a successful criminal justice outcome for many legacy cases would be limited, however, “*the circumstances of how a person died and the events around that death can be pieced together when the security forces and those in the community who have information*

²⁷ *The Stormont House Agreement*, December 2014:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf

²⁸ *Hansard HC*, 7th January 2017, Vol 590, Col 297.

²⁹ *Ibid.*

³⁰ *Ibid.*

disclose what they know. This may or may not achieve a prosecution, but will almost certainly allow the families to finally be told ‘how’ and ‘why’ their loved ones were killed” (Appendix 8).

- 13.7 In July 2019, the NIO published an analysis of the consultation responses.³¹ It included a statement from the Secretary of State that, *“the government remains fully committed to the implementation of the Stormont House Agreement and it is essential that our work continues”*. Later in July 2019 Julian Smith succeeded Karen Bradley.
- 13.8 On 22nd July 2019, the House of Commons Defence Committee produced a report ‘Drawing a Line: Protecting Veterans by a Statute of Limitations’ proposing a ‘Qualified Statute of Limitations’ for armed service veterans.³²
- 13.9 The Conservative Party Manifesto 2019 included a commitment to, *“provide better outcomes for victims and survivors and do more to give veterans the protections they deserve”*.³³
- 13.10 In January 2020 the government published, *New Decade, New Approach* as a basis for restoring the Northern Ireland executive.³⁴ This document included a commitment to, *“within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues”*.³⁵
- 13.11 In February 2020 Brandon Lewis succeeded Julian Smith as Secretary of State for Northern Ireland.
- 13.12 On 18th March 2020, after announcing legislation to provide protection to service personnel and veterans who serve in armed conflict overseas, the Secretary of State for Northern Ireland laid a Written Ministerial Statement before the House of Commons.³⁶ This made clear the government’s view that, *“while the principles underpinning the draft Bill [Stormont House Agreement] as consulted on in 2018 remain, significant changes will be needed to obtain consensus for the implementation of any legislation”*. It proposed one independent body to oversee the information recovery and investigative aspects of legacy providing every family with a report with information concerning the death of their loved one. The statement included

³¹ NIO, *Addressing the Legacy of Northern Ireland’s Past: Analysis of the Consultation Responses*, July 2019:

<https://www.gov.uk/government/news/government-publishes-summary-of-responses-to-legacy-consultation>

³² House of Commons Defence Committee, *Drawing a line: Protecting veterans by a Statute of Limitations*, Seventeenth Report of Session 2017-19, HC 1224, July 2019:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/1224/1224.pdf>

³³ *Conservative Party Manifesto 2019*, p 45:

<https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>

³⁴ HMG, *New Decade, New Approach*, January 2020:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

³⁵ *Ibid.*, paragraph 16.

³⁶ NIO, *Addressing Northern Ireland Legacy Issues*, 18th March 2020:

<https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues>

the government's undertaking that, *"the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past"*.

13.13 In July 2021, the Secretary of State for Northern Ireland published a Command Paper setting out the government's latest proposals for dealing with the legacy of the past:

"• Establish a new independent body to enable individuals and family members to seek and receive information about Troubles-related deaths and injuries.

• Establish a major oral history initiative.

• Introduce a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to the divisive cycle of criminal investigations and prosecutions, which is not working for anyone and has kept Northern Ireland hamstrung by its past".³⁷

13.14 The proposal to introduce a statute of limitations has caused a great deal of concern to victim groups and political parties in Northern Ireland. The government undertook to consult on and produce a draft Legacy Bill. The Secretary of State initially promised that a draft Bill would be published in autumn 2021. This then moved to later in 2021.

13.15 On 17th May 2022, the government published the Northern Ireland Troubles (Legacy and Reconciliation) Bill.³⁸ The Bill covered Troubles related incidents which occurred in Northern Ireland, Great Britain and elsewhere between 1st January 1966 and 10th April 1998 and moved the focus away from police investigations and court cases and towards measures intended to lead to information recovery and reconciliation. The Bill proposed to:

- establish a new Independent Commission for Reconciliation and Information Recovery (ICRIR) responsible for reviewing, not investigating, deaths and other harmful conduct forming part of the Troubles;
- create a conditional immunity scheme giving ICRIR power to grant immunity for Troubles related offences;
- allow existing civil claims introduced before the day of the Bill's introduction to continue while barring new cases from that point onwards;
- bring to an end inquests that had not reached an advanced stage and prevent requests for future inquests;

³⁷ NIO, *Addressing the Legacy of Northern Ireland's Past*, CP 498, July 2021, paragraph 6:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002140/CP_498_Addressin_g_the_Legacy_of_Northern_Ireland_s_Past.pdf

³⁸ Northern Ireland Troubles (Legacy and Reconciliation) Bill, Bill 10, 58/3, 17th May 2022:

<https://publications.parliament.uk/pa/bills/cbill/58-03/0010/220010.pdf>

- cease any ongoing criminal investigations into Troubles related matters;
 - initiate a programme to memorialise the Troubles including an Oral History Archive.
- 13.16 Many legacy commentators believe the Bill failed to consider the rights of victims and survivors. The Irish government, political parties and legacy groups in Northern Ireland spoke out against it as did opposition parties in Westminster. The government was taking a unilateral approach to resolving legacy and moving away from the SHA.
- 13.17 Shailesh Vara was appointed Secretary of State for Northern Ireland on 7th July 2022 and succeeded by Chris Heaton-Harris on 6th September 2022.
- 13.18 Prior to the introduction of the above Bill, the significant delays and changes in the government's approach to legacy caused frustration and significant loss of confidence among victims and families. Many believe it to be a deliberate strategy of 'kicking the can down the road' in the hope that victims will give up their battle to obtain information and the truth of what happened to their loved ones. These families will not give up.
- 13.19 In the brief period since the SHA was agreed and the even shorter time since we began Kenova there have been seven Secretaries of State for Northern Ireland. Each one has inevitably had their own ideas about how to deal with legacy and with each change in direction, victims and families were left more frustrated with the government's apparent inability to address the issues.
- 13.20 I welcome the government's recent focus on legacy and recognise the various and diverse opinions that it generates. I am reminded of the late Sir John Chilcot's wise advice to me when I first undertook to lead this independent investigation. He reminded me of the straightforward responsibility I had which boiled down to investigating the Kenova cases as thoroughly as possible and not being influenced or affected by political views.
- 13.21 I understand the sensitivities and the varied views that different Secretaries of State and governments have had about legacy, but we need a non-partisan approach. The best platform for a process that provides safeguards for government, the security forces, paramilitary groups and most importantly for victims and their families is a framework underpinned by the pillars of the ECHR. A legacy response should be unbiased if it is to withstand legal challenges and achieve broad consensus. There will always be some who do not support any legacy model, especially those with hard-line views, but taking account of the extreme history of the Troubles, the Kenova experience shows that broad consensus is possible.
- 13.22 The various and ever-changing strategies are confusing. Kenova has shown that it is possible to investigate legacy cases independently, effectively, promptly from the time of being commissioned and providing the next of kin and families with updates. We have shown that it is safe to share sensitive information with a single independent body and for that body to provide information to families that does not compromise national security, put anyone at risk or negatively impact the recruitment of agents.

Recommendation

Establish, on a statutory basis and with express statutory powers and duties, an independent framework and apparatus for investigating Northern Ireland legacy cases.

Part C: Management and operation

Section 1: Internal organisation, governance, compliance and accountability

14 Set up and strategic approach

- 14.1 In this section I describe the investigative model I designed to deliver against the Kenova ToR. I had not originally intended to detail my strategy or how we planned and set up Kenova. However, it has become apparent that in addressing sensitive and complex crimes where the state is alleged to be involved, the apparatus created to deal with these cases is vital to the independence and the success of and confidence in the process.
- 14.2 Northern Ireland legacy investigations attract intense scrutiny at all levels, especially politically and from interested parties often allied to the groups involved in the conflict. Motivated by self-interest, these parties constantly scrutinise such investigations. They do so primarily to find fault, especially if they suspect the approach is likely to result in criticisms of their 'side'. I know of such parties interfering significantly to pervert witnesses' accounts. You would normally expect this type of interference and witness intimidation in gang related crimes. It is entirely different for politically affiliated groups and those in power to be involved in this sort of activity. We must challenge any interventions that undermine an investigation and interfere with its effectiveness. There is also media scrutiny, with a constant flow of mainstream and social media stories about Troubles related cases that are often inaccurate and take no account of their impact on the victims and families involved.
- 14.3 I had not anticipated the level of misinformation that I would need to deal with in terms of, first, inaccurate stories about our strategic commissioning and approach and, second, incredibly damaging false information passed to victims and their families by people claiming to be well-informed.
- 14.4 There are many who are fully equipped, accredited and experienced to investigate very serious crime, but investigating legacy cases requires more than good investigative skills. It calls, in addition, for effective strategic planning and a great deal of stakeholder engagement. To protect the investigation's integrity and reputation and to ensure confidence among victims takes a broad and inclusive strategic approach. When it comes to legacy cases, there are high levels of suspicion towards the authorities because for decades they, and their legal representatives, resisted giving any information to families.
- 14.5 As a British police officer, with a career investigating organised crime and terrorism, working closely alongside the security and intelligence services, I recognised that some families and

organisations would view me with suspicion. When I met them, some shouted in pent up anger and frustration about the lack of honesty and authenticity around legacy investigations. I also knew that some of the families were aware of the alleged agent Stakeknife, and members of PIRA who may have been involved in the crimes against their loved ones. They had lobbied, unsuccessfully, for years for an independent investigation into what happened.

- 14.6 Certain families judged that Kenova would be nothing more than a puppet of the British establishment and would not investigate their cases properly. They had a perception that Whitehall would be discreetly controlling the approach any British police officers would take and that there would be inevitable bias towards protecting the security forces' reputation.
- 14.7 In the first section of Part C, I set out the principles and structures I put in place to deliver the Kenova investigative ToR and, importantly, address impartiality and independence which are requirements of both the ECHR and families.
- 14.8 In the second section, I explain what I have done to protect the investigation's integrity and independence, engaging with individuals and groups at every level, including some who were simultaneously lobbying to try to stop or interfere with the effectiveness of the investigation.
- 14.9 In the third section, I describe certain challenges and distractions that come from addressing high profile investigations where the authorities are an interested party or affiliated to those being investigated.
- 14.10 I also address On the Run (OTR) Letters and the Royal Prerogative of Mercy (RPM). Legacy stakeholders often challenge me about the limiting effect these have on criminal proceedings. Many view them, incorrectly, as protecting terrorists from investigation and prosecution.

15 Formulating the Operation Kenova Terms of Reference: a lesson learned

- 15.1 When I co-authored the Kenova Terms of Reference with the PSNI, I believed I had been suitably inclusive and taken proper account of ECHR requirements. When we announced Kenova publicly, however, I received legitimate feedback from families and their solicitors that the process had not been sufficiently inclusive as they had not been consulted.
- 15.2 At the time, I did not fully understand the level of scepticism and mistrust that existed from certain quarters when it came to any investigation associated with PSNI or some of those associated with the conflict. The families concerned, and their legal representatives, correctly highlighted that outside the security forces and PPSNI, I had not consulted about the upcoming investigation nor had I sought their input when drafting the ToR.
- 15.3 When writing the original Kenova ToR, I had focused on agreement with PSNI. I soon recognised the need for a much broader and more inclusive conversation with families and their representatives to ensure the ToR satisfied everyone's requirements in seeking the truth of what happened.

- 15.4 Many saw my sharing the Kenova ToR with families, their solicitors and posting them on the newly launched Kenova website as a new and welcome demonstration of the openness and transparency with which I planned to carry out my investigations. It went some way to persuading families that Kenova was authentic and independent.
- 15.5 At the time we drafted the initial Kenova ToR with the PSNI, I had a limited network of legacy stakeholders. I realised that the various divergent stakeholders who approached legacy from different perspectives might be adversarial towards my investigation rather than cooperative and supportive. It was also apparent at this early stage that there remained some in the security forces who continued to advocate secrecy and non-disclosure when it came to legacy. This attitude replicated a culture of non-disclosure that has endured since the conflict. These prevailing attitudes are not surprising considering the views of many security force veterans that the historical narrative around the Troubles is now being distorted.
- 15.6 For some victims and families, PSNI is affiliated with the RUC which was one of the key organisations involved in the conflict. Even today, a number of families and stakeholders view PSNI with great suspicion, notwithstanding the immense sacrifice and honourable service of the vast majority of its officers. I had not appreciated this continuing sense of mistrust when writing the Kenova ToR.
- 15.7 It is apparent that across the security forces community some still do not support disclosing information or indeed pursuing legacy cases where there is an allegation of state involvement. CC PSNI at the time did not share this view. Sir George Hamilton deserves great credit for his decision to comply with the section 35(5) directions in a way he believed would best meet the needs of families. I should also recognise the support I have received from Sir George's successor, Simon Byrne, and the past and present DPPNIs, Barra McGrory KC and Stephen Herron.
- 15.8 Notwithstanding CC Hamilton's leadership, some were nervous about my appointment and approach. I made early decisions to establish an independent governance group including impressive and challenging individuals, set up the www.kenova.co.uk website and published the ToR in order to set a tone of impartiality for the investigations.
- 15.9 The initial feedback to the launch of Kenova convinced me that I needed to ensure that families and their representatives found the ToR acceptable. Securing cooperation and support from families for any ToR is critical for future inquiries. This was an important lesson learned. From that moment, I ensured that the Kenova ToR were shared and discussed with families and their representatives and I sought their retrospective support and agreement.
- 15.10 The NPCC Homicide Working Group's Kenova review dated January 2021 highlighted the process of engaging with victim and family representatives when agreeing ToR as good practice for independent investigations (Appendix 9).

- 15.11 We shared draft versions of the ToR for Operations Mizzenmast, Turma and Denton with victims, families and their representatives for consultation before finalising them.

16 Principles, structure and a victim focused approach

- 16.1 The then CC PSNI Sir George Hamilton first approached me on 21st January 2016 to request that I consider leading an independent investigation into an alleged agent known as Stakeknife. As CC Bedfordshire Police at the time, I explained that in order to take on what would be an extremely complex investigation I would need my Police and Crime Commissioner (PCC) to agree and be satisfied that doing so would not be detrimental to leading Bedfordshire Police. I consulted a number of key stakeholders with knowledge of legacy investigations to better understand the complexities of legacy and to research how best to carry out such an investigation.
- 16.2 It surprised me that senior police colleagues and those from the legal community from whom I sought advice, with one exception, advised me not to lead the investigation. It is well-known in policing and beyond that investigating legacy cases in Northern Ireland brings huge challenges. One retired Chief Constable strongly advised me not to lead the inquiry because of its complexity and volume. It would likely take many years and I would encounter continuous obstacles, potential political interference and what he described as inevitable lobbying against me and the investigation by those affiliated to the groups involved in the Troubles. Those I expected to support me leading such an investigation sought to persuade me not to do so. The pessimism I encountered and the overwhelming message that such an investigation would be impossible disappointed me greatly. Most importantly, the reaction highlighted just how enormous the challenge is for families to get to the truth and it was this that persuaded me I had to do it. If those in senior policing positions, who are expected to lead and resolve these issues were so negative, how incredibly challenging it must be for families to get meaningful investigations which produce the outcomes they deserve and to which they are entitled.
- 16.3 Lord Stevens was the only supportive voice. He recommended that I lead the investigation but warned me about the likely challenges and threats to its success.
- 16.4 Many legacy families have not had a thorough and independent investigation into what happened to their loved ones. There should be no hierarchy of victims governing which families do and do not receive a thorough and meaningful investigation. It was immediately clear that whatever investigative structure I created, it had to be scalable and transferable. I needed a set of key principles to provide the foundation for the Kenova investigative approach. These principles are:
- An unwavering focus towards victims and their families.
 - Unfettered access to information.

- Transparency and openness.
 - An unbiased and fair approach to everyone.
- 16.5 Having secured the PCC's agreement, I informed CC Hamilton that I would take on this investigation subject to agreeing ToR. We agreed that I would update him regularly on progress, but that he would not seek to direct or control or in any way interfere with the investigation. CC PSNI remains accountable to NIPB for the conduct of Kenova and I agreed to accompany its senior personnel to brief the Board as required.
- 16.6 I took responsibility for delivering final reports to CC PSNI and DPPNI. PSNI is responsible for the financial support for all elements of the investigation and CC PSNI reserves the right to keep all costs under review and agree to reasonable financial parameters for the discharge of the investigation.
- 16.7 Bedfordshire Police entered into a 'lead force arrangement' with PSNI under section 98 of the Police Act 1996 to provide functions such as recruitment, financial management, procurement, media and communications support. This ensured operational independence from PSNI of both the Kenova business and investigative functions. This is vital to an article 2 compliant investigation.
- 16.8 We agreed that the investigation would be based in London for operational security reasons and because many of the agencies we needed to engage with are based in London. It would also help me recruit independent staff unconnected with Northern Ireland and the Troubles.
- 16.9 I sought out those who had led previous legacy inquiries, to learn from them what worked well, and what challenges they had faced. I wanted to understand what had undermined their work or prevented it from succeeding and I have continued to consult notable legacy investigation leaders since we set up Kenova. Their experiences have helped me guard against the obstacles that have hampered success in previous legacy cases. My vision was to build an investigation structure adopting the best processes and practices from previous legacy investigations, staffed by highly motivated and qualified detectives and intelligence experts. We sought to recruit the highest quality of experts available with experience tackling complex terrorism and organised crime investigations and I believe we succeeded in doing so.
- 16.10 On 10th June 2016, CC Hamilton held a press conference to announce Kenova and my role at its head. At that press conference, I made clear that families would be at the centre of the investigation. I also asked them to be patient and allow me to put in place the investigative principles and structures that I had identified as being critical to its success.
- 16.11 As I mentioned previously, when I took on the role there was no pre-existing template or framework for setting up and running an independent legacy criminal investigation. I did not have any staff - other than a Senior Investigating Officer (SIO) released to me by the then MPS Commissioner Sir Bernard Hogan-Howe - or premises or equipment. There was, therefore, considerable work to do to establish the infrastructure for the Kenova model.

- 16.12 The strategic requirement for setting up an investigation to examine complex and challenging historical events was considerable. I anticipated it would take several years to complete the investigation and the structures would have to be able to handle material that was highly classified. This was also a time when HMIC (now HMICFRS) and senior police officers first acknowledged that there is a national shortage of detectives and investigators as well as an increasing number of historic inquiries into malpractice and investigative failings. Furthermore, the office space on the police estate, particularly in London, was very hard to find.
- 16.13 In July 2016, I addressed fellow Chief Constables (for England, Wales and Scotland) at Merton College, Oxford University to brief them on Kenova and ask for their assistance to recruit an investigation team. At that meeting, South Yorkshire Police and the NCA were requesting staff to assist an inquiry into child sexual exploitation. I acknowledge my colleagues' support, against this challenging backdrop, in releasing staff and in particular the National Counter Terrorism Policing Headquarters (NCTPHQ) for their support in providing staff, accommodation, IT equipment and wider support for Kenova.
- 16.14 My overarching strategy for Kenova is: *To provide effective, efficient and independent investigations that are article 2 compliant. Kenova will apply transparency wherever possible with a focus upon, and due consideration towards, the victims of the offences being investigated and their families. The investigation applies an equal and fair approach towards all those who are engaged, treating everyone with courtesy and respect.*
- 16.15 My vision for Kenova is: *To be trusted by victims and families. To establish the truth of what happened. To gain the confidence of the communities and stakeholders. To be unwavering in the search for the truth with each agency, department, political party, other organisation, group or individual who might seek to prevent it from being established.*
- 16.16 These statements remain as relevant today as when I drafted them in July 2016 and they have guided all our work. I made clear from the start that victims and families would be at the heart of the investigation since they feel strongly that the authorities have failed them.
- 16.17 My message to them was simple: we care and we are determined to do everything we can to discover the truth; we will meet and engage with you personally as long as the investigation lasts. My philosophy for Kenova is that families will be told the information we discover. The only caveat to this being that I will not disclose information that places a person's life at risk, this could include identifying agents, or disclose sensitive methodology or covert tactics where to do so would impact negatively on those fighting organised crime and terrorism today.
- 16.18 By way of clarification, I anticipated that where an agent was involved in serious criminal offences, possibly including murder, and the state knew or should have known this, a criminal prosecution would likely result in the formal disclosure of the agent's status. Applying NCND should not prevent the identification and prosecution of those who commit murder and other serious offences.

- 16.19 It is important to understand what many families previously encountered with the authorities. Often they had no contact with the police after the murder of a loved one. In many cases, families were not even made aware that an inquest into the death was due, or had been held. As a result, what they 'know' about how their loved one's death has often been based on media reports and second or third hand information passed to them by friends, neighbours or others. This has affected both nationalist and unionist communities as well as members of the security forces and is something that those bereaved by homicide in other parts of the United Kingdom rarely encounter. This understandably contributes to families from all sections of the community mistrusting the authorities. The authorities have a legal and moral responsibility to investigate such crimes and, where possible, bring offenders to justice. The Kenova investigations have shown that for a variety of reasons many cases were not investigated properly. I explain the reasons for this elsewhere in this report, but in summary it is because the security forces were dealing with an unprecedented volume of murders and terrorist acts and operating in a uniquely hostile and dangerous environment.
- 16.20 There were prosecutions and convictions during the conflict. However, I have examined many cases where the security forces did not pass the entirety of what they knew on to investigators or prosecutors.
- 16.21 Notwithstanding some successful prosecutions, there were also cases where known suspects were not arrested and no explanation exists as to why. It is clear that the violence perpetrated by paramilitary organisations was so extensive and ruthless that it was often beyond the security forces' capabilities to deal with it. Families inevitably draw conclusions of conspiracy, bias or protectionism when there are obvious lines of enquiry to pursue but no one pursues them, even though these conclusions might not be correct.
- 16.22 In a non-Kenova case, a retired senior police officer told me about a family that believed their loved one had been targeted and killed because of his links to the security forces. The officer said the victim had been mistaken for someone else and not killed for the reasons his family believed. He suggested that it would not help the family to know the truth. This culture, which evolved into a de facto policy of non-disclosure, leads to inevitable claims that the security forces are not revealing the truth to cover up their own wrongdoing. On occasions this may be the case, however, on other occasions it may not be. The disclosure to families should be the same in Northern Ireland legacy related cases as it is with any other criminal case in the United Kingdom. The culture of secrecy continues to threaten reconciliation.
- 16.23 The security forces sometimes knew serious offences were taking place, including murder and torture, but to protect their sources they did not always pass on or act on this intelligence to the detriment of the rule of law. In many cases, the perpetrator reoffended and the organisation handling the agent concerned continued to protect them despite the agent's repeated involvement in serious criminal offences.

- 16.24 Set against this history, the Kenova Family Liaison Coordinators (FLCs) have been central to securing the trust and confidence of families. They are responsible to me and the SIOs developing our family liaison strategy and coordinating the work of our Family Liaison Officers (FLOs) (Appendix 10). The FLOs follow College of Policing accredited national guidance, and given the scale and complexity of this investigation, we have provided them with additional bespoke training relevant to Kenova.
- 16.25 Personal contact with families is essential to give them the support, understanding and information they deserve as well as assisting the team with our investigation. I make personal contact with victims' families at the start of each investigation in a direct attempt to counter past failures to engage with them and the resulting lack of trust. I seek to reassure families that Kenova is independent, to listen to any concerns they have and to better understand their experiences. I also make it clear that we seek positive relationships and regular contact and will give them a voice through the course of our work. Families have direct access to me, SIOs, FLCs and FLOs. My team and I also have regular contact with solicitors, NGOs and support groups representing families to ensure we identify and address any issues or concerns.
- 16.26 The FLCs and FLOs update the families on progress on a regular basis. This is typically monthly at first, then quarterly or when there is a significant development to share with them. We have found that, once we build trust and confidence with the families and those connected to them, many have felt able to provide new and significant evidence that was not made available to previous investigations. This has proved to be critical for the team in piecing together what happened.
- 16.27 In my written submission to NIAC in June 2020 (Appendix 11) (which I address elsewhere in this report) my concluding comments were about the Kenova families. These comments best describe my experience and what I have learned working with them:

"In my near 40 years of police service they stand out as the bravest, most humble, gracious, resilient, deserving and wronged group of victims I have met. The Troubles are often described as the Dirty War because of the actions not only of those who committed and encouraged such awful crimes, but also, sadly, the actions of those who attempted to stop them. All of those involved should be subjected to independent and proper examination of what happened so that families on all sides can know what truth might still be capable of being found. In some cases that truth will no longer be available, but Operation Kenova has shown that in other cases it is. I have spent considerable time with Operation Kenova families. For most, the tragic events of the Troubles feel as if they occurred only yesterday, notwithstanding the time that has passed. They legally and morally deserve to know the truth of what happened and if this is denied them, the next generation will carry on their fight and the wounds will never heal and the legacy of the past will continue to cast dark shadows over Northern Ireland".

- 16.28 We have been able to build this trust because the investigation is authentic and robust. We take an uncompromising approach to recovering records, accessing information and seeking the truth from all parties proactively. Legacy families have been repeatedly promised access to the truth since the GFA. They have seen every shape and size of legacy structure and know better than anyone whether an investigation is genuine, robust and committed to finding the truth. Finding the truth is the key to the trust and confidence we enjoy.
- 16.29 Most Kenova families do not support criminal prosecutions. They have varied and complex reasons for this and there is a spectrum of opinion even within a single family. Most relatives have told me they want to know the truth of what happened. They want to know the 'how' and the 'why'. Families have told me repeatedly that they want quietly to rebuild their lives and the media coverage and unwanted attention a prosecution would bring would make that very difficult. Their views should be taken into consideration when deciding whether or not a prosecution is in the public interest.
- 16.30 Since I started investigating the Kenova suite of cases I have got to know a huge number of families and the particular sadness that their individual loss has brought. In many cases, the state's failure to give them information has meant they have had to fight for the truth themselves. Many families have tried to conduct investigations themselves in the absence of the authorities doing so. This has been an unnecessary and unfair burden on them and has undoubtedly, over many years, compounded their grief and trauma. The very nature of the Troubles resulted in victims across communities suffering intimidation and even physical risks if they complained within their communities or actively sought police investigations. The lack of a trusted investigative structure for legacy cases remains an unacceptable failing by the state since the GFA.

17 Staffing

- 17.1 When beginning Kenova, I expected I would need between 50 and 70 staff to conduct the investigation effectively and in reasonable time. I initially approached the Director General of the NCA who agreed in principle that staff could be recruited via the NCA on a cost recovery basis. Ultimately, I used Bedfordshire Police to do this, as part of their lead force role. I am grateful to the NCA for its early support in making office space available to host my team.
- 17.2 As I mentioned previously, I briefed Chief Constables about Kenova in July 2016 and asked them for their support, including by advertising for Kenova staff in their forces. I made it clear that in resourcing my investigation I planned to recruit officers close to retirement who would be leaving their forces in the near future in any event. Senior colleagues were concerned about losing experienced investigators. At that time, the MPS estimated it was approximately 800 detectives short of what it needed for protecting London.

- 17.3 I decided that I would recruit no former members of the RUC, PSNI, MOD or the security forces. This was not a reflection on those organisations, rather it was to demonstrate Kenova's absolute independence and authenticity and to avoid any concerns about bias or conflict of interest.
- 17.4 The initial recruitment process, obtaining secure accommodation and IT infrastructure was an immensely frustrating period, but I managed to recruit sufficient qualified and vetted staff from serving and retired police officers. I should emphasise, for any independent inquiries in the future, that they should not underestimate the challenge of persuading police forces to release staff for an inquiry relating to another force area, albeit a counter terrorism inquiry investigating the murders of a large number of people.
- 17.5 Stakeholders say that there are not sufficient appropriately trained and skilled staff available to resource a large legacy capability. I am strongly of the view that, given sufficient lead in time, there are processes through which we can undertake the necessary recruitment successfully. Securing a suitable base for the investigation team is key to facilitating this and ensuring as wide a catchment area as possible from which to recruit staff. This strongly influenced my decision to base Kenova in London because of its excellent transport links.

18 Forensics

- 18.1 Access to the most up to date forensic techniques in modern policing is a huge advantage when investigating legacy cases. These cases are, for the most part, incredibly challenging to investigate because of the time that has passed since the events took place.
- 18.2 We have applied modern forensic techniques which were not available to previous investigations. In some cases, families have given us items relevant to Kenova cases they had not previously shared with the authorities. Using modern day forensic techniques on these items has allowed us to recover DNA evidence identifying suspects connected to murders and other serious offences. We have also obtained compelling new DNA evidence from exhibits seized from crime scenes at the time, identifying those responsible for serious offences. Many families had not realised that items they possessed, such as letters and tapes purporting to be victims' confessions, could be such rich sources of evidence. There is a clear link between families trusting Kenova and their willingness to provide items they had not given to the authorities previously. This has been vital to our success so far.
- 18.3 Recovering and examining exhibits from many years ago presents particular challenges, be that locating them, ensuring continuity of the chain of custody or deciding on the most appropriate way to examine them. In light of these challenges, I appointed a senior forensic expert to ensure we exploit every possible opportunity using today's scientific advances. He has written and developed the Kenova Forensic Strategy (Appendix 12), is a senior member of the Kenova Management Team, attends Kenova Executive Group (KEG) meetings and leads the Kenova Forensic Team (KFT) and Specialist Investigation Forensic Team (SIFT).

- 18.4 Nominated investigators responsible for managing forensics and exhibits across all Kenova investigations make up the KFT. They support the Forensic Coordinator in critical areas such as discovery, exhibit handling and recovery and continuity.
- 18.5 The SIFT is a dedicated forensic team for Kenova within the MPS Forensic Command. Staff from the MPS, Eurofins scientific test laboratories and a forensic pathologist make up the team alongside representatives from Forensic Science Northern Ireland (FSNI) and the Scottish Police Authority Forensic Services. With this structure we ensure a consistent approach to all aspects of our forensic work. I decided that we would not use FSNI to analyse any significant Kenova exhibits even though they are independent of PSNI. This is not a reflection on FSNI, rather it is intended to bolster our independence and article 2 compliance. Because of the volume of forensic evidence we have to deal with, we have used FSNI to process uncontroversial biometric material. However, we use independent laboratories to process any potentially controversial material, including all interpretive forensic procedures.
- 18.6 We review each case at the start. This includes securing case files, documentation, exhibits and 'derived materials' harvested from an item during a forensic examination. Our forensic personnel examine the relevant materials. When doing so, they follow all appropriate personal protection procedures to ensure the integrity of everything they handle and to avoid any possible degradation of exhibits or other materials.
- 18.7 Kenova staff carry out and coordinate all crime scene re-examinations. However, where we need security support, for example, if re-examination could cause disruption in the local area, we necessarily use PSNI assets.
- 18.8 We consider all forensic submissions carefully to maximise the forensic information we can extract from them while ensuring each submission is cost effective. We explore new and previously untried areas of forensic examination, including new recovery methods for fingerprints and DNA, while considering carefully the nature of the offence under investigation and the condition of each exhibit.
- 18.9 I am very grateful to the MPS Forensic Science Service for hosting the Kenova forensic capability. This has allowed us to use existing forensic capabilities and has considerably reduced costs. The full January 2021 NPCC Homicide Working Group review referred to below commented that, "*the value for money of the forensic approach appears to be exceptional with the costs far below those of comparable, conventional homicide cases*".
- 18.10 The evidence we have gathered from forensic examination in Kenova cases has far exceeded my expectations.

19 Continuous Professional Development

- 19.1 I was determined that all Kenova staff should have a very good knowledge of the Troubles, the political landscape of Northern Ireland and the challenges victims and families continue to face. I therefore ensure that all new staff attend an induction day which is supplemented with regular continuous professional development (CPD) days. I am grateful to those who have given their time to speak at these events, including victims and families, victim advocacy groups, members of the security forces (serving and retired), College of Policing staff, subject matter experts on the Troubles and those who have previously investigated legacy cases, for example, Baroness O'Loan and Lord Stevens.
- 19.2 Through liaison with the College of Policing, I also ensure that staff, including those who have retired, are up to date with the latest training in areas such as investigations, intelligence and family liaison. Having properly trained and accredited staff is vital to reassure families that the very best investigators, researchers and intelligence officer are looking into their cases.

20 Governance

- 20.1 Although CC PSNI remains accountable to NIPB for the delivery of Kenova, the investigation is independent of PSNI. Direction and control of the investigation rest with me. I provide quarterly updates to CC PSNI and attend NIPB meetings when requested, but all decisions regarding how the investigation is managed are my responsibility.
- 20.2 Notwithstanding the above, I was concerned at an absence in legacy investigations of meaningful independent scrutiny. To provide families with the reassurance they legally deserve for article 2 compliance, I set up a number of groups to provide governance and challenge across the Operation Kenova investigative model. It is important to note that none of these groups is required by law or police regulations. For transparency, I announced their establishment, membership and ToR on the Operation Kenova website. The groups are made up of people of international standing with huge experience in their respective fields. All members generously give their time for no payment other than the reimbursement of necessary expenses. I am enormously grateful for their support and wise counsel.

Independent Steering Group (ISG)

- 20.3 The ISG provides support to the investigation through oversight, advice and challenge. It consists of internationally renowned senior policing leaders including the first PONI. The ISG is provided with investigative material but is not accountable for the Kenova investigations. Its guidance and support has been invaluable to me and my team in ensuring that our investigations are conducted as well as they possibly can be. The active role of the ISG provides further reassurance to families and stakeholders that these cases are being dealt with thoroughly and as comprehensively as possible.

(Membership of the ISG and its ToR can be found at Appendix 13.)

Victim Focus Group (VFG)

20.4 The VFG is a strategic group formed in order to provide independent advice regarding engagement with victims' families, intermediaries and NGOs representing the interests of victims and families and to ensure the highest level of service delivery possible. The group meets quarterly and its membership comprises of internationally respected practitioners with significant experience of working with victims of serious and traumatic crime and of bereavement support.

(Membership of the VFG and its ToR can be found at Appendix 14.)

Kenova Governance Board

20.5 With the growth of Kenova and the expansion of our caseload, I determined that further independent governance was required to oversee its business functions, including the roles of the ISG and VFG. The Governance Board is comprised of executive members from the Kenova senior management team and independent non-executive members. The non-executive members have significant knowledge and experience of Northern Ireland and legacy matters.

(Membership of the Kenova Governance Board and its ToR can be found at Appendix 15.)

Kenova Remuneration Committee

20.6 I am very mindful of the cost to the public purse of independent investigations and inquiries. There is always a risk that those who wish to undermine what we are attempting to achieve for families will question their value for money.

20.7 To ensure there is independent oversight of recruitment, terms and conditions of service and remuneration of Kenova staff, I set up the Kenova Remuneration Committee. The Committee is made up of the Chief Finance Officer for Bedfordshire Police, a member of the Joint Audit Committee for the Bedfordshire PCC and a member of the Kenova executive team. I attend as an ex-officio member. Members of the Kenova Governance Board can attend as observers.

(ToR for the Kenova Remuneration Committee can be found at Appendix 16.)

Kenova Professional Reference Group

20.8 On retiring from policing as a Chief Constable of Bedfordshire and taking up the role of leading Kenova full-time I was keen not to lose the advice and support of senior police chief officer colleagues. This Group has acted as an important 'critical friend' as I have worked to construct and deliver this interim report. This peer review mechanism has been of great value to me in testing my thinking, identifying solutions to problems and allowing me access to a vast range of senior law enforcement skills and experience.

(Membership of the Kenova Professional Reference Group and its ToR can be found at Appendix 17.)

Kenova Executive Group (KEG)

- 20.9 I set up the KEG to be the accountability process for our investigative decision making. This group, chaired by me, and attended by the senior leadership team and investigation case officers is the ultimate decision making forum for operational activity across all Kenova cases. Decisions relating to the prioritisation of investigative resources are made at a weekly tasking meeting and feed into the KEG. This model was set up to take best practice from both a traditional Gold Group process for major inquiries or critical incidents and the Executive Liaison Group format used to manage counter terrorism investigations. Minutes of the meeting provide a clear audit trail in terms of ownership, decision making and accountability.
- 20.10 Cases are divided into three categories:
- **Cases within the ToR:** These cases are those that have been identified, because of intelligence or evidence, as falling within the ToR. These cases receive a full investigation.
 - **Cases under consideration:** This category contains a larger volume of cases. Cases under consideration are cases where families or third parties come forward and suggest a link with the Kenova ToR. We then conduct a thorough review of all available information and evidence, keep these cases under consideration and check all new information against them.
 - **Cases under review:** This is a group of cases that previous legacy inquiries have examined. We are reviewing them partly because those killed appear to have been murdered for being suspected agents. There is no known or suggested link to our ToR but we examine them further to establish if there is one.
- 20.11 We investigate additional cases outside of the original ToR by separate agreement with CC PSNI.
- 20.12 As a direct consequence of the lack of a framework to investigate legacy cases, many families have come forward to me wanting Kenova to investigate their cases and asserting a link to Stakeknife, often these alleged links are extremely tenuous. We examine each such case thoroughly to see if it falls within the ToR.
- 20.13 In addition to the operational KEG, I also chair quarterly business KEGs. These meetings are attended by the senior leadership team, the Kenova Business Manager and the Chief Finance Officer for Bedfordshire Police. Their primary function is to review finances, human resources, logistics, health and safety and CPD.

21 Finance

- 21.1 Our principal responsibilities are to acknowledge victims and their families, obtain all the relevant information about their cases and investigate them thoroughly so they will not need to be investigated again. We also have a responsibility to be careful custodians of the public purse. This is especially important in legacy cases as some who wish to undermine or criticise an investigation will exploit references to its cost. The reality is that we need to fund a specialist workforce with adequate resources to carry out this work, to have a secure building accredited to hold highly classified material, and a secure IT framework to host the information we gather in order to deliver a comprehensive investigation.
- 21.2 I researched the costs incurred by previous legacy inquiries and became aware of the levels of funding that had been available to previous single set-piece reviews. Historically, legacy investigations and inquiries have taken place broadly in isolation, with no eye to wider legacy opportunities or any additional or more integrated model to collect information. Each previous legacy investigation or inquiry has been designed to deliver its own very specific ToR often examining a single case or small group of cases. There has not been a strategic plan to consider legacy cases as a whole or to consider a single structure for the equitable examination of all legacy cases. In building Kenova, I sought to establish an investigative model that would not only provide value for money, but also an opportunity to scale up to enable more families to benefit.
- 21.3 The NPCC Homicide Working Group review of January 2021 which comprehensively and independently examined Kenova, commented on the exceptional value for money it provides. We have partnered successfully with existing law enforcement organisations to do this. I am particularly grateful to NCTPHQ, NCA, MPS and Bedfordshire Police who have provided various facilities and services including accommodation, forensic support and IT equipment at reduced and sometimes nil cost.

21.4 The annual budgets for Kenova are set out below:³⁹

Year	Costs incurred by Bedfordshire Police (funded by PSNI)	Costs incurred by PSNI	Total Costs
2016-17	1,481,728	248,386	1,730,114
2017-18	4,357,367	250,024	4,607,391
2018-19	5,438,896	328,685	5,767,581
2019-20	5,411,773	373,737	5,785,510
2020-21	6,329,917	403,830	6,733,747
2021-22	6,480,268	622,268	7,102,536
2022-23	5,838,532	434,895	6,273,427
TOTAL	35,338,481	2,661,825	38,000,306

21.5 To put Kenova costs in context, a report by the Criminal Justice Inspectorate Northern Ireland in 2013 is a useful reference.⁴⁰ It is the only independent analysis I could find that describes legacy costs. It examined the costs of legacy to the criminal justice system in Northern Ireland. It set out costs of the then HET in 2013 as £6.01m million a year plus the additional costs of work it passed to PSNI Serious Crime Branch for legacy cases as £8.65m per year. In addition, PSNI legal costs for legacy are given as £1.4m. This amount does not include costs the PSNI absorbed such as accommodation, security and transport. According to the Criminal Justice Inspectorate report, in 2013 the PSNI legacy investigation costs were circa £16m per year. The report gives a conservative forecast that at least £187m would be spent within the criminal

³⁹ Note: At the end of 2022-23, Bedfordshire Police held a reserve on behalf of Operation Kenova of £163,500 being the difference between the amounts invoiced by Bedfordshire Police to PSNI and actual spend. This balance has been used to reduce the level of funding required from PSNI for 2023-24.

⁴⁰ Chief Inspector of Criminal Justice in Northern Ireland, *A Review of the Cost and Impact of Dealing with the Past on Criminal Justice Organisations In Northern Ireland*, November 2013:

<https://www.cjini.org/getattachment/8b89d447-fb32-41d7-ae26-57b18509c8a2/report.aspx>

justice system on legacy during the following five years. These costs excluded those of public inquiries which had cost circa £301m in the years prior to the report being published.

21.6 As part of my research, I met those who led or are leading various legacy inquiries and panels, this included meeting panel members from the Rosemary Nelson Inquiry, the Billy Wright Inquiry and the Robert Hamill Inquiry. I was grateful for their time and counsel.

21.7 The costs for these inquiries are estimated as:

Rosemary Nelson -	£46.5 million
Robert Hamill -	£32.6million
Billy Wright -	£30.5 Million

22 Review and compliance

22.1 When setting up Kenova we developed an ECHR framework document taking advice from independent counsel. This set out how Kenova would aim to achieve ECHR compliance (Appendix 18).

22.2 As already noted, I have sought to ensure that the Kenova investigative structure is fully compliant with the requirements of article 2 which guarantees the right to life. In particular, article 2 requires that an enhanced official investigation be conducted into any death occurring in circumstances in which it appears that the state may have breached one of its substantive obligations thereunder. This includes the negative obligation not to take life unless absolutely necessary and the positive obligation to protect life.

22.3 ECHR jurisprudence specifically requires that article 2 compliant investigations should be effective, independent, prompt, open to public scrutiny and involve the next of kin. Many Kenova families have fought through the civil courts for years to have their cases investigated independently as article 2 requires. This provision has driven how we have designed and set up Kenova and our investigative operating model.

22.4 Victims and families should not have to take legal action to obtain an independent and effective investigation into cases as serious as murder. There are some who do not feel able, either legally or publicly, to lobby for an investigation, because of their community's condemnation of those it believes to be agents. The allegations involving the alleged agent Stakeknife and claims that he was involved in the abduction, torture and murder of people accused of being agents is such an example. There is a view held by many and regularly expressed to me that the British state will never allow cases involving criminality by agents to be investigated. The state must provide a framework for such investigations.

22.5 All too often, the security forces see article 2 and the other ECHR provisions as an obstacle or impediment to their operating practices when in fact they provide safeguards for citizens, the authorities and government in keeping society safe.

22.6 We have put our policies and procedures, including independent governance arrangements, in place to ensure that, as far as possible, Kenova is article 2 compliant. Most importantly, the families we deal with recognise and acknowledge this approach and the authenticity of our efforts to reassure them and give them confidence in our independence to a degree they have not experienced in legacy cases before.

23 Northern Ireland Policing Board (NIPB) review of ECHR compliance

23.1 In February 2017 I received notification from PSNI of a draft ToR tasking the then human rights advisor to NIPB and now Chief Commissioner of the Northern Ireland Human Rights Commission, Alyson Kilpatrick BL, to, “*assess the police investigation known as Operation Kenova*” and “*whether it complies with the Human Rights Act 1998, with particular regard paid to:*

- *the policies and procedures adopted by the investigation team;*
- *the police powers used;*
- *information sharing between PSNI and the investigation team; and*
- *article 2 compliance*”.⁴¹

23.2 I was alive to the pitfalls of a body that might be seen as having members affiliated to those being investigated examining Kenova. Families and stakeholders raised the specific concern that NIPB might be conflicted with respect to Kenova because of the perceived and historical links between board members, political parties and those involved in the conflict. I understand and recognise these concerns.

23.3 From the outset, I have been open and transparent, inviting independent scrutiny to reassure interested parties and, most importantly, victims and families. I met Ms Kilpatrick in March 2017 and briefed her on Kenova and the various governance mechanisms and processes I had put in place to meet ECHR requirements. I remained alive to the risk that NIPB might not be considered as independent with regard to the matters I had been commissioned to investigate.

23.4 In her 2017 NIPB Human Rights Annual Report, Ms Kilpatrick said that from the outset Kenova sought full compliance with article 2, with clear mechanisms in place to ensure independence

⁴¹ P McCreedy, *Internal review Operation Kenova*, February 2017.

and avoid any real or perceived conflicts of interest.⁴² She also commented positively about Kenova's accessible website, the appointment of independent legal advisers and the establishment of an ISG and VFG of experienced and world-renowned individuals.

- 23.5 I wanted to assure victims, families, stakeholders and NIPB that Kenova was, and is, fully independent and article 2 compliant. I have sought to do this with the independent governance arrangements I have put in place and the various independent reviews of Kenova I have commissioned through the life of the investigation.

24 Other reviews commissioned by Kenova

- 24.1 From the beginning, I recorded in my policy log the need for independent examination and review to reassure me, PSNI, NIPB, the Kenova governance groups and, most importantly, victims and families that our investigations are conducted as well as they can be. There are those who do not want investigations like Kenova to succeed and as a result will seek to malign and criticise them either publicly or privately in order to undermine and stop progress. To combat such attitudes and attacks, I have subjected Kenova to ongoing and independent evaluation.
- 24.2 When first setting up Kenova, an outside police force conducted an independent review to give initial reassurance about our setup, administration and financial and business management.
- 24.3 In October 2019, I briefed CC PSNI Simon Byrne about my planned three tier review process. First, an independent human rights barrister would carry out an article 2 compliance examination, second, the NPCC Homicide Working Group would carry out an investigation and intelligence review and, third, there would be an independent financial audit of Kenova.
- 24.4 On the article 2 compliance review, I sought the advice of the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC. He recommended Alyson Kilpatrick BL and suggested I take references from Lord Alex Carlisle QC and Lord David Anderson QC to confirm her suitability. The suggestion that I appoint Ms Kilpatrick to carry out a comprehensive ECHR examination seemed sensible for a number of reasons. First, she had a working knowledge of the investigation following her work on behalf of NIPB, and, second, she had become available to commit to the task having served her term as the human rights advisor to NIPB.
- 24.5 To look at our performance from an investigations and intelligence perspective, I sought support from DAC Stuart Cundy of the MPS, Chair of the NPCC Homicide Working Group and DAC Dean Haydon, the Senior National Coordinator for Counter Terrorism. I then commissioned the nationally recognised subject matter experts on homicide investigations, the NPCC Homicide

⁴² NIPB, *Human Rights Annual Report 2016/17*, pp 175-6:

<https://www.nipolicingboard.org.uk/files/nipolicingboard/publications/human-rights-annual-report201617.PDF>

Working Group. I also commissioned the NCTPHQ to ensure that the sensitive and complex national security elements of our investigations would be scrutinised appropriately.

- 24.6 With regard to the independent financial review, I asked the Chief Finance Officer for Bedfordshire Police to organise this.
- 24.7 My rationale for these intrusive and important independent examinations into how we run Kenova is rooted in my belief that any investigation that examines the conduct of the state, either wholly or in part, must be predicated on a solid ECHR framework. Ms Kilpatrick’s helpful NIPB review in 2017 was positive about our initial set up with respect to ECHR, but I was conscious of my responsibility to ensure continual compliance with article 2 and wanted to guard against complacency. I therefore decided that we needed to review and monitor our performance with respect to the ECHR over the longer term.

25 Alyson Kilpatrick BL article 2 review

- 25.1 Ms Kilpatrick published her first interim report in February 2020 and said that the “*Operation Kenova investigation appears to be an exemplar of one which is commanded and controlled with every aspect of article 2 firmly in mind and one which has already contributed to securing public confidence in the rule of law*” (Appendix 19). It is important to note she stated, “*the obligation to gather evidence cannot be discharged unless those holding evidence and information cooperate fully with the investigation...*” and “*...those in charge of the investigation must have the autonomy to identify the material, to ‘follow the evidence’ and to recover and use whatever they consider relevant. Any diminution of that will impact adversely on the effectiveness of the investigation*”. These comments go to the heart of our requirement for unfettered access to records from the security forces as an article 2 compliance requirement.
- 25.2 Ms Kilpatrick commented positively about the ISG and the calibre of its membership. She commended their invaluable service to Kenova and the community of Northern Ireland in their contribution to ensuring our article 2 compliance.
- 25.3 I cover the lack of a framework for independent legacy investigations in Part D of this report. Ms Kilpatrick highlighted in her report that some families and stakeholders are concerned that PSNI provides funding for Kenova. The ISG wrote to the Northern Ireland Minister for Justice, Naomi Long about this. In responding, she explained that there is no alternative funding mechanism and this again highlights the lack of a legal framework and independent funding for legacy.
- 25.4 Families have raised with me their concern that inadequate funding from PSNI could restrict our capability and reach. It is important to clarify that this has not happened and if we encountered funding problems I would challenge this at the highest level.

- 25.5 In January 2021, Ms Kilpatrick produced a second interim report in which she said she remained entirely satisfied of Kenova's article 2 compliance (Appendix 20). In this second update, she addressed Kenova's effectiveness and independence in the context of resources, oversight and decisions by PPSNI not to prosecute four individuals.
- 25.6 Ms Kilpatrick said that resourcing is critically important for the effectiveness and reach of an investigation and is potentially significant in determining whether or not it can be said to be sufficiently independent. The state discharges its article 2 responsibilities in a number of cases by establishing an independent investigation - in this case Kenova. There must be an institutional separation between my team and PSNI.
- 25.7 Ms Kilpatrick pointed out that a number of people have suggested or assumed wrongly that the Kenova team is seconded to PSNI and therefore under its control or that of NIPB. She said that both suggestions are incorrect and clarified that an independent investigation is *not* one overseen by or accountable to anyone implicated or anyone with some other conflict of interest. It is important that such an investigation is overseen and accountable independently. She concluded that, taking account of the arrangements I have put in place, she could think of no other level of governance or oversight that Kenova needs.
- 25.8 Ms Kilpatrick also said that the investigation of four individuals in connection with allegations of perjury and related matters, where PPSNI decided not to prosecute, was exemplary and the decision was not a reflection on its quality.
- 25.9 In August 2021, Ms Kilpatrick submitted her final report under cover of a letter dated 26th August 2021 she said, *"I would like to take this opportunity to pay tribute to you and your team on the work you are doing. Every person I met within Kenova was incredibly welcoming, clearly receiving my review as a positive opportunity to demonstrate transparency in their work. They should be proud of what they are doing and the high regard in which they are held by all who have dealt with them"* (Appendix 21).
- 25.10 Ms Kilpatrick also said, *"While I am frustrated to not be able to improve on Kenova - a lawyer never likes to admit that - I am delighted to be able to reassure you that from a human rights perspective, Kenova really is an exemplar of what such an investigation can and should be. It is the best I have seen in all of my experience"*.
- 25.11 Ms Kilpatrick stated that Kenova has achieved compliance with article 2 and has built confidence among victims, families and survivors which has in turn led to it being an effective investigation protective of the rights of all, while respecting democracy and the rule of law. She commented that Kenova has displayed the utmost care in identifying and protecting information which is sensitive and which could have prejudicial effects on private individuals and other investigations while providing sufficient information and updates to relatives to ensure that their legitimate interests are protected. She went on to report that Kenova demonstrates, *"that the handling of the most sensitive information which has been fiercely protected by the security forces can be properly handled and the legitimate information from that sensitive material can*

be safely provided to families". She concluded that, "*Kenova continues as an investigation with human rights at its core*".

- 25.12 Ms Kilpatrick provided a detailed analysis of Kenova's ethos, structure, governance, resources and public scrutiny in her final report (Appendix 22). I recommend reading it in full. In her concluding remarks she states, "*as the courts have repeatedly found, there must be a degree of deference shown to investigators so long as they are independent. In Kenova, the investigators are independent and it is only by them demonstrating that independence in theory and practice, that the state is capable of discharging its domestic and international obligations*".⁴³
- 25.13 After publishing her report, Ms Kilpatrick attended a Kenova Governance Board meeting to present her findings and answer questions. I published her two interim reports and her final report on the Kenova website and shared them with families at the time of their release.

26 National Police Chiefs' Council (NPCC) Homicide Working Group review

- 26.1 Work by the NPCC on the Kenova progress and thematic peer review started in September 2020 in line with an agreed timetable and ToR (Appendix 23).
- 26.2 Colleagues in the NPCC Homicide Working Group and NCTPHQ carried out the reviews which examined Kenova's strategic approach including to the specific investigations of Operations Mizzenmast and Turma and the review of the Glenanne Gang series of cases under Operation Denton. Covid 19 restrictions affected the review timetables.
- 26.3 The NPCC Homicide Working Group produced its reports in January 2021 (Appendix 9). We shared the executive summary and conclusions of the documents with victims and families and posted them on the Kenova website. The deputy chair of the Working Group, Deputy CC (DCC) Tim Forber, led the review with subject matter experts in policing and intelligence carrying out a four month 'deep dive' to scrutinise our work. They interviewed the Kenova team, a diverse array of stakeholders and members of the governance groups. The NPCC reviewers reported that they had been impressed with our professionalism and dedication and found Kenova to be unique in gaining the confidence of victims, families, survivors and communities.
- 26.4 The review praised our structures and operating model. It emphasised the priority we give to victims, families and survivors with our comprehensive programme of engagement which has extended to sections of the community that have previously been hard to reach. It also endorsed the quality of our investigations and highlighted Kenova's value for money as well as commenting positively about how we manage our work. The reviewers described our overall approach as an innovative hybrid of homicide and counter terrorism investigative processes.

⁴³ Page 90.

They talked about our effective and efficient governance framework saying our approach to is unique and a highly credible function unlike anything they had seen in other legacy investigations or police homicide inquiries. The report said, “*The introduction of three highly credible independent oversight groups, quarterly updates to PSNI, attendance at the NIPB, a rhythm and quality of independent external reviews, additional scrutiny of investigation files submitted to the Public Prosecution Service NI, together with public media and family communication is impressive and an exemplar of good practice throughout*”.⁴⁴

26.5 After publishing their report, members of the Homicide Working Group presented their findings to the Kenova Governance Board and answered their questions.

26.6 The NPCC team also reviewed our management of the CT Home Office Large Major Enquiries System (HOLMES) and an independent firm of auditors carried out an internal audit of the expenditure controls we have in place.

27 Victim Focus Group (VFG) review

27.1 The VFG undertook to hold Kenova to account in relation to victim best practice and our approach to victims’ rights. It published its findings and recommendations on Kenova’s performance in August 2021 (Appendix 24). The report sought to:

- identify areas of good practice the Kenova team demonstrated and any areas that needed improvement;
- review Kenova’s engagement with victims and family members and establish whether it was victim focused;
- establish if the Kenova strategy has supported and facilitated victims and families to exercise their rights.

27.2 The VFG also agreed to make recommendations to assist us in developing a victim/family strategy which might support any future unit set up to carry out legacy investigations in Northern Ireland or elsewhere.

27.3 Alongside its report, the VFG wrote an introductory statement referring to the government’s Command Paper of July 2021 (Appendix 25). This identified several interrelated themes that enabled us to establish Kenova’s legitimacy, build trust with families and thereby carry out effective investigations. These are a victim and human rights centred approach, independence, procedural fairness, transparency and public accountability together with a leadership style which embeds these principles into the investigation and appropriate resourcing.

⁴⁴ Executive Summary, p 2.

- 27.4 The VFG referred to the government's position that legacy investigations are not working but made clear that it has evidence that Kenova's model of investigation has been successful in uncovering and providing new information for families.
- 27.5 Judith Thompson, the ex-Commissioner for Victims and Survivors in Northern Ireland and VFG member, presented its report to the Kenova Governance Board and we shared it with families and posted it on the Kenova website.

Section 2: External engagement

28 Protecting Kenova

- 28.1 In this section I cover what we have done externally to protect Kenova's independence and effectiveness and comply with ECHR requirements. This has meant engaging with stakeholders and organisations extensively and in a way that is uniquely important in legacy cases to prevent and correct misinformation.
- 28.2 Legacy investigations are somewhat unusual in that interested parties affiliated to those being investigated are part of the stakeholder community whose views influence and inform the trust and confidence of victims and families. Occasionally, interested parties seek to undermine legacy investigations they perceive as a threat to their narrative of the Troubles.
- 28.3 Another vitally important group of stakeholders are those who support the acknowledgment of victims and their families, in recognition of what they have endured, and who support uncovering the truth without prejudice to one side or another. Some of these stakeholders were connected to the conflict, but have long since advocated for all victims and families to hear the truth regardless of their background.
- 28.4 As I set out above, focusing on victims and their families has always been a priority for Kenova and central to my strategy and vision. I also recognised that we needed a strategy and communication plan for the two groups mentioned above - those affiliated to the conflict who do not necessarily wish to see the truth of what happened uncovered, and those that acknowledge and champion the rights of victims and families and want to see it brought into the light.
- 28.5 I have proactively engaged with legacy stakeholders and interested parties setting out for them the various mechanisms of oversight and independence we apply to the Kenova model and offering myself for questions. I meet any organisation, group or individual wishing to engage in order to explain Kenova.
- 28.6 Our proactive approach to communicating and defending the Kenova model, upholding its strategic aims and vision and confronting those who seek to undermine our work, has been key

to securing victims and families confidence. Engagement helped change minds. It helped counter those who said that neither Kenova nor I were genuine in our claims about pursuing the truth.

29 Access to information

- 29.1 Victims and families want what any other citizen of the United Kingdom would expect - a thorough investigation of crimes committed against their loved ones. My experience of Kenova is that victims and their families are entirely realistic as regards the likelihood of a legacy investigation leading to a criminal justice process and conviction.
- 29.2 I cover this in more detail in Part D of this report but will note here that gaining full access to information in connection with Troubles related cases has been an issue for previous legacy inquiries. Whether a result of cultural obstruction, documents being over-classified or difficulty identifying and locating relevant material held by the authorities, access to records has been a persistent problem and a legitimate concern to families.
- 29.3 For clarity, our philosophy to uncovering information at Kenova goes beyond examining the readily available material, including material organisations have provided to previous investigations or inquiries. We make no assumptions and actively search out information and evidence.
- 29.4 Any investigation is only as good as the information available to it. In legacy cases, many records are uncatalogued and few are digitised. For Kenova to be effective, I recognised that we had to take an active approach to searching for relevant information and not rely on what was already available or what the agencies produced in response to our requests.
- 29.5 In an effective article 2 compliant investigation, the investigators themselves must determine whether material is relevant to an inquiry and not the organisation holding it. This is particularly important if that organisation is affiliated to an individual or body under investigation.
- 29.6 Investigators having full access to potentially relevant material is a prerequisite to their independence and effectiveness and (therefore) public confidence and engagement. The burden on state bodies to provide information should be exactly the same as the burden on any other organisation holding material required by an investigation. There should be full disclosure and no scope for them to decide for themselves that material is not relevant or its disclosure is not proportionate or necessary.
- 29.7 Many families and stakeholders do not trust the security forces to disclose information voluntarily and I needed to demonstrate that Kenova was different and that our investigation would reach its findings having recovered and examined *all* the information.
- 29.8 We hold all the material provided to Kenova, some of which is classified as 'Secret' or 'Top Secret', in a secure environment accredited by MI5. I ensured the Kenova offices are formally

accredited to hold all levels of protected material and all Kenova staff are vetted to the highest level.

- 29.9 We manage our investigations using the CT version of the HOLMES system, in the same way as all major police inquiries in the United Kingdom, the CT version being accredited to hold material classified as 'Secret'. We have additional arrangements for holding material of a higher classification. A senior member of the Kenova team is exclusively responsible for Kenova security, including the buildings in which we operate, systems we use, material we recover and the personal security of our team.
- 29.10 We have MOUs with all state agencies and departments holding material relevant to our investigations. These cover access, handling and any potential further disclosure or use, including in prosecutions.
- 29.11 I secured agreement to appoint Kenova staff as Single Points of Contact (SPOCs) for MI5, MOD and PSNI. We selected our SPOCs specifically for these roles as they can be challenging and complex and require a diplomatic and constructive approach and good working relations. The role of the SPOCs is to locate and identify material and decide whether it is relevant to our investigation, rather than the organisation which it holds it making those decisions.
- 29.12 Even with processes and safeguards in place, recovering all of the relevant information has not been without its challenges. This will be discussed further later in this report. By working in this way, we have discovered material that was not made available to or discovered by previous inquiries. This includes official contemporaneous records identifying those responsible for murders and other serious offences.
- 29.13 Any future legacy structure must be established in law and have statutory powers allowing it to compel disclosure, so as to guarantee access to all relevant information. Organisations must facilitate this notwithstanding any embarrassing or difficult issues that may arise. There can be no possibility of withholding material from a future legacy unit on any grounds, including national security, as has happened in the past. That said, there must be measures in place to ensure there can be no onward disclosures that might lead to any person being put at risk or exposure of any methodology that would undermine public safety.
- 29.14 Bereaved families deserve to know what happened to their loved ones and where the state holds information that will reveal the truth of what happened it should disclose it and any decision to withhold it should lie with an independent body.

Recommendation

Subject all public authorities to an unqualified and enforceable legal obligation to cooperate with and disclose information and records to those charged with conducting Northern Ireland legacy investigations under a new structure.

30 The MACER database

- 30.1 One particularly striking example of the information access and disclosure issues encountered by the Kenova team arose in connection with the Army's 'MACER' intelligence database.
- 30.2 The Army formally withdrew from Northern Ireland at midnight on 31st July 2007. On doing so, it handed control of MACER to PSNI while retaining access through MOD's own Historical Inquiries Team (MOD HIT).
- 30.3 Although PSNI then 'owned' the system, unknowingly, it did not have access to all of the information contained on it. By this point, MACER was no longer active and was used as a closed archive to service historic investigations, inquiries and inquests. The process adopted was as follows:
- the investigative body made a request for information to PSNI;
 - PSNI would search the MACER database for any relevant material;
 - most of the material was fully accessible to PSNI who would provide it to the requesting body;
 - some material responsive to a search might not be accessible to PSNI and in these cases, a flag would appear on the record directing the searcher to the MOD HIT;
 - the requesting investigation would contact the MOD HIT with the record reference number;
 - the HIT would print the specific document for the requesting investigation.
- 30.4 All investigations, inquiries and inquests adopted this process in the belief it provided access to all relevant material held on MACER. When Kenova started in 2016, we were provided with PSNI MACER logins and told these gave full access to the entire system.
- 30.5 In 2017, we became aware that the MOD HIT had separate access to MACER. We decided to test whether Kenova had 'full' access by conducting a trial search using our PSNI logins and then repeating the same search at the MOD HIT office using its military logins. The results showed a significant disparity between the information available through the different logins. Additional hits we discovered using the military logins were completely invisible using the PSNI logins. Neither the Army nor PSNI could provide a satisfactory explanation. As a result, Kenova staff received MOD logins codes and have been able to access records held on the MACER database that had previously been inaccessible to other investigations.
- 30.6 Subsequently, CC PSNI wrote to various stakeholders who had previously requested information held on MACER apologising and explaining what had happened.

31 Evidence to the Northern Ireland Affairs Committee (NIAC) - June 2020

- 31.1 I was invited to provide a written submission to NIAC and subsequently to give evidence to it in person (Appendix 26). Both my written submission and later oral evidence reflect the information I have provided to the various stakeholders I have met.
- 31.2 The Committee approached me to assist its inquiry 'Addressing the Legacy of Northern Ireland's Past'. This examined the government's new legacy policy proposals
- 31.3 On 19th June 2020, I provided my first written submission (Appendix 11). The Committee had presumed that because Kenova was an ongoing investigation, I would be prohibited from giving live evidence, but I assured them that I could give evidence without referring to specific cases.
- 31.4 The Committee requested information about:
- Operation Kenova's approach to its investigations process and management of cases;
 - steps Operation Kenova takes to try to ensure that its investigations are article 2 compliant;
 - how those working under Operation Kenova manage family liaison and engagement and maintain confidence in the process from victims, families and interested parties;
 - the role and importance of the ISG and VFG;
 - lessons the government could learn from Operation Kenova and apply to its new legacy investigations process; and
 - any other comments I might like to make on the government's new plans for legacy investigations.
- 31.5 The very fact that the Committee was seeking my views was an important moment in the life of Kenova. It reassured me that the hard work we had done engaging and tackling inaccurate information was succeeding as numerous people referred to Kenova in positive terms in their submissions and evidence to the Committee.
- 31.6 For my detailed answers to the Committee's questions, I recommend reading my written submission, particularly my response to the final question which sought: "*Any other comments you might like to make on the government's new plans for legacy investigations*". A summary of my answer follows.
- 31.7 I explained that I had responded to the government's previous consultation on 'Addressing the legacy of Northern Ireland's Past' and shared my submission (Appendix 8). I said that the Secretary of State's proposals of 18th March 2020 were not detailed, but they provided an opportunity to move Northern Ireland legacy forward. I shared our Kenova experiences, especially my views on the importance of working with victims, families, advocacy groups and the Commissioner for Victims and Survivors of the conflict in Northern Ireland and my hope that a consensus around how legacy should be taken forward would emerge.

- 31.8 I suggested encouraging the Republic of Ireland to set up its own independent unit to undertake complementary investigations into Troubles related murders: the Republic faces similar issues with victims' lack of confidence in certain cases and a single, jointly funded unit would be ideal.
- 31.9 I supported the government's desire for investigations to be completed speedily as this is in everyone's interests. However, I cautioned that there must be no compromise on the quality of investigations or reviews and this was of concern to families. We should establish a process that has broad consensus and that gives families confidence that everything that reasonably can be done has been done to find the truth.
- 31.10 I said that the proposal to close unsolved murder investigations, after a quick review, would be a legal novelty in the United Kingdom for serious crimes. I urged caution especially as regards the processes applied to establish what information exists about the cases and expressed my view that an investigation starting and finishing with only the information available at the outset, not allowing for the development of lines of enquiry, would not be article 2 compliant.
- 31.11 Those responsible for crimes such as murder should never be protected by the lack of a thorough examination of the facts. Legacy prosecutions are extremely challenging and I would expect them to be the exception. Our aim should be finding the truth of what happened. Above all, families want to be listened to, acknowledged and see an independent and robust search for the truth. They are generally realistic about the prospect of seeing culprits brought to justice.

32 Evidence to NIAC - September 2020

- 32.1 I gave live evidence to NIAC on 2nd September 2020. In his introduction to the virtual hearing, the Committee Chairman, Simon Hoare MP, said that Kenova is often held up across communities as an exemplar of good practice in legacy.
- 32.2 I was invited to make some introductory remarks (Appendix 27) and took the opportunity to reiterate many of the key points I have raised in this report. In very broad summary, these are:

The impact on victims and families

- Victims were let down by the security forces.
- The security forces very often did not engage with victims and families at the time.
- Victims and families:
 - have faced community hostility and misinformation;
 - have been denied the truth for too long;
 - do not always want prosecution or publicity;
 - should be acknowledged, listened to and told the truth.

Previous and future legacy investigations

- Previous legacy investigations were resisted and denied information.
- Previous legacy reports were over-classified and should be de-classified.
- Legacy is the unwritten chapter of the GFA.
- Effective legacy investigations are still possible.
- Kenova is independent and has a victim and human rights centred approach.
- Kenova has obtained new cooperation and new information.
- Prosecutions are not always appropriate or wanted.
- Legacy investigations still face resistance and undermining from all sides.
- An independent legacy investigation structure should be established to overcome this.
- PPSNI and Northern Ireland legacy cases are under-resourced and unable to move at any speed.

33 NIAC report and Secretary of State for Northern Ireland evidence

33.1 In its interim report published on 21st October 2020, the Committee dedicated a chapter to Kenova. It recommended that:

“The Government must examine:

- a) How Operation Kenova has engaged with victims’ groups and families;*
- b) Whether Operation Kenova could be scaled up to deliver across the piece; and*
- c) Whether aspects of Operation Kenova’s approach could usefully be replicated or reinforced in any new legacy body or bodies, including its use of investigative governance and victims oversight mechanisms to provide independent scrutiny and build public confidence and the way it has fostered positive and trusting relationships with families”.*⁴⁵

33.2 On 27th October 2021, the Secretary of State for Northern Ireland gave evidence to the Committee. He acknowledged that there were lessons to be learned from Kenova for future legacy investigations. He highlighted that there had been no Kenova prosecutions, but

⁴⁵ NIAC, *Addressing the Legacy of Northern Ireland’s Past: the Government’s New Proposals (Interim Report)*, Third Report of Session 2019-21, HC 329, October 2021, paragraph 54:

<https://committees.parliament.uk/publications/3186/documents/29458/default/>

acknowledged that, “there is technically a possibility that Operation Kenova’s investigations could lead to the prosecution service deciding that there is a prosecution in the future”.⁴⁶

- 33.3 Before the Secretary of State gave evidence, the Kenova ISG had written to him about comments in the government Command Paper of July 2021 suggesting that “none” of Kenova’s investigations had “yet reached the prosecution stage”.⁴⁷ The ISG made clear that these comments did not “reflect the reality of the situation” and expressed concern that they “might be interpreted as a criticism of Kenova or be seen to mean that legacy prosecutions are no longer possible”. As to the facts, the ISG recorded that:

“Thirty-one separate files have been submitted to the Public Prosecution Service (PPS) in Northern Ireland. We are aware of the strength of evidence in many of those files which in the jurisdictions in which we have worked, we consider, would almost certainly lead to prosecution. Our assessment is that the absence of prosecutions so far has been more to do with the lack of sufficient resource within the PPS to enable prompt decision making rather than any lack of evidence provided by the Operation Kenova team. We are constantly impressed by the quality of investigations and find it remarkable that so much continues to be achieved at such low cost compared with similar investigations in other jurisdictions and indeed the previous public inquiries that have been conducted on Troubles related matters in Northern Ireland”.

- 33.4 Any decision to prosecute is taken after an independent review of the evidence by a public prosecutor. In Northern Ireland, this process is conducted by PPSNI. I must not prejudice that process by discussing any specific details or individual cases.
- 33.5 As explained in this report, the material provided to PPSNI by Kenova exceeds 50,000 pages of evidence for it to consider. These files are incredibly complex with countless sensitive issues.

34 Evidence to NIAC - June 2022

- 34.1 On 21st June 2022, I again gave evidence to the Committee following the publication of the government’s Northern Ireland Troubles (Legacy and Reconciliation) Bill on 17th May 2022. My evidence was provided in company with DCC PSNI Mark Hamilton (Appendix 28).
- 34.2 The Committee was keen to understand my engagement with NIO regarding the Bill. I explained that I had written a document for the Kenova independent governance groups setting out the

⁴⁶ NIAC, *Oral evidence: Addressing the Legacy of Northern Ireland’s past: The UK Government’s New Proposals*, HC 827, 27th October 2021:

<https://committees.parliament.uk/oralevidence/2917/pdf/>

⁴⁷ NIO, *Addressing the Legacy of Northern Ireland’s Past*, CP 498, July 2021, paragraph 12:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002140/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf

operational implications of the Bill, as I saw them, and had shared this with NIO. I later shared this document with the Committee (Appendix 29).

35 Tom Lantos Human Rights Commission of the United States Congress

- 35.1 On 15th February 2022, I was invited by the Tom Lantos Human Rights Commission of the United States Congress, chaired jointly by James P. McGovern (Democrat) and Christopher H. Smith (Republican) to give evidence at their session titled 'Northern Ireland; Accountability at Risk'.
- 35.2 The Commission was examining the government Command Paper of July 2021 and proposing a statute of limitations. Also present at the meeting were Mark Thompson, the Chief Executive Officer of Relatives for Justice, Geraldine Finucane, widow of the murdered lawyer Pat Finucane, Alan McBride Coordinator of the Wave Trauma Centre and Louise Mallinder, vice chair of the Committee on the Administration of Justice.
- 35.3 I submitted a paper in advance, broadly reflecting the evidence I gave to NIAC in September 2020 (Appendix 30).

36 Equitable approach to stakeholders

- 36.1 As I was setting up Kenova, stakeholders and senior colleagues asked if Number 10 and the republican leadership supported the investigation. Many believed that without their backing the investigation would fail because of a lack of cooperation - not something murder investigations usually need to consider. This concern demonstrates the unique high level challenges presented by legacy cases.
- 36.2 I had taken the decision to reach out to key stakeholders and to those associated with paramilitary organisations to set out what I was doing and make clear Kenova's independence and impartiality. I explained that I would report my findings with proper candour, including what had occurred and any efforts to undermine or frustrate my investigation.
- 36.3 I made clear that I would not compromise when it came to anyone's possible guilt or culpability, be they senior republican leaders, the security forces or indeed those in government, should lines of enquiry or evidence lead to them.
- 36.4 As part of my approach, I met Gerry Kelly, Sinn Féin spokesperson for policing and a member of the NIPB, in November 2016.
- 36.5 When I contacted Mr Kelly he wanted to know on what basis I wished to speak to him - was it in his role as the policing representative for Sinn Féin and member of the NIPB or an ex-PIRA volunteer and republican activist. I said that it was in all of his various capacities. This was a

- deliberate act of reaching out to the republican movement because of the specific and obvious connection to the Kenova ToR.
- 36.6 When we met, I explained that Kenova would treat all those we spoke to with equal fairness and courtesy. Where evidence exists that people might have been involved in serious crimes such as murder, or might know something about what happened, we would be speaking to them. I described how Kenova would not be arresting people unless this was necessary due to a refusal by them voluntarily to attend an interview under caution. I aimed to speak to people by appointment and, wherever I had information that required that they should be cautioned and treated as a suspect that would happen.
- 36.7 I explained to Mr Kelly that at some point I would be appealing for witnesses to come forward and asked what the republican movement's position might be in supporting such an appeal.
- 36.8 I registered concern that criminal elements within the republican movement might seek to intimidate and threaten families and said I would not tolerate this. I reiterated my determination to protect families. At this early stage I asked Mr Kelly whether Sinn Féin supported the Kenova investigation.
- 36.9 Mr Kelly said that Sinn Féin has been very clear, publicly supporting the need to address legacy issues and that legacy processes had to look at both government collusion and paramilitary activities. He claimed that Sinn Féin had been more supportive publicly about legacy investigations than Westminster.
- 36.10 I updated him on progress setting up Kenova, including the ISG and VFG. I explained that I took on the investigation in order to acknowledge families and to give them the truth of what had happened and, where possible, justice.
- 36.11 During this time, I also met with those internal departments in the security forces that are responsible for legacy matters setting out the same position as I had provided to Sinn Féin. Additionally for fairness and equity, I met with various bodies that represent legacy groups to again explain the approach I was taking and offer myself for any questions.
- 36.12 In November 2016, I received an invitation to meet the Prime Minister, Theresa May, with Chief Constable colleagues for a Christmas thank you for our work policing the United Kingdom. The invitation was not connected to Kenova.
- 36.13 When I met the Prime Minister, I explained that I was leading the investigation into the activities of the alleged agent known as Stakeknife and gave her an overview. I told her I had met many families whose bravery and fortitude were remarkable in the face of dreadful experiences - losing their loved ones in unimaginably violent circumstances, with many being tortured and then murdered by PIRA, and that it was humbling and extremely moving to hear their stories.
- 36.14 I explained how many families believed members of the security forces had effectively decided their loved one's fate, and of their strong opinion that a member of PIRA's ISU, responsible for

the torture of these victims, was an agent for the United Kingdom government. Families believed that the security forces had information that their loved ones were likely to come to serious harm and did nothing to protect them. I explained that I would be investigating the role of everyone involved, including those in the security forces and PIRA at every level, from those who committed the actual murderous acts, to those higher up who sanctioned them.

- 36.15 I said to her that members of the media had asked me whether Number 10 and the republican movement supported the Kenova investigation and explained the importance of the investigation to the families. This meeting gave me an opportunity to set out our investigative approach and to understand the government's view of the investigation. I said we had to address legacy issues. Everyone deserved justice and families deserved a thorough investigation into their loved one's murder.
- 36.16 The Prime Minister listened with interest and, on 5th January 2017, I sent her a follow-up letter reiterating what I had said, outlining the independent groups I had set up to advise us and emphasising the sensitivities and complexities of the investigation.
- 36.17 The Prime Minister replied the same month. Her letter spoke of the investigation being important because issues that remain unresolved for decades have the potential to undermine progress building a peaceful and prosperous Northern Ireland. It was my understanding following these exchanges that the Prime Minister supported the investigation while remaining rightfully detached and respectful of our independence.
- 36.18 On 9th May 2018, answering Prime Minister's questions (PMQs) in the House of Commons the Prime Minister said, "*The peace we see today in Northern Ireland is very much due to the work of our armed forces and law enforcement in Northern Ireland, but we have an unfair situation at the moment, in that the only people being investigated for these issues that happened in the past are those of our armed forces or those who served in law enforcement in Northern Ireland. That is patently unfair terrorists are not being investigated. Terrorists should be investigated and that's what the Government wants to see*".⁴⁸
- 36.19 This contradicted our previous exchanges so I wrote to the Prime Minister on 17th May 2018, reminding her of our conversation and of my letter of 5th January 2017. I sought her assistance in correcting her comments at PMQs and putting on record the fact that Kenova is looking at PIRA members who may have committed serious criminal offences in the same way we are looking at other organisations.
- 36.20 I contacted every family to reassure them that Kenova was investigating PIRA and all those involved and that the Prime Minister's comments had been inaccurate. Without exception, every family remained positive about and confident in Kenova notwithstanding what had been said and the publicity generated.

⁴⁸ Hansard HC, 9th May 2018, Vol 640, Col 677.

- 36.21 On 7th June 2018, I received a response from the Prime Minister's Office saying the existing systems to address legacy were not working well and, *"we have every confidence in the effectiveness and thoroughness of your investigation. The Prime Minister recognises the great efforts you have undertaken to carry out your work professionally and independently, agrees fully that no individual or organisation is above the law and understands that you are examining the role of the IRA as well as the security services as part of your investigation"*.
- 36.22 I was grateful for the correction which I communicated to families.

Section 3: Challenges

37 Overview

- 37.1 In this section, I cover a number of difficulties I have encountered while leading Kenova. Legacy investigations face resistance across the board, inevitably from those involved in criminal acts during the Troubles, and disappointingly even from some in and around successive governments and the security forces. There remains a defensiveness about what happened during the Troubles that does not resonate with the investigative responsibility to examine legacy cases independently and effectively.
- 37.2 It is abundantly clear that agencies of the state involved in dealing with the Troubles have made decisions not to disclose information that should have been passed to legacy investigations, and have permitted a culture of delay and obstruction. Those leading previous legacy investigations have evidenced these actions. This should not happen, particularly where grounds exist to indicate the state was complicit in or turned a blind eye to serious criminality.
- 37.3 It is surely right that there should be a proper examination of 'how' and 'why' someone was killed whether such a death occurred in England, Wales, Scotland or Northern Ireland and whether or not it was Troubles related. This is not only in the public interest, it is a basic entitlement for all victims and their families and an example of the benefit of living in an effective democracy compared with a country that would not permit any examination of cases where state involvement may have occurred. In the debate amongst those who remain defensive about what happened, the voice of the victim is not sufficiently heard. The culture of secrecy and withholding information by the authorities feeds distrust. I have heard time and again from those who led previous legacy inquiries how this culture hampered and even stymied their investigations. To help overcome this resistance, legacy investigations need to be independent, effective and build trust and confidence on all sides. Such a position is incredibly difficult to achieve in the absence of an independent legacy structure.
- 37.4 Kenova has had to carry out its investigations while functioning on ad hoc and piecemeal arrangements involving multiple different organisations and individuals and without an express statutory basis or statutory powers. This has, almost inevitably, caused numerous challenges

with many of those organisations and individuals. In the following paragraphs, I highlight some of these issues and how a freestanding independent legacy investigation structure would help address many of them.

- 37.5 First, I should like to acknowledge and thank those in the police, military and other security forces who operated on the front line during the conflict and who have been both cooperative and helpful to Kenova. As early as August 2020, we had identified 467 potential military witnesses who might be able to assist the investigation. We assessed each one to identify who had been in what roles during the Troubles and approached those who might be able to assist. From that group, we took 102 statements. Only eight people declined to engage with my officers because of ill health or because they did not recall events.
- 37.6 For the same period, we identified 494 former RUC officers as potential witnesses. From that group we took 159 statements with only 19 former officers declining to engage for similar reasons. It is important to clarify that these individuals were not suspected of any crime.
- 37.7 Former members of the FRU provided 64 witness statements and we interviewed 12 of them under caution.

38 PSNI intelligence

- 38.1 In January 2020, at the end of a meeting with CC PSNI Simon Byrne and ACC George Clarke, during which I provided a general update on Kenova's progress, CC Byrne said he had information about me that he needed to address. He explained that the information was sensitive and had been gisted.⁴⁹ He explained that he would be passing it on to MI5 and told me that he intended to read a pre-prepared document that evidently contained information about me.
- 38.2 I asked to read the document, he agreed and informed me that ACC Clarke would write down any response I provided.
- 38.3 In summary, the document contained various names and claims about a meeting I had attended as part of my role in leading Kenova and suggested that I had wrongly passed the names of state agents to and had an unhealthy relationship with third parties and had breached the Official Secrets Act 1989.
- 38.4 I told CC Byrne and ACC Clarke that the report was wrong. I recalled a meeting matching elements of the document as it involved a theory about a Troubles incident which, if accurate, would have brought that event within the Kenova ToR. A member of my team had accompanied me to the meeting and took a detailed note. I had listened to the theory from a person I had not met before and his solicitor without disclosing information in return and advised them to write

⁴⁹ 'Gisted' intelligence is a summary of intelligence that is written in such a way as to protect its source.

to CC PSNI if they wanted the incident investigated. I was clear that it was not connected to Kenova and I was confident the theory was misconceived.

- 38.5 Furthermore, I reassured CC Byrne that I had never actually met others named in the document and suggested that it was hard to imagine that I would inform people I had not met before of sensitive information from an inquiry such as Kenova as claimed.
- 38.6 I invited CC Byrne to have the claims fully investigated and offered to make the Kenova staff member present at the meeting available for interview as well as provide access to their note which would show those named in the intelligence report were not present and that no sensitive information was disclosed.
- 38.7 I suggested that the role that I was doing was one that causes some to feel threatened and that there would undoubtedly be efforts to undermine me and the Kenova investigation. CC Byrne did not inform me where the information came from and I received no further update on the matter. It is my understanding that the intelligence was passed to MI5.
- 38.8 This episode provides an example of the efforts that can be made to undermine and discredit those conducting legacy investigations.

39 PSNI affidavit

- 39.1 On 20th September 2019, the Northern Ireland Court of Appeal handed down the McGuigan and McKenna judgment in the so-called ‘Hooded Men’ cases.⁵⁰ This led to ACC PSNI George Clarke raising informally with me the prospect of commissioning Kenova to review the underlying events.
- 39.2 On 13th November 2019, after some earlier discussions about feasibility and resources, CC PSNI Byrne and ACC Clarke formally asked me to take on the ‘Hooded Men’ Review. I accepted and agreed to begin engaging with legal representatives to discuss potential ToR.
- 39.3 From the following day, 14th November 2019, up to and including 10th March 2021, I had discussions and correspondence with PSNI and stakeholders to agree ToR as PSNI requested. On 3rd December 2019, I briefed CC Byrne and ACC Clarke on progress and my engagement with the legal representatives.
- 39.4 I updated CC Byrne and DCC Hamilton regularly on progress. On 10th March 2021, I submitted a fifth (and what I then believed to be final) draft ToR for PSNI sign-off. On 23rd March 2021, DCC Hamilton notified me that PSNI was ‘pausing’ any further work on the ‘Hooded Men’ case pending the outcome of an upcoming Supreme Court appeal hearing about it. DCC Hamilton’s

⁵⁰ *Re McGuigan and McKenna’s Applications* [2019] NICA 46:

[https://www.judiciaryni.uk/sites/judiciary/files/decisions/McGuigan%E2%80%99s%20\(Francis\)%20and%20McKenna%E2%80%99s%20\(Mary\)%20Application.pdf](https://www.judiciaryni.uk/sites/judiciary/files/decisions/McGuigan%E2%80%99s%20(Francis)%20and%20McKenna%E2%80%99s%20(Mary)%20Application.pdf)

letter to me acknowledged, *“our engagement over recent weeks and months about our request that you undertake a review into the circumstances of the detention and treatment of the Hooded Men... As you are aware the context of the PSNI request to you was the decision of the NI Court of Appeal in the case of Re McGuigan and McKenna”*. The letter explained that PSNI had taken advice from counsel and then made the decision to pause the ‘Hooded Men’ work.

- 39.5 Having received the letter from PSNI indicating its change of approach, I wrote a brief response that, *“it would be remiss of me not to ask that rather more consideration be given to the families in any future shift in such decision making. I have a detailed history of the exchanges between myself and PSNI dating back to November 2019 whereupon I was asked by CC [Simon Byrne] to lead the Barnard Review and lead an independent team in the matter of McGuigan and McKenna where similar considerations around independence apply. Families have been let down far too often in legacy cases and whilst this is potentially merely a paused position it will be a bitter blow to the expectations of the families having been aware of our advanced discussions to agree the final terms of reference”*.
- 39.6 At the time of the pause on agreeing ‘Hooded Men’ ToR, solicitors representing them informed me that papers they had received in connection with the forthcoming Supreme Court case including an affidavit sworn by a PSNI officer making remarks about my role. The solicitor said the affidavit misrepresented the background with regard to my tasking from CC Byrne and ACC Clarke. I have not read the affidavit but I am informed that it stated that I had *“acted on my own initiative”* (or words to that effect) in seeking to progress the ToR when I was, in fact, asked to do so by CC PSNI.
- 39.7 A solicitor representing the ‘Hooded Men’ made a formal allegation of perjury to PONI relating to the affidavit, I drew it to DCC Hamilton’s attention and he accepted that the claim I had *“acted on my own initiative”* was clearly wrong. He had not seen the affidavit either. I asked that PSNI withdraw or correct it and alerted him to my specific point of the affidavit misleading the court.
- 39.8 A further PSNI affidavit was sworn in May 2021. As a result, solicitors for the ‘Hooded Men’ wrote to me with a number of questions. To address these, I wrote to all parties, CC and DCC PSNI and each of the solicitors concerned setting out the history of the ‘Hooded Men’ review with regard to PSNI commissioning me. I received a response from CC Byrne agreeing with my account.
- 39.9 The informal, organic process for commissioning my services led to a lack of transparency and confusion with the result that I had to spend yet more time defending Kenova’s reputation. This was destabilising for families and could have been avoided had an independent legacy investigation structure, on a proper statutory basis, been in place.
- 39.10 Following on from the above events, it may be noted that PSNI issued a statement dated 13th June 2023 apologising to the ‘Hooded Men’ and their families for their mistreatment and torture in police custody in 1971.

40 PSNI and 'Stakeknife' civil claims

- 40.1 Many of the allegations at the heart of Operation Kenova are also the subject of ongoing civil claims brought by victims and families in the Northern Ireland High Court. These are being case managed as a linked group, PSNI is a named defendant in all of them and other co-defendants are also named, including MOD, MI5, NIO and Freddie Scappaticci.
- 40.2 Although Kenova is not a party to these proceedings, it was always inevitable that the two processes - criminal and civil - would both need access to at least some of the same documentary and evidential materials. Where necessary, facilitating and cooperating with parallel legal processes is an ordinary function of legacy investigation casework.
- 40.3 However, I was drawn into these civil claims more directly than I would have liked because of the mechanism by which Operation Kenova was established and its connections to PSNI. These created a number of practical difficulties and again illustrated the importance of future legacy investigations being conducted through an institutionally separate legacy structure. If Kenova had been constituted, authorised and funded as a freestanding legal entity under its own statutory arrangements - rather than through a 'lead force arrangement' under section 98 of the Police Act 1996 - the confusion and concern which arose from the way it became drawn into the Stakeknife civil claims could have been avoided.
- 40.4 As party to the civil claims, PSNI is required by the relevant High Court procedure rules to disclose any relevant documents 'which are or have been in its possession, custody or power'.⁵¹ The issue my team faced is that this provision effectively extends PSNI's disclosure obligations to all documentary materials held by Kenova for two reasons. First, a great many of Kenova's documents originated from PSNI meaning that they 'have been' in its 'possession, custody or power' at some point. Secondly, the notion of 'possession, custody or power' is given a wide, purposive interpretation which, strictly speaking, extends to Kenova materials because its authority and funding derive from PSNI. When Operation Kenova completes its work and disbands or, in theory, if PSNI decides to discontinue that work, responsibility for our premises, equipment, files and exhibits will devolve to PSNI, meaning our documents are all, strictly speaking, within its ultimate 'power' for the purposes of the procedure rules.
- 40.5 I never had any difficulty with the prospect of disclosing into the civil proceedings official materials pre-dating the establishment of Operation Kenova in June 2016 and other materials inherited by us at that point from previous RUC, PSNI and PONI investigations and inquiries, albeit that the original owners of those materials would still need to review their relevance and

⁵¹ Rules of the Court of Judicature (Northern Ireland) 1980, Order 24:

<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/the-rules-of-the-court-of-judicature-northern-ireland-1980-february-2021.pdf>

sensitivity. In this regard, PSNI provided Kenova with copy sets of records held by RUC CID and Special Branch, the Stevens inquiry and the HET.

- 40.6 However, I was very concerned about the possible disclosure of internal 'working papers' obtained or generated by Kenova after 10th June 2016. These contain the identities of and information provided by people engaging with Operation Kenova on a confidential basis and sensitive information about the conduct of the investigation, evidential leads, lines of enquiry and so on.
- 40.7 In the event, the High Court agreed to 'ring fence' Kenova's working papers from disclosure into the civil proceedings for the time being. My team has made a full copy set of the materials we inherited in 2016 available to PSNI and these are now being reviewed and processed, including by special advocates. I am confident that Operation Kenova's work can be completed before the civil claims progress much further and, moreover, I am optimistic that completion of Kenova's work and publication of our final report will greatly assist the parties to come to a sensible resolution and settlement of the claims themselves.
- 40.8 It took a great deal of effort over a number of years to ensure the protection of our working papers and this included me having to prepare and file five position statements, three affidavits and three sets of exhibits. I was assisted by my own independent counsel in doing this, but I was also reliant on the support of PSNI and its legal team to present my arguments and represent Kenova's interests. I was, of course, grateful for this and would always be keen to work with and not against others in finding a resolution to all such matters. However, I was also uncomfortable, first, that PSNI's role as mediator could have given the impression that Kenova is its subsidiary and, secondly, that its establishment under section 98 of the Police Act 1996 meant its materials fell to be treated as being 'within the power of' PSNI.
- 40.9 Legacy investigations should not have to fight to demonstrate their independence: it should be clearly and expressly hard-wired into their constitutional makeup by statute. Furthermore, concerns about confidentiality, even if unfounded, can undermine vital public trust and confidence in investigators and deter and discourage public engagement and the provision of vital information.

41 MI5

- 41.1 Kenova's relationship with MI5 has endured some extremely fractious spells and the process of extracting information from it has sometimes felt like a hard-fought uphill battle. Given that MI5 had very little involvement in running security force agents in Northern Ireland during the course of the Troubles and Stakeknife himself was run by the FRU, this may appear surprising and it has certainly troubled me.
- 41.2 During the Troubles, MI5 advised and assisted the FRU generally, was copied into its intelligence and even conducted a supportive review of its handling of Stakeknife in particular.

However, MI5 was not responsible for how Stakeknife was targeted or run and could not sensibly be criticised for the conduct or operation of the FRU or any of its agents. Indeed, MI5 came onto Kenova's radar in a largely tangential way because it retained a vast amount of FRU and RUC Special Branch intelligence product when others did not.

- 41.3 MI5's diligent and methodical retention of so much historical intelligence material has been of huge benefit to Kenova, but I would immediately recognise that it has proved an unwelcome logistical burden for the Service itself. Indeed, MI5 has been drawn into a wide variety of historical investigations and inquiries relating to events in which it was only peripherally involved for the simple reason that it retained records sent to it by others who later lost or destroyed their copies. For example, MI5 has been obliged to expend considerable resources on reviewing and disclosing thousands of MPS Special Branch intelligence reports to the Undercover Policing Inquiry simply because the originals were later culled from the latter's Registry.
- 41.4 In such cases, it might be asked why MI5 does not leave it to each document's originator to assess whether disclosure to an investigation or inquiry should be allowed or resisted. The answer would appear to be, first, that it sees itself as obliged to defend and protect all classified information regardless of its source and, secondly, that this practice derives not only from its internal culture, but also its reading of section 2 of the Security Service Act 1989. The latter obliges the DG MI5 to ensure, amongst other things, *"that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceeding"*. While I would query whether this could be given a less restrictive interpretation or amended to facilitate access to third party materials originating elsewhere, it goes some way to explaining why MI5 controls such access as tightly as it does. That said, there is a key difference between, on the one hand, restricted access by vetted investigators within the circle of trust and apprised of key 'need to know' details and, on the other hand, onward disclosure to others.
- 41.5 I believe two further contextual points coloured the early phases of MI5's engagement with Kenova and should also be noted:
- (1) When Kenova was first announced, senior staff at MI5 understandably assumed that it would be an investigation into the FRU and RUC Special Branch which would have no particular impact on MI5. As a result, resource needs were initially underestimated.
 - (2) Like many other members in the security and intelligence community, some MI5 staff also appeared to have a tendency to view the Stakeknife case through rose-tinted spectacles. They had been sold an idealised narrative about a highly placed source inside the PIRA ISU bravely saving 'countless' or 'hundreds' of lives and naturally felt that this legend should be defended and not unfairly tarnished. Unfortunately, and as I outline below, this is a myth and the truth is much murkier.

- 41.6 Before turning to the difficulties faced in connection with Kenova's engagement with MI5, I should make clear that these have related to matters of process, not outcome, and that I do not believe anything has been intentionally withheld or that there has been a deliberate attempt to frustrate my investigation. One potentially relevant file did go missing within MI5 and has never been located, but MI5 apologised for this and I have to accept that these things can and do happen.
- 41.7 I also recognise that MI5 faces the double-challenge of meeting current operational threats - which must be its priority - while simultaneously servicing numerous criminal, official, Parliamentary, regulatory and judicial investigations, inquiries and proceedings relating to past events from its vast library of information. As a result, MI5's resources are hugely stretched and it is right to acknowledge that it did allocate staff, accommodation, equipment and facilities to help process Kenova's requests, that the majority of these were ultimately answered and that we were always able to have frank and robust dialogue about the difficulties that did arise.
- 41.8 Early in the process, the MI5 team facilitating responses to our requests for information kindly shared an internal report analysing its Stakeknife related records. This provided a helpful overview and assisted with our navigation of its files, but it also contained a number of comments and false assumptions about the case and repeated inaccurate and unreliable FRU figures about lives saved by Stakeknife. Subject to caveats but with some confidence, the report set out a position reflective of the abovementioned myth, namely, that MI5 had seen and heard nothing to suggest that Stakeknife had been personally involved in any serious criminality. While Kenova found no direct evidence of him delivering a fatal blow or bullet by his own hand, I believe the truth to have been very different and the position set out in the MI5 report was not sustainable.
- 41.9 I wrote to MI5 raising concerns about the flow of material to my team in January 2017, January 2018 and June 2018. On each occasion, the Deputy DG MI5 was both responsive and supportive, but his strategic leadership was not always matched by those tasked with delivering the required cooperation, matters did not improve and they ultimately came to a head in late 2019.
- 41.10 In September 2019, I met the Deputy DG MI5 and Head of Legal to reiterate and escalate a number of concerns. These included the ongoing issue of access to information, the organisation's decision to classify as 'Top Secret' aggregations of previously 'Secret' documents, the fact that solicitors representing former security force personnel had been given greater and unorthodox access to MI5 materials, the abovementioned internal report and delays in responding to Kenova's requests.
- 41.11 One of my senior officers was secretly recorded by a third party (not MI5) at a meeting in October 2018 and edited extracts from the recording were later broadcast as part of a BBC Spotlight documentary series reporting on the 50th anniversary since the start of the conflict. The programme aired on 22nd October 2019. At no point in advance of this did the BBC notify

me or seek any comment from me or my team about the recording. I had previously been asked to contribute to the series but had declined to do so.

- 41.12 Legacy cases often bring with them a notoriety that causes undesirable distractions and I am well aware that, on occasions, people have recorded me and my staff without our agreement.
- 41.13 The secretly recorded meeting was held to update a complainant about the Kenova perjury investigation and to finalise taking a statement from him. It was not a controversial meeting. It involved my investigating officer providing the complainant with a broad update of progress and finalising his statement. The complainant had previously expressed strong reservations about Kenova's ability to access sensitive material from the security forces. During the meeting and to address his concerns my officer correctly disclosed that Kenova had recovered information from MI5 that had not previously been made available to other legacy investigations and inquiries.
- 41.14 In response to the television programme, MI5 wrongly suggested that my officer had unlawfully disclosed secret information. The making and broadcast of the secret recording and the reaction from MI5 provide further examples of the challenges faced by those investigating legacy cases. The Service also suggested that the existence of the recording might be an example of how its own staff are put in jeopardy by assisting Kenova. I judged this to be utterly implausible. Kenova has a legal responsibility to update victims, families and complainants and did so in this instance by disclosing non-sensitive information in response to a reasonable question. Our commitment to engaging with victims, families and stakeholders is key to the credibility and positive reputation Kenova enjoys. We rightfully meet and update witnesses and victims on a regular basis.
- 41.15 Shortly after the BBC Spotlight programme was broadcast, I had a further meeting with MI5 about a number of concerns in early November 2019. I raised an issue of legacy material being classified at a level that appeared to be entirely disproportionate to its actual sensitivity. I also raised the somewhat recent practice of MI5 retrospectively classifying legacy material as 'Top Secret' when the Kenova team requested multiple documents that were individually classified as 'Secret'. This prevented Kenova from placing these documents on the HOLMES system as it is only accredited to hold material classified up to 'Secret' and therefore impeded analytical and investigative examination and comparison work. The content of the documents had no bearing on MI5's assessment, it was simply the accumulation of them that supposedly attracted a 'Top Secret' classification. Finally, I raised the lapsed security accreditation of the PPSNI offices in Belfast which needed to be addressed so that Kenova could submit its files (see below).
- 41.16 For its part, MI5 raised the Spotlight broadcast and some wider media reporting about Kenova. Apparently, there was a suspicion within MI5 that the Kenova team had been aware of the secret recording and, in particular, the headline that Kenova had recovered material not previously made available. I corrected this misunderstanding explaining that my officer had

been recorded without our knowledge and we had not known of the planned broadcast in advance. MI5 then raised media stories claiming I had made recommendations for prosecutions in the files we remained unable to serve on PPSNI due to security accreditation issues. I categorically refuted this inaccurate reporting and pointed out that Kenova is routinely the subject of inaccurate media stories. I undertook to write to the solicitors representing those at risk of prosecution to correct such reporting and to work with MI5 to address future media inaccuracies. I made no recommendations in the files, I merely presented the evidence.

- 41.17 I was then shown a draft letter that MI5 intended to send me. It reflected the inaccurate assessments that I had addressed in the meeting and so I undertook to write setting out the true position and suggested that there was no need to send the draft letter. I noticed the draft was to be shared with PSNI and the NIO and was surprised as this had not occurred previously. I sent my letter the following day.
- 41.18 Notwithstanding this, MI5 wrote to me in late November 2019 raising the same concerns about the BBC Spotlight documentary and wider media reporting. The letter was copied to the NIO and Deputy National Security Advisor and suggested Kenova had acted improperly. I was increasingly concerned by these new obstacles and that MI5 sharing the letter outside of normal protocol could be interpreted as an attempt to undermine Kenova. I sought legal advice and set about responding in considerable detail about all matters.
- 41.19 I replied in December 2019 setting out that I had made a commitment to victims and families, including security forces families, to get to the truth. Previous investigations had failed to do this, partly due to the culture of secrecy and information retention within the security forces. I set out that I was seeking a significant change in approach. I acknowledged MI5's disquiet and suggested we meet again to address the issues. I was clear that the disquiet was unfair and unfounded and I could not leave it unanswered. I also addressed issues raised around the government Security Policy Framework and new obstacles and bureaucratic processes MI5 was introducing contrary to our previously agreed Information Handling Protocol.
- 41.20 I have emphasised repeatedly that I would never compromise or put at risk any sensitive MI5 information. The Information Handling Protocol we agreed previously with MI5 guarantees that its records will remain secure and protected within Kenova. Information cannot be the subject of any onward disclosure without proper notice and agreement.
- 41.21 I set out separately the ongoing problems with records not being made readily available to my team and delays since we had prepared files of evidence for PPSNI.
- 41.22 Another ongoing concern I raised was MI5's assertion that witness statements from its personnel taken as part of my investigation were effectively its property and could not be referred to in any wider Kenova interviews (such as when suspects are interviewed under caution) or shared with PPSNI without its permission. I suggested various mechanisms to resolve these issues, such as seeking resolution through the Parliamentary Intelligence and Security Committee, the Investigatory Powers Commissioner or the Cabinet Office.

- 41.23 In February 2020, I had a pivotal meeting with the then Deputy DG MI5 in order to seek a way forward in light of recent events and to update him on certain specific issues on individual investigations. The meeting was positive and productive and resulted in MI5 commissioning an external review into our relationship and the appointment of an operationally experienced senior MI5 officer to be interlocutor with my team. The Kenova relationship with MI5 improved significantly from then on.
- 41.24 The reviewer was very thorough. She interviewed 21 people from both sides and produced an impressive 33 page report which identified four key problem areas and made 27 recommendations which were all accepted by MI5. The key problem areas were: MI5's narrow transactional approach to interactions with Kenova; confused structures around its internal decision making and a lack of policy guidance; a failure to build strong working relationships; and Kenova's capacity to process large volumes of sensitive intelligence information. The report also fairly recognised that MI5 had assisted Kenova with more than 1,500 requests, provided access to hundreds of files and facilitated interviews with more than 30 current and former members of staff.
- 41.25 To reassure MI5, I set out key principles to underpin a new Information Sharing Protocol which further recognised and protected national security issues without compromising the achievement of Kenova's wider operational objectives. These are:
- all potentially relevant MI5 material will be available to Kenova;
 - Kenova will be informed of any new acquisition of potentially relevant MI5 material;
 - MI5 material disseminated to Kenova will not be shared without MI5's permission;
 - MI5 and Kenova will work together to resolve disputes relating to the Information Sharing Protocol.
- 41.26 The information sharing process between Kenova and MI5 is now working much more effectively and I commend its now DG for instigating an independent review of the various issues I highlighted. I would reassure families and stakeholders and others reading this report that, although some engagement between MI5 and Kenova was not as I would have liked, we now have a constructive relationship in which MI5 responds in full to our requests for information. This must be maintained for any future Northern Ireland legacy investigations and indeed any other legally commissioned inquiries that require information disclosure.

42 Claims that the security forces have been unfairly targeted

- 42.1 Inaccurate reporting about legacy investigations resulted in incorrect and disproportionate claims that Kenova's focus was on prosecuting Army veterans and retired RUC officers. I have had repeatedly to address these inaccuracies with veterans' groups and retired security force

personnel. Many veterans have important information about these cases and Kenova will pursue evidence wherever it might be and regardless of who it might implicate.

- 42.2 Certain high profile cases have been brought against security force personnel that have adversely affected the reputation of legacy investigations, such as the Soldiers A and C case that was dismissed by the courts.⁵² If legacy is done properly, applying modern day investigative tools including cutting edge forensic techniques and recovering all intelligence available at the time, it is the terrorists that have most to fear.
- 42.3 I have already mentioned in this report how the security forces failed to disclose information to previous legacy inquiries. It is clear that many within the security forces view any legacy investigation as a criticism of those who risked their lives to keep society safe. I have always acknowledged that the security forces faced considerable challenges and dilemmas to which there were often no easy solutions or 'right answers'. It is only right to acknowledge the context and danger of the operating environment during the Troubles, but it is essential for public trust and confidence that legacy investigations now have unfettered access to sensitive material.
- 42.4 However, there are still those within the security forces who remain resistant to what they perceive as inquiries, such as Kenova, rewriting the history of the Northern Ireland conflict. Lord Stevens, Judge Cory and others faced similar problems.
- 42.5 Such resistance is understandable as the security forces stood bravely protecting society from terrorism and the cost to them in lives lost must never be forgotten. Those who work in these agencies today are understandably protective of the reputation of their colleagues in light of such sacrifices. However, those of us who serve in these agencies accept that we are held to a higher standard even in times of conflict. Any loyalty to the security forces is best demonstrated by being open to and welcoming of scrutiny in order that lessons that need to be learned can be. Society will trust those security forces that embrace scrutiny and lose confidence in those that do not.
- 42.6 I reiterate here again, that the existence of an independent legacy investigation structure could have avoided the encounters, debates and different interpretations described in this section. This is especially the case as regards our bilaterally agreed information and handling arrangements. We have learned from the experiences of many others, including Lord Stevens, Judge Cory, Judge Smithwick, the HET, Sir Desmond De Silva QC and the various victims groups and legacy stakeholders from all sides. It is critical that government also learns the lessons from these experiences if legacy is to be properly and finally resolved. I welcome the government's commitment to doing this through bespoke legislation.

⁵² *R v Soldier A and Soldier C* [2021] NICC 3:

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/The%20Queen%20v%20Soldier%20A%20and%20Soldier%20C.pdf>

42.7 It is vitally important that the security forces keeping us safe can be trusted with the authority and powers to do so and that they are accountable for their actions. Such accountability applies to those on the front line and, perhaps more importantly, to those who led those organisations and were charged with ensuring their staff conducted themselves properly. The values such organisations espouse about fairness, honesty, integrity and human rights are as valid for Troubles related cases as for any others. In many legacy cases, we have failed to uphold such accountability and values.

43 PONI

43.1 As the make-up of our workforce evolved to include more staff working as contracted police staff, the current PONI, Marie Anderson, became concerned about whether she could continue to share information with me and my team. In light of this, in October 2020, she raised this formally and also challenged the accountability arrangements for complaints or breaches of discipline that non-warranted Kenova staff might commit during the course of their work.

43.2 PONI's concerns hinged upon whether the original information sharing agreement between our offices remained legally extant and two issues which arose from that: the accountability arrangements in both jurisdictions (Northern Ireland and England and Wales); and the lawful authority for disclosure to Kenova.

43.3 I sought advice from my own counsel which I received in November 2020 and shared this with PONI. I hoped this would address her concerns regarding both staff accountability and disclosure. Unfortunately, she assessed the situation differently and there was no meaningful exchange of information with Kenova for some six months.

43.4 I understand and acknowledge the clarity and legal assurances PONI required. The situation was unusual and I am sure that it is right that it was challenged. However, this further illustrated the complications that exist in the absence of a proper structure under which to conduct independent legacy inquiries.

43.5 To resolve the impasse, and against my own counsel's advice that this was not necessary, I attested as a special constable with Bedfordshire Police on 11th March 2021 together with two senior members of my executive team. My attestation as a constable appeared to overcome the issues PONI had raised and allowed for the formulation of a new, updated information sharing agreement between us which we finalised in October 2021 (Appendix 31). However, and without any change in the law or status quo, PONI unilaterally 'suspended' all further information sharing in May 2023 because of "*concerns that [the agreement] no longer meets our respective duties and obligations under the Data Protection Act 2018 (and related ICO Code [sic] of Practice) and my own responsibilities under the Police (Northern Ireland) Act 1998*". At the time of writing, the basis for these concerns is unclear and I will again have to go through a

further process of legal debate and negotiation in order to find a solution. None of this would be necessary under a proper statutory legacy structure.

- 43.6 For victims and families, these challenges create delay and frustration. There should be established structures to provide for accountability and disclosure processes between those investigating legacy cases.

44 PPSNI

- 44.1 When I commenced the Kenova investigations, I learned of the fraught history around legacy cases with respect to the Northern Ireland criminal justice process. During Kenova's early days, criminal proceedings were underway against the loyalist terrorist Gary Haggarty and others. These cases involved a number of complex issues including allegations of state complicity whereby, ultimately, other than Haggarty, a number of linked cases either collapsed or PPSNI decided not to pursue them. Commentators and PPSNI will no doubt have various explanations for why this happened. For me, it was partly an indication that PPSNI lacked an adequately equipped and resourced legacy team. As with other parts of the criminal justice process, this can be traced back to a longstanding lack of investment.
- 44.2 It is worth noting the contrast between the resource and innovation that the criminal justice system applied in response to the terrorist threat from Al Qaeda and Islamic State with that applied to legacy in Northern Ireland. It is both inevitable and right that the modern day terror threat receives enormous political focus underpinned with significant funding across the criminal justice sector. Compare this to the response to legacy cases in which over 3,700 citizens lost their lives. I accept and understand the difference in the immediacy of the threat, but the rightfully robust stance against present day issues demonstrates what is possible when governments set their mind to something.
- 44.3 By way of example, the Counter Terrorism Command within the MPS, which is part of a National Police Counter Terrorism Network, was set up to provide the best possible policing investigative response to emerging national security threats. When the counter terrorism police submit terrorist case files to the Crown Prosecution Service (CPS), the Counter Terrorism Division (CTD), a specialist prosecution unit within the CPS, is allocated to examine the files in a timely manner, using their specialist expertise. These well-resourced specialist units provide confidence and reassurance to the public and the investment includes a network of counter terrorism units with secure and accredited premises to hold classified material. The same model is also adopted in the context of historical war crimes investigations.
- 44.4 By contrast, PPSNI responds very differently to investigation teams dealing with serious and complex legacy crimes. When PPSNI is contacted by such a team or receives files in connection with a legacy case, it does not actively engage or collaborate with investigators, provide them with any provisional assessment of the evidence or identify areas that need

corroboration or additional work. As a result of PPSNI's prioritisation criteria, legacy files are effectively put in a queue for examination as resourcing and demand allow. Despite the fact that legacy files go into the Central Casework Section that examines some of the most high profile and complex cases in Northern Ireland, the reviewing lawyer's caseload and the prioritisation criteria mean there are considerable delays to reviewing legacy files and hence the taking of decisions. PPSNI does engage independent counsel on some cases, but it usually treats its instructions and their advice as confidential and excludes investigators from key conversations. In my experience, the result is generally a disjointed and transactional process with prosecutors, counsel and investigators each operating on the basis of different assumptions and understandings and without a proper shared grasp of all the factual complexities.

- 44.5 In cases it manages, CPS CTD almost immediately engages with an investigation team, analyses the material it has received, appoints counsel and looks to hold early joint case conferences in order to achieve a more collegiate, multi-disciplinary assessment. I should be clear that the CTD, although at times certainly challenged as regards resourcing and demand, is in a far more fortunate position than PPSNI with respect to the time its lawyers have to dedicate to cases. It is also important to note that CTD deals primarily with current terrorism cases where the threat remains and, therefore, the need for prompt action is more pressing. This collaborative approach to examining terrorism files enables CTD to have a more informed understanding of its cases. In anticipation of how complex the Kenova cases were likely to be, I advocated that PPSNI adopt this model, appoint senior counsel early and get all parties together in the same room to work through any issues. Unfortunately, continuing with its existing practices has resulted in delays and limited collective understanding of the cases we have submitted.
- 44.6 It appears to me that PPSNI's approach is partly the result of a desire to safeguard its institutional independence, coupled with differences between the jurisdictions and legal cultures in England and Wales, on the one hand, and Northern Ireland, on the other. However, I am not aware of any sense in which the CPS is any less independent than PPSNI or any way in which the CPS CTD model could be criticised for a lack of independence.
- 44.7 Furthermore, the criminal justice process in Northern Ireland is slower than in England and Wales and Scotland. In the latter jurisdictions, frameworks exist to manage the timeliness of the court process, but corresponding arrangements do not exist in Northern Ireland. In 2020-2021, the average time for a case to go from charge to trial in Northern Ireland was 470 days, in England and Wales it was 182 days in a murder case.⁵³ Accepting that criminal justice is

⁵³ DOJ NI, *Case Processing Time for Criminal Cases dealt with at Courts in Northern Ireland 2020/21*, September 2021:

<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Accessibility%20case%20processing%20times%20for%20criminals%20dealt%20with%20in%20court%20202021.pdf>

slower in Northern Ireland, legacy is known to take even longer. These additional delays mean even more frustration for victims, families and defendants alike.

- 44.8 DPPNI Stephen Herron has long called for an increase in funding for his office's legacy casework.⁵⁴ Notwithstanding this, in February 2022, he informed me of a potential 2% cut to his budget for 2022-2023. A proposed 10% uplift to Department of Health funding would require cuts from wider public service budgets across Northern Ireland, including PSNI which suspended police recruitment as a result. DPPNI said he anticipated that this would impact legacy cases because he must prioritise prosecution files where a present risk exists to public safety. Put simply, the time his lawyers spend examining legacy cases will likely reduce further. It is also likely PSNI, in managing numerous budgetary pressures, will seek to find savings from legacy costs. This demonstrates some of the challenges the authorities face and ultimately reflects why victims and families feel abandoned.
- 44.9 Inevitably, legacy matters are complex. Such cases need careful consideration before a prosecution decision can be taken. It has been of great frustration to Kenova and more so for families, that PPSNI has not had adequate resources to consider the volume and complexity of cases submitted to it in a timely fashion.
- 44.10 As well as the above structural and resourcing problems, PPSNI's receipt of Kenova files also faced (avoidable) logistical challenges and delays. A large proportion of the evidence Kenova has relied on to build criminal cases has been classified as 'Secret'. In October 2019, we made the initial tranche of Kenova files available to PPSNI. Our submission consisted of five murder files, three files on abduction cases, a conspiracy to pervert the course of justice file, a perjury file and two files covering other matters. Mostly these files related to PIRA suspects, but they also contained submissions about members of the security forces.
- 44.11 However, on the day we were due to serve these files at PPSNI's office in Belfast, MI5 informed us that the building's security accreditation had expired and we therefore could not proceed. This was unexpected and exceptionally frustrating. Various building upgrades and accreditation processes and staff training, were required to restore the necessary accreditation. Going through the process was necessary to permit PPSNI to hold the classified material contained in the Kenova files. In an effort to assist, I made the Kenova files available to PPSNI to view at an accredited, secure location on the PSNI estate controlled by Kenova. However, it chose not to take advantage of this offer, deciding instead to wait for the PPSNI building and staff to be accredited. No doubt it did not expect this to take as long as it did. It was finally confirmed in February 2020, permitting us formally to submit the first tranche of files.

⁵⁴ See, for example, PPSNI, *Addressing the Legacy of Northern Ireland's Past Consultation Response by the Public Prosecution Service*, October 2018, paragraphs 8-13:

<https://www.ppsni.gov.uk/publications/addressing-legacy-northern-irelands-past-consultation>

- 44.12 The lapse of PPSNI's security accreditation will inevitably be viewed by some with suspicion. It is inevitable that such incidents will cause some to believe that legacy investigations such as Kenova are subject to interference and obstruction. Notwithstanding such concerns, I am satisfied that the submission of files to PPSNI was not deliberately delayed and this frustrating episode can best be described as a case of 'cockup rather than conspiracy'.
- 44.13 We submitted a second tranche of files to PPSNI in June 2020. This consisted of eight supporting reports that provided additional information about the structure and operating processes of different organisations during the Troubles, as well as evidence about the identity of the agent Stakeknife together with an overarching executive summary report. Tranche 2 also included three more murder and five abduction cases.
- 44.14 In April 2021, we submitted a third tranche of Kenova files to PPSNI. This consisted of six murder and four abductions cases. We also submitted an initial advice file concerning Operation Turma relating to the murder of three police officers in October 1982.
- 44.15 We have since submitted four further files to PPSNI: two in November 2021; another in February 2022; and a file relating to Operation Mizzenmast and the murder of Jean Smyth Campbell in December 2022.
- 44.16 PPSNI wrote to victims and families about the cases submitted suggesting Spring 2022 for prosecution decisions to be made. It has since extended this timeframe partly because it lacks dedicated resource to examine these cases and because we have submitted additional files. Some commentators argue that the resulting delays are part of a deliberate state strategy of procrastination and, while I am certain that this is not right and that PPSNI would sincerely wish to have made better progress, the delays themselves have undoubtedly undermined the trust and confidence of many in the criminal justice system as a whole.
- 44.17 Despite the rhetoric from politicians about the importance of legacy, it is clear that the time PPSNI has taken illustrates the serious lack of investment. It has been unable to resource the dedicated Legacy Casework Team proposed by the DPPNI in 2018 and simply does not have enough staff with the requisite skills to deal with these cases.
- 44.18 Future proposals to deal with legacy cases should include robust court case management with timescales mandated by legislation to circumvent the glacial pace at which criminal justice proceeds in Northern Ireland legacy cases. Any future legacy structure that includes a criminal justice option should review the operating practices PPSNI uses to manage legacy files.

Recommendations

Enact legislation to provide procedural time limits enforced by judicial case management to handle cases passing from a new legacy structure to the criminal justice system.

Review and reform the resourcing and operating practices of PPSNI in connection with Northern Ireland legacy cases.

45 ‘On The Run’ (OTR) letters and the Royal Prerogative of Mercy (RPM)

- 45.1 The On the Run (OTR) letter scheme evolved from negotiations between the United Kingdom government and Sinn Féin on the implementation of the GFA. The scheme began in 2000 and continued until 7th March 2014 when the Secretary of State for Northern Ireland announced its termination. OTR letters were intended to inform individuals that, as at the date of the letter, they were not wanted for questioning or prosecution in the United Kingdom. This was not intended to mean that if new intelligence or evidence came to light the recipient would not face arrest or prosecution.
- 45.2 Separately, the Royal Prerogative of Mercy (RPM) allows the monarch, exceptionally and on the recommendation of the Justice Secretary, to grant a free pardon, a conditional pardon or a remission of sentence to those convicted of an offence. RPM was used in cases related to the Troubles to remit the sentences of convicted offenders who were unable to benefit from the early release provisions of the early release scheme under the GFA,⁵⁵ for example, where part of a sentence was served outside of Northern Ireland or the individual has escaped and was unlawfully at large.
- 45.3 A number of stakeholders have expressed the view to me that many republican terrorists cannot be prosecuted because they have received OTR letters and/or because these represent an exercise of the RPM. This is not the case. OTR letters offer no protection against investigation or prosecution. I have undertaken to address this in my report as oral explanations are treated with suspicion and doubts remain as to the assertion that OTR letters do not protect terrorists from prosecution.
- 45.4 The false impression that OTR letters confer some kind of life-long amnesty or immunity on recipients came about after the collapse of the criminal trial against John Downey in February 2014. Downey was on trial for the Hyde Park bombing in July 1982 when four soldiers were killed and 31 other people injured. The trial Judge, Mr Justice Sweeney, stayed the prosecution as an abuse of process on the basis that in July 2007 Downey had been issued with an OTR

⁵⁵ Northern Ireland (Sentences) Act 1998.

- letter stating that he was of no interest to any police force in the United Kingdom. The prosecution did not appeal.
- 45.5 Lady Justice Hallett was appointed in March 2014 by the Secretary of State for Northern Ireland, Theresa Villiers, to conduct an independent review of the administrative scheme under which OTR letters were issued. The Review summarises the scheme’s history, highlights failures in its administration and clearly sets out the settled legal position that OTR letters do not preclude criminal investigations or proceedings.⁵⁶
- 45.6 The first two letters of assurance under the scheme were dated 15th June 2000 and sent from 10 Downing Street. Thereafter, officials at the NIO sent the vast majority of letters. In total, 228 names were put forward for inclusion in the scheme. Sinn Féin put forward 184 (of which five names were duplicates), solicitors acting for Sinn Féin another 35, the Irish government four and the Northern Ireland Prison Service 14 (of which four were duplicate names). A total of 156 received an individual letter of assurance, another 31 were told they were ‘not wanted’ in some other way, 23 were informed that they were wanted and 18 (at the time of the Hallett report) did not have a definitive answer as to their status. The review also discovered that 13 on the list who had benefited from the exercise of the RPM were convicted prisoners who had escaped.
- 45.7 I will not detail Dame Heather’s report here, but, crucially, she said: “*The ruling in Mr Downey’s case was made very much on its own facts. It is a first instance decision. It does not bind any other judge in any other part of the UK. It does not follow from the result in Mr Downey’s case that recipients of letters of assurance can never be prosecuted. This will depend on individual circumstances*”.⁵⁷
- 45.8 On 9th September 2014, Theresa Villiers made a statement to the House of Commons following the Hallett report to clarify the position on OTR letters and make clear that recipients, “*should cease to place any reliance on those letters*”, “*decisions about investigations and prosecutions will be taken simply on the basis of the intelligence and/or evidence relating to whether or not the person committed the offences*” and “*decisions taken today and in future will be taken on the basis of views formed about the investigation and prosecution by those who now have responsibility for those matters*”.⁵⁸
- 45.9 I hope that those concerned that OTR letters prevent terrorists from being prosecuted are reassured that they do not.

⁵⁶ H Hallett, *The Report of the Hallett Review: An Independent Review into the On The Runs Administrative Scheme*, HC 380, July 2014:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/335206/41003_Hallett_Web_Accessible.pdf

⁵⁷ *Ibid.*, paragraph 9.48.

⁵⁸ *Hansard HC*, 9th September 2014, Vol 585, Col 779.

Part D: Interim findings

Section 1: Overview

46 Strategic themes and issues

- 46.1 During the course of our work on Kenova, I have identified a number of high level themes and issues which arise across the cases. In this section, I identify these and the ways in which they appear to be linked to each other and the underlying circumstances of the Troubles. I do not comment on individual cases, as to do so could prejudice an ongoing or future criminal justice process.
- 46.2 During the conflict in Northern Ireland, terrorists targeted and murdered civilians, members of the security forces and each other; the security forces carried out counter terrorism operations collecting and exploiting secret intelligence from human and technical sources; terrorists mounted counter intelligence efforts including abducting, torturing and murdering alleged or suspected agents; and the police responded to these crimes in a fundamentally different way to the way in which comparable crimes anywhere else in the United Kingdom would have been dealt with, partly because the security forces withheld relevant information and evidence.
- 46.3 Some reasons for this difference in approach are understandable:
- (1) The ordinary pursuit of evidence and leads was inherently problematic in communities hostile to and distrustful of the police. Individuals were often attacked, intimidated and ostracised by terrorists and their supporters should they be seen to cooperate with the security forces. In many Kenova cases, families had not previously had any engagement with the police, let alone any positive engagement.
 - (2) The security forces were operating in a challenging environment in which terrorists regularly targeted and murdered their members and agents and in which they themselves were subject to a much less rigorous regulatory and oversight framework.
- 46.4 Notwithstanding these difficulties, the RUC managed successfully to investigate and prosecute many Troubles related offences and achieve criminal justice outcomes.
- 46.5 That said, criminal cases involving secret intelligence or agents were particularly difficult to prosecute because they raised and were inextricably bound up with considerations of secrecy and agent-protection which made full disclosure to the defendant and public court proceedings highly problematic and obscured the truth.
- 46.6 In this regard, agents were at the heart of both security force counter terrorist intelligence operations and (therefore) terrorist counter intelligence activities. Agents infiltrating and penetrating terrorist groups provided the security forces with significant amounts of valuable

intelligence, but this was not always seen as actionable because intervening on the strength of it could point to its existence and consequently compromise its source and any future supply of intelligence. Even when this was not an immediate risk, an intelligence-based law enforcement intervention could still be futile if it would ultimately entail disclosure and compromise of a sensitive source. For this reason, the security forces often withheld and did not act on or share with investigators intelligence they held about Troubles related murders and other offences. Investigations and prosecutions were often stymied from the outset.

46.7 This has been central to our work on Kenova. Agents saved many lives during the Troubles, however, in order to protect their agents, the security forces allowed preventable serious crimes including murder to take place and go unsolved and unpunished. We have found the following kinds of case:

- (1) murders committed by agents, including cases where one agent knowingly or unknowingly murdered another, cases where agents were acting contrary to their instructions or tasking and cases where it is arguable that they were acting on behalf of the state;
- (2) murders of alleged or suspected agents, including cases where the murder was carried out as punishment and to deter others from acting as agents and cases where the victim was not in fact an agent; and
- (3) murders falling within (1)-(2) above which were or could have been the subject of advance intelligence and so could have been foreseen and prevented, cases where intelligence was not passed on or properly assessed and cases where this was done but the security forces nevertheless decided against preventive action because this might have exposed or compromised an agent.

46.8 Some of these cases were uniquely challenging for the security forces to deal with. They had to assess risks and consequences with limited information, guidance or training. They did so under exceptionally stressful conditions and extreme time pressure, and were sometimes presented with dilemmas which had no 'right answer', because protecting one individual might expose another. Mistakes and questionable decisions were inevitable and understandable. However, whatever the circumstances, each case should have been, and should still be, the subject of independent investigation and, if appropriate, adjudication. We have encountered cases in which, because of secrecy, no such process took place at the time. It is unacceptable that due to information being classified as 'Secret' or above these cases were denied meaningful investigation and scrutiny. This position is no longer sustainable.

46.9 As I have asserted earlier, the security forces are accountable for their actions. That accountability extends to the supervisors and leaders of those organisations. I am a huge advocate for the security forces and remain supportive of their work, dedication and skill in keeping society safe. However, I would question whether their response to accusations and scrutiny is always consistent with their stated values.

46.10 As regards Northern Ireland legacy matters, successive governments, civil servants and the security forces have too often obfuscated and avoided meaningful and independent investigations. The dying embers of this culture have been experienced by my team and me. These attitudes and behaviours must stop. They do no good for the future trust and confidence of society in Northern Ireland in the authorities or the many Troubles related victims and families from Great Britain.

47 The importance and limits of secrecy in the national security context

47.1 Although I think many Northern Ireland legacy cases have been the subject of excessive secrecy, I have never doubted the fundamental need for secrecy in the security and intelligence context or the role of the NCND policy as a tool to maintain it. Furthermore, my frustrations with NCND, which I have expressed to many and address further below, relate to the way in which it is and has been interpreted and applied in practice and what it has come to represent, not its basic rationale.

47.2 In my view, we need to approach this complicated topic from a starting point of first principles and keep an understanding of the security forces' ultimate objectives, and their importance, firmly in mind throughout. In this regard, the first duty of government is to protect and safeguard its citizens and its country against external and internal threats by maintaining law, order and national security. These are basic pre-requisites to a stable and democratic society in which the rule of law and fundamental human rights are respected and in which civil liberties may be freely exercised - national security is a means to this end.

47.3 The following inter-linked propositions are all well-established and reflected in legislation and case law: operationally effective security forces are vital to national security; reliable secret intelligence is vital to the operational effectiveness of those forces; covert agents are a vital source of such intelligence; the recruitment and retention of agents depends on them being given reliable assurances about their anonymity, safety and protection; and such assurances require demonstrably high levels of secrecy and security.

47.4 In support of these propositions, there can be no doubt that Northern Ireland terrorism was a threat to national security and that secret intelligence operations against the terrorist groups involved in the Troubles significantly disrupted and degraded their activities and capabilities, contributed to their realisation that armed conflict was futile and saved countless lives. The agents that infiltrated and penetrated those groups and the intelligence they provided were vital to these operations and society owes them and their handlers a huge debt of gratitude.

47.5 That said, there are two competing public interest considerations at play here and both are part and parcel of and integral to democracy, the rule of law and human rights. First, there is the public interest in ensuring the operational effectiveness of the security forces in the interests of national security - this calls for secrecy. Second, there is the public interest in ensuring that

laws are not broken and that all public authorities, including security forces, operate lawfully and compatibly with human rights - this calls for external accountability and scrutiny.

- 47.6 So far as concerns the public interest in secrecy, individuals with access to reliable intelligence about threats to national security are rarely willing to supply it to state authorities unless they are given assurances about their anonymity, safety and security and have trust and confidence in those authorities. This is because they are being asked to report on subjects of interest who are inherently likely to (a) be dangerous and averse to detection and infiltration and (b) take action to discover, punish and deter state infiltrators. Although state agents will inevitably be close to or involved with these subjects of interest and may themselves have mixed motives for providing intelligence, they ultimately act in the public interest and often do so at great personal risk and sometimes cost to themselves.
- 47.7 Furthermore, the public identification of an agent can not only put that individual at risk, destroy their value as a source and make others less likely to cooperate, it can also indicate security force interests, operations, methods and other sources and thereby prompt and facilitate counter measures.
- 47.8 For all these reasons there is a very strong public interest in, and national security justification for, keeping the identities and activities of agents confidential. This requires the security forces to maintain secrecy and take a precautionary approach to internal security and the control of sensitive information. It also requires that agents themselves observe a mutual obligation of confidence and do not avow or self-declare their activities without prior approval - doing so may compromise their work and put others at risk.
- 47.9 So far as concerns the other side of the public interest equation, the rule of law and the interests of justice require that the security forces and their agents act lawfully and compatibly with human rights and are subject to independent oversight and, where appropriate, investigation and legal proceedings. This in turn requires a separation of powers, the due administration of justice and, as a general rule, openness, transparency and publicity; justice must not only be done, it must be seen to be done.
- 47.10 I cannot overstate the importance of these principles. State agents need to be protected by a cloak of anonymity and secrecy, but that cloak cannot confer de facto immunity or a right to act with impunity as that would be wholly incompatible with the rule of law and human rights. Agents may sometimes engage in criminal conduct, but they do not have a free licence to break the law and should not be led to believe otherwise. Furthermore, the absolutist approach to agent anonymity and protection we have encountered in some Kenova cases risked, and may well have led to, other individuals losing their lives and it undoubtedly prevented lessons being learned and improvements made.
- 47.11 The requirements of articles 2 and 3 of the ECHR have dual relevance here. First, they oblige the state to take reasonable steps to prevent real and immediate risks of serious or life-threatening harm. A failure to disrupt a foreseeable attack could breach these obligations,

putting the responsible authority in breach of articles 2 or 3, as could public identification of or a failure to protect an agent, including one who has been outed. Secondly, these provisions oblige the state to carry out an independent and effective investigation into all serious offending and into any arguable state failures to address real and immediate risks of the above kind.

47.12 In the context of security force operations, there are various ways in which the use or conduct of agents could be relevant to questions of criminal or civil liability or other unlawfulness and so give rise to grounds for investigation or legal proceedings:

- (1) if an agent breaks the law, issues may arise as to their validation, handling or management or whether they were acting within or outside of their tasking and/or on behalf of the state;
- (2) if an agent or non-agent is the victim of an offence because of an allegation or suspicion that they are an agent, issues may arise as to whether the state could and should have foreseen and prevented the offence; and
- (3) the existence or availability of advance intelligence about a planned or likely attack - whether by or against an agent or non-agent - may have mandated preventive action or made inaction incompatible with articles 2-3 of the ECHR, particularly if such action was not taken in order to protect the source of that intelligence or another agent.

47.13 Just as importantly, an agent's involvement in such cases, the existence or availability of relevant intelligence, the scope for preventive action and the truth or falsity of allegations or suspicions about agent status may all be critical to a sound understanding of what actually happened and are likely to be especially important to victims and their families, whether or not the perpetrator or victim was an agent.

47.14 Drawing these threads together, I think these competing public interests point to a number of conclusions:

- (1) the public interest requires that the state must be able to give agents reliable assurances of anonymity, confidentiality and protection and that all information about agents must be the subject of enforceable and very strong obligations of confidentiality which cannot be lightly set aside;
- (2) the public interest also requires that the security forces and their agents operate lawfully and this requires that they are amenable to independent and effective investigation and legal proceedings which may need to entail publicity;
- (3) given (1)-(2) above, no agent can lawfully be given an absolute or unqualified assurance of perpetual anonymity and confidentiality 'come what may' or expect to be able to act unlawfully without any prospect of accountability or consequence; and
- (4) even in cases involving allegations of very serious wrongdoing, the public interest in protecting an agent's identity may preclude their participation in public legal

proceedings or even anonymised proceedings in private, but the balance should be struck and the final decision taken by the independent judiciary (supported by independent investigators and prosecutors and having due regard to official national security assessments) and not by government or the security forces themselves.

48 Secrecy and accountability in practice: ‘neither confirm nor deny’ (NCND)

- 48.1 In many ways, the NCND policy followed by government and the security forces in the security and intelligence context does not deserve the status it is given or the attention it attracts. However, this is itself revealing because of what it says about the approach to secrecy.
- 48.2 As set out above, I think the need for secrecy in this context is beyond doubt and the rationale underpinning the NCND policy is perfectly sound. As a tool for ensuring secrecy at the interface between, on the one hand, those on the inside of government and the security forces and, on the other, those on the outside, NCND is not only logical, it is a matter of common sense. Indeed, I have applied the policy in my career in order to protect sensitive information, including the identities of agents and methodologies used in covert policing. To this end, NCND simply provides that those on the inside should generally give an evasive and non-committal response to assertions and questions about security and intelligence matters from those on the outside. Such a response could be worded in a variety of ways such as ‘no comment’, ‘I’m not going to be drawn on or answer that’ or I can ‘neither confirm nor deny X’.
- 48.3 The adoption of ‘NCND’ as the preferred or most commonly used label in this country appears to derive from its adoption in the context of Freedom of Information requests in the US where it is known as the ‘Glomar Response’ and the abbreviation ‘NCND’ is much less frequently used: The ‘Hughes Glomar Explorer’ was a salvage vessel secretly deployed by the US government to recover a sunken Russian K-129 submarine in 1974. When asked questions about this under the US Freedom of Information Act (1970), the Central Intelligence Agency (CIA) gave an NCND response which was later upheld by the United States Court of Appeals, District of Columbia Circuit in the lead case of *Phillipi v CIA* 546 F 2d 1009 (DC Cir 1976).
- 48.4 The then Lord Chief Justice of Northern Ireland, Lord Carswell, considered the policy in the case of *Re Scappaticci’s Application*.⁵⁹ This was a judicial review brought by Mr Scappaticci to challenge the NIO’s refusal of his request that the department deny media allegations he was the agent Stakeknife. The NIO minister with responsibility for security matters, Jane Kennedy MP, responded that it was government policy not to comment on intelligence matters and that she could neither confirm nor deny the allegations. In dismissing the judicial review, the Lord Chief Justice referred to the evidence of the NIO Permanent Secretary, Sir Joseph Pilling, and

⁵⁹ [2003] NIQB 56:

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20an%20application%20by%20Freddie%20Scappaticci%20for%20Judicial%20Review.pdf>

said the following at paragraph 15 of his judgment:

“The reasons for adopting and adhering to the NCND policy appear from paragraph 3 of Sir Joseph Pilling’s affidavit. To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger... If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy”.

- 48.5 Numerous other judgments have recognised the public interest in the confidentiality and protection of agent identities and the logic and importance of the NCND policy as a means of ensuring these objectives, albeit that these judgments generally stress that NCND is not a legal rule or principle, does not bind the courts, is not absolute and should not be applied on a blanket basis. Indeed, in the *Scappaticci* case, Sir Joseph Pilling and the Lord Chief Justice both made express reference to the fact that departures from the policy may be appropriate and necessary in exceptional circumstances.
- 48.6 A Cabinet Office ‘Guidance Note on The NCND Principle - its use, importance and effectiveness’ dated October 2017 makes the same point.⁶⁰ This describes NCND as “a mechanism used to protect sensitive information” which “applies where secrecy is necessary in the public interest and where this mechanism avoids the risks of damage that a confirmation or denial would create” (paragraph 1) and it refers to the scope for departures (paragraphs 13-15).
- 48.7 In my view, the problem with NCND, and there is a problem, relates not to its underlying theory, but to its interpretation and application in practice. For some in government and the security forces, NCND seems to have assumed a totemic status and to have become an implacable dogma or mantra with the qualities of a stone wall. Some of these issues are addressed in Alyson Kilpatrick’s second interim and final reports on Kenova’s article 2 compliance respectively dated 11th January 2021 (paragraphs 23-31) and 26th August 2021 (paragraphs 77-89) (see above). They are also touched on in other reports on NCND such as the report of

⁶⁰ Cabinet Office, *Guidance Note on NCND Principle*, October 2017:

<https://www.kenova.co.uk/41.%20D5371%20Guidance%20Re%20NCND%202017.pdf>

Justice, 'To 'Neither Confirm Nor Deny': Assessing the Response and its Impact on Access to Justice' dated 2018.⁶¹ From my perspective, the key problems with the practical application of NCND are as follows:

- (1) The policy is often wrongly treated as a distillation of all official policy on disclosure and publicity in the security and intelligence context into a single four-letter abbreviation which is in absolute and categorical terms and which produces a single negative answer to any and every related question: NCND appears to posit a binary choice between two options and then provides that neither is acceptable. This may have the virtue of simplicity, but it does not adequately signal the scope for exceptions or allow for the flexibility that the public interest requires.
- (2) The policy itself assumes lawful conduct on the part of the security forces. This is easy to understand given that this is generally a safe assumption, but it does not allow for the possibility that aberrations may occur and may need external testing and verification.
- (3) In consequence of (1)-(2) above, the policy is too often applied in a rigid and blanket fashion and without consideration of or consultation about the need for exceptions. For example, the title of the abovementioned Cabinet Office guidance note mis-describes the NCND policy as a "*principle*" and its text stresses the importance of its consistent application (i.e. application irrespective of whether the truth would lead to confirmation or denial), but then includes the following non sequitur, "*If the Government were forced to depart from the NCND principle in one case, it would create a clear risk of serious harm to essential UK national security interests. It could, furthermore, potentially put lives at risk*" (paragraph 8). This is manifestly wrong and inconsistent with paragraphs 12-15 on "*Exceptions to the principle*" and including it in such an important document is bound to cause confusion. In my view, the guidance should make clear that 'consistency' of application requires a fair, principled and predictable approach which avoids arbitrariness and treats like cases alike, not one which admits of only one outcome.
- (4) The policy can be wrongly understood to apply to every interaction between those on the inside of government and the security forces and those on the outside, when it should not be applied in connection with disclosures to suitably vetted and secure investigatory and oversight bodies. Internal assessments that a given process should not ultimately result in public disclosure can therefore lead to the application of NCND in a way that stops any process from taking place at all. I have no reason to think the intelligence services give bodies such as the Investigatory Powers Commissioner or

⁶¹ Justice, *To 'Neither Confirm Nor Deny': Assessing the Response and its Impact on Access to Justice*, 2017:

https://files.justice.org.uk/wp-content/uploads/2018/02/06170605/NCND-Brochure_FINAL_WEB_Spreads2.pdf

Tribunal or the Intelligence and Security Committee of Parliament an NCND response to their requests. However, this can and does happen in connection with police and prosecutors when secure channels of communication are and should be available to allow disclosure and, then, an independent balancing of the public interest considerations for and against any onward disclosure can take place. So far as concerns Operation Kenova, I am satisfied that we ultimately reached a position with the security forces whereby the application of NCND did not frustrate our access to information or the effectiveness of our enquiries.

- (5) Finally, the policy tends to work against a staged process or the partial disclosure of 'gisted', redacted or anonymised information in a way that maximises disclosure in the public interest while also protecting national security.

48.8 So far as concerns disclosures to the outside world, there have been departures from NCND in connection with security and intelligence matters generally:

- (1) the government gives confidential 'off the record' briefings to trusted contacts;
- (2) public disclosures are made in connection with deportation or criminal proceedings against terrorists and spies or when a defendant in criminal proceedings falsely claims that they were acting for the intelligence services (the 'greymail' defence);
- (3) consideration is given to requests from family members asking to know if a deceased relative worked for an intelligence service;⁶² and
- (4) grave and unfounded allegations can be denied, such as when the Thatcher government refuted claims that MI5 had conspired against Labour Prime Minister Harold Wilson in the 1970s and the former Chief of MI6, Sir Richard Dearlove, gave evidence to the Inquest into the deaths of Princess Diana and Dodi Fayed denying any MI6 involvement and a number of other allegations and confirming the existence of an MI6 station in Paris.

48.9 Confirmation or denial that an individual was a security force agent is understandably less common but this has happened and some examples follow:

- (1) I deal below with the cases of Brian Nelson and William Stobie whose roles as agents for the FRU and RUC respectively were publicly avowed including in connection with their respective prosecutions, the Stevens 1 and Stevens 3 reports⁶³ and the Cory

⁶² <https://www.mi5.gov.uk/faq>

⁶³ J Stevens, *Stevens 3 Enquiry: Overview & Recommendations*, April 2003:
<https://cain.ulster.ac.uk/issues/collusion/stevens3/stevens3summary.pdf>

Collusion Inquiry Report on Pat Finucane dated 1st April 2004.⁶⁴

- (2) In proceedings before the European Commission of Human Rights, the government confirmed that a member of the Workers Revolutionary Party who claimed to have made a listening device found by the actress and political activist Vanessa Redgrave, “*is not and never has been employed by, an agent of or otherwise connected with the Security Service and has never received instructions from the Service, whether in respect of the installation of a listening device or otherwise*”.⁶⁵ This denial was issued because Ms Redgrave suspected and alleged that the device had been planted and monitored by or on behalf of MI5.
- (3) On 8th March 2004, the Special Immigration Appeals Commission gave an open judgment that confirmed that MI5 notes of meetings with Mohammed Othman (aka Abu Qatada) had been disclosed and relied on in open court.⁶⁶
- (4) The former PONI, Baroness Nuala O’Loan, published a ‘Report into the complaint by James and Michael McConville regarding the police investigation into the abduction and murder of their mother Mrs Jean McConville’ dated 18th July 2006.⁶⁷ Mrs McConville was a widow with 10 children who lived in the Divis Flats in West Belfast and was abducted and murdered by PIRA in December 1972 because she was believed to have been an agent. Baroness O’Loan found that the RUC had failed to investigate the abduction and that there were exceptional and overriding reasons to depart from NCND. Her report stated, “*There is no evidence [of] information or intelligence of any kind which refers to or emanated from Mrs Jean McConville prior to 2nd January 1973. She is not recorded as having been an agent at any time. She was an innocent woman who was abducted and murdered*”.⁶⁸ An accompanying press release described the case as ‘unique’ and said:⁶⁹

“Jean McConville left an orphaned family, the youngest of whom were six year old boys. The family have suffered extensively over the years, as we all know,

⁶⁴ P Cory, *Cory Collusion Inquiry Report: Patrick Finucane*, HC 470, April 2004:

<https://cain.ulster.ac.uk/issues/collusion/cory/cory03finucane.pdf>

⁶⁵ *Redgrave v United Kingdom*, Application Number 20271/92, 1st September 1993, pp 6-7:

<https://hudoc.echr.coe.int/eng?i=001-1656>

⁶⁶ *Othman v Home Secretary*, SC/15/2002, 8th March 2004, paragraphs 17-18:

<http://siac.decisions.tribunals.gov.uk/Documents/outcomes/documents/sc152002qatada.pdf>

⁶⁷ PONI, *Report into the complaint by James and Michael McConville regarding the police investigation into the abduction and murder of their mother Mrs Jean McConville*, August 2006:

<https://www.policeombudsman.org/PONI/files/1f/1f0434d5-dd9f-411a-838d-d8453d4d98cc.pdf>

⁶⁸ *Ibid.*, p 15.

⁶⁹ PONI, *No evidence Jean McConville was an informant*, 7th July 2006:

<https://www.policeombudsman.org/Media-Releases/2000-2010/2006/No-evidence-Jean-Mcconville-was-an-informant>

and that suffering has only been made worse by allegations that their mother was an informant.

As part of our investigation we have looked very extensively at all the intelligence available at the time. There is no evidence that Mrs McConville gave information to the police, the military or the Security Service. She was not an informant”.

- (5) An open letter from the Foreign Secretary, Mr William Hague MP, to the Chair of the Foreign Affairs Committee, Mr Richard Ottaway MP, dated 26th April 2012 denied ‘intense’ media speculation that the late Mr Neil Heywood had been an agent for MI6.
- 48.10 The above is not intended to provide an exhaustive account of every departure from NCND, but it serves to make the point that the policy allows for departures and, importantly, I have seen and heard nothing to suggest that the above departures have inhibited the recruitment or retention of agents or otherwise damaged national security or the public interest.
- 48.11 In particular, the Nelson and Stobie cases show that where allegations of very serious wrongdoing are made against an agent, a criminal justice process in which their agent status is confirmed may be the appropriate course. Similarly, the McConville case shows that the lapse of time and compassionate reasons may justify a departure from NCND and, in this regard, I have found a number of Kenova cases are remarkably similar and, in my view, justify a similar departure from NCND.
- 48.12 For the avoidance of doubt, I would never advocate a departure from NCND or the public identification of a confidential state agent if this would put an individual at risk of serious or life threatening harm or genuinely imperil our national security. However, a departure from NCND in some of the Kenova cases would, in my view, have no such effects and can be readily justified. Furthermore, I think there are a number of reasons why NCND can and should be applied in a more flexible and nuanced way, particularly in the context of Northern Ireland legacy investigations:
- (1) Part of the rationale and justification for NCND is the premise that confirmation or denial of agent status in one case would be inconsistent with assurances of lifelong anonymity, secrecy and protection given in other cases and so deter the recruitment and retention of other agents, disrupt the supply of secret intelligence and damage national security. I accept this as a general proposition and am well aware that actual and potential agents can be vulnerable and isolated and have fragile and chaotic backgrounds meaning that they can be easily rattled and made to feel unsafe, whether or not their fears are rational or objectively justified. That said, and as I have already mentioned, no agent could lawfully be given an absolute assurance of anonymity and secrecy ‘come what may’ or told that their cooperation carries no risk. On the contrary, proper handling and management mandates that agents are warned not to exceed their tasking, or commit crimes without authorisation or act as agent provocateurs and that

doing so may have consequences. MI5 made representations to me that a “*promise*” of “*secrecy forever*” is crucial to its agent operations and the performance of its statutory functions. For my part, I do not think “*secrecy forever*” could ever be guaranteed and think it would be wrong for the security forces to recruit an agent - thereby putting them at risk - on the basis of false and unrealistic promises.

- (2) The state has adopted the NCND policy in the public interest, but it is capable of having devastating consequences for individuals and their lives and human rights. An allegation that an individual is or was an agent may put them at risk of serious or life-threatening attack and harm. If they are not an agent, this risk could be avoided by an official denial to this effect and the individual could continue their life as before. If the risk transpires or the individual has to relocate or be relocated in order to escape it, NCND will have played a part in this outcome in a way that may not be justified.
- (3) If an allegation or suspicion that an individual is or has been an agent leads to them being abducted, tortured, beaten or murdered and/or to them having to relocate or be relocated (possibly under a new identity), the impact of official confirmation or denial of their agent status on the recruitment and retention of other agents is likely to be radically different. Fear of “the worst coming to the worst” can undoubtedly deter other actual or potential agents from cooperating. However, fear of the truth being confirmed following the occurrence of the absolute worst case scenario is unlikely to carry as much weight. Furthermore, if the belief that an individual was an agent has become widespread and they are deceased or have left their former life altogether, there may come a point when maintaining NCND becomes futile and untenable or, at least, where the public interest in its maintenance may be more readily outweighed by the public interest in it being set aside.
- (4) Northern Ireland legacy cases pre-date the peace process, the end of the Troubles and the entry into force of RIPA provisions governing the authorisation and use of covert human intelligence sources (CHIS) and the oversight of the Investigatory Powers Commissioner and Tribunal. These provisions have even more recently been amended by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 on the authorisation of criminality. More generally, the social and legal landscape has changed and the security forces have been reformed. As a result, the public interest equation has inevitably shifted and a relaxation of NCND is likely to be justified in a number of these cases, particularly in connection with alleged agents who have died or been relocated or who are the subject of allegations or findings of very serious criminality.

Recommendation

Review, codify and define the proper limits to the NCND policy as it relates to the identification of agents and its application in the context of Northern Ireland legacy cases pre-dating the GFA.

Section 2: Previous inquiries and reports

49 Overview

- 49.1 The reports described below are summarised as part of this interim report as each one contains findings that are either identical or similar to my Kenova findings. These earlier reports were mainly classified as 'Secret' or 'Top Secret' and some still remain so today. Like this report, they highlight the consequences of separating intelligence from evidence and the use of agents from the investigation and prosecution of offences, as occurred during the conflict. Should any part of the security forces receive information today suggesting a real and immediate threat to life, they would be bound to act on it in order to protect life.
- 49.2 The reports discussed below reflect a number of other themes associated with legacy investigations. These include that: each report contains similar findings; they are too often over-classified meaning that the lessons they were intended to draw cannot be learned or subjected to public scrutiny; there is an unifying history of the various inquiries facing the same challenges in obtaining information; and their investigators had to confront constant efforts to undermine and frustrate them.
- 49.3 I recognise and understand the nervousness of many in the security forces who describe legacy as 'history being re-written'. Through a fair and independent investigative process that recognises the context of the times, such concerns can be addressed. Attempts to undermine and the culture of obstruction that have frustrated legacy inquiries only damage the reputation of the security forces. A continuing 'slow waltz' has become the dominant factor in most legacy cases; the terms 'slow waltz' or 'no downward dissemination' (NDD) were used routinely by RUC Special Branch to indicate that information should be shared in slow time, if at all.
- 49.4 In advance of my evidence to NIAC in September 2020, I telephoned a number of my predecessors to inform them that I was giving evidence and to ask if there was anything they might wish me to pass on to the Committee. They said:
- David Cox, formerly Head of PSNI HET - *"They (PSNI Intelligence) always gave me a limited version of the truth - they invariably did not and will not give up information"*.
 - Lord Stevens, referring to the security forces - *"I was misled deliberately, I was criminally obstructed from doing my job by the RUC and military, whilst MI5 failed to disclose information"*.
 - Judge Pomerance, Senior Counsel to the Cory Inquiry - *"We could not compel material being provided - others controlled what we received and when and how we received it and"*

the conditions in which we received it. They (MI5) made the entire process uncomfortable. The state viewed itself as above the law”.

- Mary Laverty, Senior Counsel to Judge Smithwick - *“They (the security forces) made it incredibly hard - when will they decide they can reveal information?”*

50 Walker

- 50.1 As already mentioned, on 16th January 1980, the then CC RUC Sir John Hermon asked MI5 to review the RUC’s intelligence gathering practices and Senior MI5 Director (and later DG) Sir Patrick Walker made a number of recommendations intended to improve the exchange of intelligence between Special Branch and CID.⁷⁰
- 50.2 The Walker report dealt with the interchange of intelligence between CID and Special Branch and the Army and recommended that CID should hand agent-running over to Special Branch and that Special Branch should clear all arrest lists. The report recommended that Special Branch should, where possible, have the opportunity to interview individuals after they had made an admission, but before they had been charged.
- 50.3 In adopting the main recommendations, the RUC made Special Branch far more active in interviewing and handling individuals who were brought into custody. Details of all agents who were or had been capable of disclosing intelligence were passed to Special Branch. This was coupled with internal organisational changes and refinements that together produced a system for collecting, analysing and disseminating intelligence relating to terrorist matters. Special Branch was to become almost exclusively responsible for contacts with and the handling of agents concerned with terrorist organisations.
- 50.4 Special Branch defined an agent as a person who: is the subject of regular direction and control; has an agent runner or handler; and is used to obtain intelligence secretly. Information obtained from agents was to be recorded on a ‘Form SB 50’ by the officer responsible for acquiring it. This would be routed through the Special Branch command chain and collated and analysed at headquarters.
- 50.5 The Walker report put the focus on and prioritised the intelligence collection efforts of Special Branch. Ultimately, this caused a separation between those managing the intelligence, on the one hand, and those seeking to gather evidence to arrest and prosecute suspects, on the other. RUC investigators subsequently described how Special Branch frequently thwarted terrorist arrests by warning suspects.

⁷⁰ P Walker, *Report on the Interchange of Intelligence between Special Branch and CID, and on the RUC Units involved, including those in Crime Branch*, March 1980:

<https://www.kenova.co.uk/6.%20D13484%20Walker-Report-1980.pdf>

- 50.6 What emerged from the Walker report was an unhelpful separation between the intelligence gathering and law enforcement sides of policing in Northern Ireland. The report, and how Special Branch interpreted and applied it, resulted in the routine practice of intelligence not being shared with those investigating Troubles related crimes, on the basis that to share such information would risk exposing where it came from. Many of the failures to pass on or act upon information in order to prevent crimes from occurring can be traced back to practices that were adopted following the Walker report.
- 50.7 The report itself set out 39 recommendations and conclusions and was classified as 'Secret'. The PSNI agreed to release a redacted version in response to a Freedom of Information request from the Committee for the Administration of Justice in 2018.

51 Stalker

- 51.1 In November and December 1982, the RUC shot dead six suspected terrorists and seriously injured another in three incidents in County Armagh. These events were subsequently connected to the earlier murder of three police officers at Kinnego Embankment, Oxford Island, near Lurgan in October 1982 that Kenova is now investigating under Operation Turma. The shootings of suspected terrorists led to allegations that the RUC had a 'shoot to kill' policy and had covered up its responsibility for the killings.
- 51.2 The RUC initially led investigations into the three incidents. Subsequently, DPPNI expressed concern about all three investigations and raised numerous queries in correspondence with the RUC, in response to which he received additional evidence. The information in the original files DPPNI received was at odds with the updated version of events and so he made a formal request that a senior officer be appointed to conduct all three investigations. The then DCC of the RUC was appointed to do this.
- 51.3 During the course of 1983, DPPNI directed a number of prosecutions in relation to the three incidents, including murder charges against four RUC officers.
- 51.4 When one of these officers appeared in court in March 1984, he disclosed that he had lied to investigators on the instructions of his superior officers (whom he named) and that these instructions were given in order to conceal the participation of an agent in the relevant incident. This officer was formally acquitted in April 1984 and DPPNI issued a formal request for the re-investigation of all three incidents by CC RUC under article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972.
- 51.5 In May 1984, following consultations with HMIC Sir Phillip Myers, CC RUC Sir John Hermon commissioned an inquiry into the 'shoot to kill' allegations and appointed DCC Greater Manchester Police John Stalker to carry it out. They agreed a written ToR.

- 51.6 DCC Stalker submitted individual reports in August 1985 covering: the Kinnego Embankment bomb explosion where three RUC officers were killed; the Tullygally East Road investigation where three PIRA suspects were killed; the Ballynery Road North investigation where one PIRA suspect was killed and another was shot and severely injured; and the Mullacreevie Park investigation where two INLA suspects were killed.
- 51.7 DCC Stalker submitted an interim report to CC RUC on 18th September 1985.
- 51.8 The interim report described how RUC Special Branch had withheld information from the investigation team which impaired its effectiveness. This included denying the existence of material that was later found to exist. The report highlighted the fact that some Special Branch officers did not understand the potential evidential value of intelligence material or how to use it. DCC Stalker said there was resentment towards his investigation in Special Branch and that, below ACC level, that resentment never disappeared. Others made judgements as to whether or not to disclose information to him and he could not say convincingly that he had seen all relevant material.
- 51.9 The report highlighted the lack of effective guidelines for the police in dealing with agents, that the protection of agents was seen as all important and that the guidelines in the abovementioned Home Office Circular 97/1969 were seen as optional and advisory. He made recommendations regarding a variety of prosecutions for conspiring to pervert the course of justice and for offences relating to the Explosive Substances Act 1883.
- 51.10 DCC Stalker was critical of: the suppression of intelligence; how Special Branch used and handled agents; and the tactics which he assessed had prevented CID from fully understanding what had happened. According to DCC Stalker, if CID had had access to the full intelligence picture known to Special Branch, a significant number of people would have been prosecuted. DCC Stalker highlighted the moral and legal concerns policing faced when dealing with agents because of the lack of appropriate guidelines and that enabling an agent to establish credibility in terrorist circles was incompatible with Home Office Circular 97/1969.
- 51.11 The RUC critiqued the Stalker report before it was delivered to DPPNI in February 1986. DCC Stalker was critical of this delay.
- 51.12 In March 1986, DPPNI directed that further investigations be undertaken. DCC Stalker was to carry these out. However, in May 1986 following unsubstantiated allegations about his conduct, unrelated to his Northern Ireland inquiry, DCC Stalker was placed on leave and later suspended before being reinstated. CC West Yorkshire Police Colin Sampson then took on responsibility for the investigations.
- 51.13 CC RUC acknowledged that not disclosing the truth in order to protect source information irreparably damaged investigations and that suppression of related intelligence had a negative impact on the quality of CID investigation into the cases DCC Stalker had examined.

- 51.14 DCC Stalker was clear in his view that RUC Special Branch had too much power over CID when it came to deciding the investigative order of affairs for a police inquiry into a serious terrorist incident.
- 51.15 At the time, this was considered to be the best operating model and I am conscious that it is all too easy to criticise in hindsight. These were incredibly challenging times for the security forces. However, adopting an approach that gave intelligence primacy to its recipients and those handling agents, without any inspection or oversight mechanisms or any analysis of the overall costs and benefits was a serious failing.
- 51.16 Some have sought to hide these failings and their origins, but accepting and acknowledging mistakes does not undermine or negate the bravery, sacrifices and successes of the security forces. The terrorists created an incredibly dangerous operating environment for them and their agents, mistakes were inevitable. The continued secrecy around this has become counterproductive and damaging to the confidence of communities in the authorities charged with their protection.
- 51.17 So far as I am concerned, incidents such as those DCC Stalker examined and Kenova is investigating should not happen today - the proportionality tests that now govern how the security forces use agents, together with the senior authorisation requirements, accreditation of staff and independent inspection processes would prevent their recurrence.
- 51.18 There was intelligence reporting on many of the terrorist incidents that occurred during the Troubles and, in a number of cases, this identified or would have assisted in identifying those responsible. DCC Stalker highlighted that intelligence was not always shared with CID when it was investigating crimes and Kenova has found the same issue in many of its cases.
- 51.19 The Stalker reports remain classified as 'Secret'.

52 Sampson

- 52.1 CC Sampson took over DCC Stalker's work in May 1986 and the Sampson report of 1987 found that RUC officers had operated outside of the guidelines in Home Office Circular 97/1969. He described senior officers abrogating their responsibilities because of Special Branch instructions and influence. CC Sampson identified the need for a better understanding of intelligence material being utilised as evidence as had been highlighted by DCC Stalker.
- 52.2 As with DCC Stalker's interim report from 1985, CC Sampson recommended that the RUC find ways to restore the confidence and trust of DPPNI and fair minded members of the public. He reported high levels of deep-seated mistrust between some officers and DPPNI.
- 52.3 CC Sampson described how the police had no relationship with the families following these serious incidents. Much of what the families learned was through the media, local gossip and terrorist propaganda. He recommended that the RUC make efforts to engage with families.

- 52.4 CC Sampson described a widely held belief at senior levels in RUC Special Branch that the unit was autonomous and its operations should not be questioned. Its officers did not disclose aspects of intelligence or evidence to CID, disregarded Home Office Circular 97/1969 and needed to be made aware of the limitations it contained. The Special Branch used a form that purported to strengthen the Official Secrets Acts and had the effect of restricting what officers disclosed, to the detriment of the truth. This form had no legal standing and Sampson recommended its use should be discontinued forthwith.
- 52.5 DCC Sampson recommended that: Special Branch disclose information about covert agents and surveillance to CID SIOs and related statements to DPPNI; legal, workable and manageable procedures for using agents be adopted; and RUC and DPPNI establish a proper method for submitting sensitive and secret material and its subsequent disclosure in future proceedings. When describing the need to adopt *“legal, workable and manageable procedures respecting the use of sources”*, Sampson explained that disclosure to CID and DPPNI could be managed in a classified way and specified that, while protection must be considered, any role an agent plays must not be hidden from them.
- 52.6 The Sampson report remains classified as ‘Secret’.

53 McLachlan

- 53.1 In his report, CC Sampson made clear that evidence did not reveal conduct amounting to criminal behaviour as far as chief officers were concerned, and unlike DCC Stalker, stipulated that disciplinary proceedings would not be justified. Nevertheless, concerns about operational and administrative matters persisted and Charles McLachlan, an HMIC Inspector, was asked to carry out a special investigation into those concerns.
- 53.2 The McLachlan report of 1988 provided a ‘classified’ examination of the Stalker/Sampson recommendations.
- 53.3 As regards agents, Mr McLachlan suggested the guidelines in Home Office Circular 97/1969 made little practical contribution to managing the terrorist situation and were liable to cause confusion in the already difficult and dangerous work of defeating terrorists. He highlighted that the Circular said, *“No member of a police force or public agent should counsel, incite or procure the commission of a crime”* and yet the mere fact an agent was a member of a proscribed organisation breached this principle. He pointed out the lack of control in such situations as an agent could either continue to play their part in a crime or risk punishment for refusing to do so. Mr McLachlan recommended that the Home Office review its guidelines to reflect and accommodate the Northern Ireland situation.
- 53.4 Mr McLachlan also drew attention in his report to the RUC’s focus on intelligence and the fact that it placed ever more demands on intelligence collectors and little weight on how or from whom they acquired their intelligence. He raised concerns that the RUC did not inform DPPNI

of the existence of agents, let alone their identity and stated that the law is clear in protecting an agent's identity but not their existence. He recommended reviewing confidentiality between the RUC and DPPNI with respect to agents.

- 53.5 Mr McLachlan understood the need to protect sources and agreed that reports marked NDD, which we often find in Kenova cases, should first be sent to the ACC Crime for information only and not to divisional CID, so that the ACC could resolve any disagreements about disclosure. Mr McLachlan felt that the Stalker recommendations were not always practical, and that covert methodologies should remain secret to protect lives.
- 53.6 Mr McLachlan recommended appointing a senior ACC to coordinate the work of Special Branch and CID. Interestingly he drew on a Stalker quote, *"informers are a vital weapon in the security forces' battle against the IRA, INLA and their loyalist military counterparts, their value and importance are incalculable. The way in which intelligence information is used and the responsibilities carried by those who use it became a central feature of the Stalker investigation: tactics which may seem perfectly legitimate when exercised by military forces in wartime take on a very different complexion when used by a civil police in peace time"*.
- 53.7 The McLachlan report remains classified as 'Top Secret'.

54 Stevens 1

- 54.1 Stevens 1 is the report of (then) DCC of Cambridgeshire Constabulary John (later Lord) Stevens into allegations of collusion between members of the security forces and loyalist paramilitaries.
- 54.2 In September 1989, CC RUC Sir Hugh Annesley provided Lord Stevens with the following ToR:
- *To investigate the alleged leak of information to loyalist terrorist groups as disclosed by the television reporter Mr Chris Moore and allegedly associated with the murder of Mr John Anthony Loughlin Maginn.*
 - *To investigate the alleged disappearance of confidential material from Ballykinler Army camp on or about 1st September 1989.*
 - *To investigate the disappearance of photographs of alleged PIRA terrorists from Dunmurry Police Station on or around the 11th August.*
 - *In consultation with me, to investigate any associated matters directly relevant to the above that come to light in the course of your enquiry.*
 - *To make relevant recommendations regarding these aspects"*.

- 54.3 In the outline of his first report, Lord Stevens described how he pursued all aspects of the inquiry in a determined effort to find the truth wherever the evidence led. He described doing this in the context of the unique and dangerous situation facing the security forces at that time. He was clear that the security forces needed to know the identities of terrorists in society, whatever side of the sectarian divide they came from and that there must be a balance between the need for them to be properly informed and the need for systems to protect such information from being used by the terrorists themselves. The wrongful or illegal use of that information by the security forces could bring into disrepute those trusted to maintain the rule of law impartially.
- 54.4 Lord Stevens obtained evidence of considerable significance from Brian Nelson, a senior member of the Ulster Defence Association (UDA) and Army agent, made 104 recommendations and found that loyalist terrorist groups had used security force information and intelligence material to target potential murder victims.
- 54.5 The Dunmurry investigation resulted in the prosecution of two Ulster Defence Regiment (UDR) soldiers. Searches recovered extensive numbers of Army documents which demonstrated a lack of security. Almost all the military related documents that the UDA held were ultimately supplied by members of the security forces. Documents leaked from the security forces made up a significant part of 10 loyalist terrorist intelligence systems examined by Lord Stevens.
- 54.6 In his findings, Lord Stevens made the case for RUC Special Branch to reassert its position when it came to intelligence gathering as against the Army. This is particularly important in relation to controlling and using intelligence from agents. Liaison processes were uncoordinated, and the existing arrangements needed to be formalised to allow for controlled information exchange between the Army, RUC and Northern Ireland Prison Service.
- 54.7 The report acknowledged that it might never be possible to eradicate leaks completely in the then climate.
- 54.8 Lord Stevens suggested that substantial improvements could nevertheless be made by introducing:
- higher standards of recruitment and retention within the security forces;
 - strict controls relating to the dissemination and handling of intelligence documentation;
 - accounting and supervisory functions on intelligence computer systems.
- 54.9 The Stevens 1 report, and its 104 recommendations, remain classified as 'Top Secret'.
- 54.10 Lord Stevens recounts a concerted effort to discredit him and his inquiry through the media and says the Army gave him misleading information from the beginning. For example, he says that the Army told him it did not run agents or have a dedicated intelligence unit in Northern Ireland. His investigation then became aware of the FRU.

54.11 Lord Stevens has told me directly about the nature of briefings against him and his inquiry team. He describes meeting a wall of silence when he sought to investigate elements of Special Branch and of RUC documents being 'removed' or 'lost'. His team planned to arrest a key suspect in January 1990 but their plan was leaked to the media and the suspect fled to England. Lord Stevens remains certain that a fire in January 1990 at his incident room in the Sea Park estate of the RUC headquarters was arson.

55 Brian Nelson

55.1 I need briefly to outline the Brian Nelson case before I discuss the reports which followed it. Nelson was an Army agent in the loyalist UDA who operated around the same time as the alleged agent Stakeknife, both were handled by the FRU.

55.2 As I mentioned previously, Stevens 1 established in 1990 that Brian Nelson had been working as an agent for the FRU. Nelson admitted to the Stevens team that he had been acting on behalf of the security forces. Lord Stevens identified that Brian Nelson, the UDA chief intelligence officer, was a FRU agent and showed that, through Nelson, the FRU had been involved in passing intelligence to the UDA for the purposes of targeting people for murder.

55.3 The FRU's senior personnel said that if presented with a choice between protecting a source's identity and saving a person's life, they would always save that person's life. Lord Stevens assessed that Nelson's actions saved two lives, set against some 30 murders that should have been prevented. Kenova has found that the claim that the FRU always sought to save lives was not accurate.

55.4 Lord Stevens did not know then that the FRU was simultaneously running the agent known as Stakeknife. The Stevens inquiry had to uncover the FRU's very existence for themselves. No-one disclosed its existence to the inquiry when it began.

55.5 While Lord Stevens was investigating Nelson - and hearing from the FRU about how it managed its agents and its supposed policy position that protecting life took precedence over protecting an agent's identity - we have established that other agents were also actively involved or implicated in kidnappings, unlawful imprisonment, assaults and murders and that the unit withheld information that could have prevented these crimes.

55.6 From reviewing records and government papers, I am also aware of efforts to prevent the Stevens inquiry accessing information and of efforts to persuade the then Attorney General Sir Patrick Mayhew QC not to prosecute Brian Nelson.

55.7 On 23rd January 1992, Nelson pleaded guilty to 20 serious crimes including five counts of conspiracy to murder. On 3rd February 1992, after hearing character testimony, including from the FRU, Nelson was sentenced to 101 years' imprisonment with an actual sentence of 10 years' imprisonment to be served.

- 55.8 Brian Nelson's conviction shows that the FRU was responsible for the handling of an agent involved in serious criminality. The Military Directives describing how agent running should be conducted were unambiguous in stipulating that "*operations are to be conducted within the law*". The Directive's command and control section described the FRU commanding officer's role as being "*responsible to the CLF (Commander Land Forces) for the command, control and coordination of all research operations province wide*".
- 55.9 It is incredibly concerning that the outcome of the Stevens inquiry did not lead to the activities of other agents being subjected to meaningful supervision and oversight in order to ensure that people's lives were saved.
- 55.10 Although it would have been disruptive to review and update agent recruitment, management and handling at that time - in the middle of the conflict - that is precisely what was needed. There was no appetite to address these issues notwithstanding the dangerous FRU practices uncovered by Lord Stevens.

56 Blelloch

- 56.1 In March 1992, Sir Patrick Mayhew QC, by then the Secretary of State for Northern Ireland, asked the NIO's Permanent Under Secretary, Sir John Blelloch, to review agent handling in the aftermath of the Brian Nelson case. His ToR were to review the recruitment and handling of Army agents in Northern Ireland and the arrangements for the transmission of and feedback on the information they provided. The review was directed to take into account the practices and procedures MI5 and RUC Special Branch used and, where appropriate, make recommendations. Sir John concluded his review in May 1992.
- 56.2 The Blelloch report acknowledged that the guidelines in Home Office Circular 97/1969 were inappropriate in the terrorist context of Northern Ireland. It highlighted that the Circular was drafted in 1969 before the terrorist campaign had started and essentially dealt with ordinary crime. Sir John pointed out that both DCC Stalker and Mr McLachlan had previously raised these issues.
- 56.3 The report made 12 recommendations aimed at professionalising and joining up agent handling efforts across the security forces: changes in structures being discussed with the MI5 DCI and the Head of RUC Special Branch; co-locating assets; filling vacant handler posts; building legal input into training and monitoring cases; improving de-briefing and dissemination procedures; Special Branch approval regarding agent recruitment; joint review of Army agent operations; dispute resolution processes regarding Army agents; an operational audit; ensuring effective and secure communications; improving agent recruitment and targeting so that different security forces could complement each other; and new guidelines for managing agent issues.
- 56.4 In June 1992, the Secretary of State warmly welcomed and endorsed the Blelloch report and its recommendations. The government's position was that whatever lessons needed to be taken

from the Brian Nelson case would be learned and applied. This position was not translated into reality.

- 56.5 The Blelloch report was classified as 'Top Secret'. Upon my request, the NIO agreed to downgrade it to 'Secret' in order to make its handling and storage by Kenova less cumbersome.

57 Stevens 2

- 57.1 Lord Stevens was subsequently appointed by CC RUC Sir Hugh Annesley to deal with further enquiries regarding Brian Nelson as a result of instructions from the DPPNI in 1993 and 1994.
- 57.2 Lord Stevens found that Brian Nelson had received information from his handlers about those it would be useful for his organisation, the UDA, to target. His report highlighted Nelson's claims that he passed on all information to his handlers about the Pat Finucane matter, something the Army strongly disputed.
- 57.3 There were also disputes between the Army and MI5 about the background to Brian Nelson's recruitment and between the Army and the RUC about Special Branch's knowledge of FRU activities and intelligence. MI5 insisted it was not involved in recruiting Nelson and the Army said there had been a loyalist 'intelligence dump' which it had reported to Special Branch and which contained confidential security force documents.
- 57.4 The Stevens 2 report included a finding that Army personnel were under orders not to speak to the Stevens inquiry or to hand over any material. Lord Stevens said it was apparent that discussions at the highest level in the Army had resulted in the decision to withhold vital information from his inquiry team.
- 57.5 The report's conclusion clarifies that the inquiry had found only two examples where Brian Nelson's activities had saved lives and that information the FRU provided to the court in connection with his sentencing was inaccurate and misleading. The unit had significantly exaggerated and misrepresented the number of lives Nelson had saved.
- 57.6 The report referred to a lack of coordination between the security forces in Northern Ireland and senior Army officers citing the continuing problem that a lack of guidelines for agents presented. In his earlier report, submitted between 1990 and 1991, Lord Stevens dealt with similar issues and had hoped the lessons had already been learned, they had not.
- 57.7 The Stevens 2 report (which comprises more than one document) remains classified as 'Top Secret'.

58 Patten

- 58.1 The Independent Commission on Policing for Northern Ireland was established in 1998 under the GFA and reported in 1999. This became known as the Patten Commission.
- 58.2 Taking account of policing principles, the Commission was asked to examine policing in Northern Ireland and make proposals for future structures and arrangements, including ways to encourage widespread community support for those new arrangements.
- 58.3 A number of themes emerged and the Commission made recommendations on each of them.
- 58.4 Under the theme of human rights, the report recommended a comprehensive programme of action to focus policing in Northern Ireland on a human rights based approach.⁷¹ It recommended that the NIPB monitor PSNI's performance in respect of human rights, as it did in other respects.
- 58.5 On the subject of accountability, the report set out that the police service in Northern Ireland should take steps to improve transparency. The presumption being that everything should be available for public scrutiny unless the public interest - not the police interest - required that it be withheld.
- 58.6 The report emphasised the need for oversight and the role of PONI saying that it should be, and be seen to be, an important institution of governance in Northern Ireland, and should be staffed and resourced accordingly.
- 58.7 The Patten Commission's recommendation that PONI should be resourced and staffed properly is in contrast to the comments made by previous Ombudsman, Dr Michael Maguire, when he said the following in a public lecture in March 2019: *"Let me be very clear, I am not saying that there has been some form of conspiracy to underfund the office, to undermine its ability to investigate the past, I am not saying that, although there are some who would argue that that is the case... but it is perhaps an unintended consequence of the failure to fund legacy that has forced the office to prioritise which legacy cases it can work on"*.⁷²
- 58.8 I refer here to the Patten Commission report to highlight its clear direction that the new police organisation (PSNI) should be more transparent and share information rather than retain it and PONI should be resourced and funded properly.

⁷¹ Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing In Northern Ireland: The Report of the Independent Commission on Policing For Northern Ireland*, September 1999:

<https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf>

⁷² Imagine! Belfast Festival of Ideas and Politics, *What does Independence Mean?*, 28th March 2019:

<https://www.youtube.com/watch?v=k2l-3mht85Q>

59 Stevens 3

- 59.1 In May 1999, following correspondence between the then DPPNI Alasdair Fraser QC and CC RUC Sir Ronnie Flanagan, Lord Stevens was asked to re-investigate Pat Finucane's murder and allegations of collusion raised by British Irish Rights Watch. The significance of RUC agent William Stobie's role in events surrounding Pat Finucane's murder led to two principal further matters being added to these ToR. First, to investigate the murder in November 1987 of a young student Brian Adam Lambert and, second, to examine certain issues around the handling of agents.
- 59.2 On 17th April 2003, the Stevens 3 inquiry 'Overview & Recommendations Report' was released. This stated that members of the security forces had colluded with the UDA in loyalist murders including that of Pat Finucane in 1989. The publication of this report represented a welcome shift in openness.
- 59.3 In summarising some 14 years of his legacy investigations, Lord Stevens highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence and the involvement of agents in murder. He reported that these serious acts and omissions had resulted in people being killed and seriously injured.
- 59.4 His recommendations addressed the collection and use of intelligence, the use of agents, standards of investigation and preventing collusion. He remarked that some of the recommendations he had made in his first report were still relevant, re-emphasised the importance of implementing them and proposed new recommendations about the future policing of Northern Ireland.
- 59.5 Lord Stevens explained that his report was later than he had intended both because of the extension of his ToR and because of MOD's late disclosure of a considerable amount of documentation giving rise to several new and significant lines of enquiry. He reiterated the problems with disclosure he had encountered in his previous two enquiries.
- 59.6 The Stevens 3 report gives an outline of Lord Stevens' investigations into the murders of Pat Finucane and Adam Lambert. It also addresses the activities of William Stobie and Brian Nelson, describing them as central to the commission of serious criminal offences.
- 59.7 It had already been established that before Pat Finucane's murder, William Stobie supplied information to RUC Special Branch that it was being planned. He also provided significant information to his handlers in the days after the murder. This was principally about the collection of a firearm. This vital information did not reach the murder investigation team.
- 59.8 Lord Stevens stated that throughout his three inquiries he was obstructed. He described this obstruction as cultural and widespread in parts of the Army and RUC. He was confident that through his team's investigative efforts he had overcome this obstruction and achieved his overall objectives.

59.9 He assessed that his inquiry uncovered enough evidence to lead him to believe that Pat Finucane and Brian Adam Lambert's murders could have been prevented and that the RUC investigation should have led to the early detection and arrest of Pat Finucane's killers.

60 Cory

60.1 Between 2002 and 2003, the Honourable Peter de Carteret Cory led an inquiry in the United Kingdom that examined allegations of state collusion in paramilitary murders. The 'Cory Collusion Inquiry' arose out of the Weston Park peace negotiations led by United Kingdom Prime Minister Tony Blair and Irish Taoiseach Bertie Ahern.

60.2 For some time, allegations of state collusion in murder cases had obstructed the pursuit of a lasting peace in Northern Ireland. The GFA was not working and the political parties regrouped at Weston Park in 2001. It was at that time that Prime Minister Tony Blair proposed appointing a judge from outside the United Kingdom to review a number of controversial cases and determine whether public inquiries were warranted. The judge selected was Peter Cory, then retired from the Supreme Court of Canada.

60.3 The announcement of the Cory Collusion Inquiry in the United Kingdom was initially met with some scepticism. Cory described the level of distrust as outweighing any sense of optimism. However, all of that changed when he met the families of the deceased and other interested parties. He put people at ease and he very quickly earned the public's respect and confidence.

60.4 The cases he was to review, six in all, spanned from 1987 to 1999 and involved a broad range of circumstances. Four cases were chosen by the United Kingdom government and two by the Irish government. In each case, it was alleged that state actors facilitated killings either through direct action, or by turning a blind eye to credible and serious threats. Various state agencies were implicated, including the security forces, the Northern Ireland Prison Service, the NIO and the Irish police service, An Garda Síochána.

60.5 Judge Cory appointed Renée Pomerance as senior counsel to his inquiry. She has since herself become a judge and written about her experiences: "*We were not always welcomed. One agency extended a chilly reception, quite literally, when it sat us in a room so cold I had to wear gloves to type. Another agency sat us with 'watchers', who stared intently as we read through documents or walked to the restroom. We responded to all of this with equanimity and, on occasion, warmer clothing*".⁷³

60.6 Judge Pomerance described how on one occasion, the first time that she and Judge Cory were both absent from their London office, individuals who identified themselves to the secretary and office manager as representatives of MI5 attended and demanded that staff turn over their

⁷³ R Pomerance, *Dispatches from The Collusion Inquiry: A Tribute to the Honourable Peter Cory* (2020) 44 Fordham International Law Journal 245, p 254.

computer hard drives. They told the staff that this was essential in the interests of national security. At the time, the Finucane Report was in draft form and contained findings about various state agencies. Hard drives were seized, wiped clean and then returned to Judge Cory. Fortunately, his team had stored copies of their work off site and the inquiry was able to continue unhindered. Judge Cory consulted the Commissioner of the MPS (then Lord Stevens) who offered to investigate the raid, but he ultimately decided not to request this as there was a risk that doing so might set off collateral events and derail the inquiry.

- 60.7 MI5 disagrees with the above version of events and has told me: *“It was, in fact, NIO officials - advised on occasion by MI5 concerning protective security measures - who were responsible for the physical and information security for Judge Cory’s investigation and who, with the consent of Judge Cory’s secretariat, removed the hard drive [sic], after their contents had been transferred from non-secure systems on which they had been stored onto encrypted laptops... MI5 did not remove anything from Judge Cory’s offices, nor did MI5 direct others to do so...”*
- 60.8 In light of MI5’s position, I have again discussed the above with Judge Pomerance and spoken with Lord Stevens. Judge Pomerance remains absolutely clear about her account and the fact that Judge Cory’s team reported that those attending their office had identified themselves as representatives of MI5. Lord Stevens shares this recollection and vividly recalls Judge Cory raising the matter with him and being furious that his office had been raided and vital material had been seized and not returned. It is a tribute to the legacy of Judge Cory to hold fast to the truth of his account in the face of efforts to mislead.
- 60.9 In speaking about these events, Judge Pomerance said, *“Those in a position to know had warned us that we would be followed, listened to, and subject to harassment. We were cautioned that people would try to befriend us to infiltrate the inquiry. While this might seem the stuff of cold war fiction, I believe that those things did occur. Within that atmosphere, reasonable paranoia was not an oxymoron”*.⁷⁴
- 60.10 After completing six reports, Judge Cory submitted them to the respective governments for security checking. The governments had the final say on whether content would be redacted in the interests of national security. There was much negotiation over what that phrase encompassed. Just as Judge Cory was responding to letters from the government, other officials were dismantling his offices. Judge Pomerance recalls someone whisking away her keyboard while she was typing. The correspondence with government continued after they had returned to Canada. In one letter, Judge Cory challenged a redaction by observing that, *“Not since Moses came down from the mount was something so much in the public domain”*. The redactions were not lifted, but Judge Cory persuaded the government to include the edited pages in the published report, with content blacked out, in order that the public would know just how much had been removed.

⁷⁴ *Ibid.*, p 255.

- 60.11 As negotiations continued, the victims' families were suffering. They did not know the result of the inquiry and their anguish was compounded by false media reports claiming to have the inside track. Judge Cory contacted the United Kingdom government and implored it to end the suffering by telling the families the report conclusions. He reasoned that, while the contents could not be disclosed, it would be an immense relief for the families to know whether or not he had recommended an inquiry. The government did not respond. Judge Cory raised the issue again, this time adding that he would speak to the families if the government did not. Again, there was no response. On the third occasion, receiving no response, Judge Cory took matters into his own hands and contacted each of the families. He told them that he could not discuss the content of the reports, but shared his ultimate findings.
- 60.12 I refer to Judge Cory and Judge Pomerance's experiences because what they went through, as they sought to do the job that two governments had asked them to do, should not have occurred. Those in authority have a duty to support such legally commissioned inquiries, they should not be obstructed, delayed or frustrated in any way by arms of the state. Such behaviour would not happen in an inquiry into matters that did not involve state participation and they should most certainly not happen when the opposite is true.
- 60.13 To summarise Judge Cory's findings, he recommended in four cases that the United Kingdom government hold public inquiries.
- 60.14 An inquiry into the Rosemary Nelson case opened at the Craigavon Civic Centre in April 2005. The panel members were Sir Michael Morland (Chair), Dame Valerie Strachan and Sir Anthony Burden. The Inquiry reported in May 2011.
- 60.15 The Billy Wright Inquiry opened in June 2005, chaired by Lord MacLean. Also sitting on the inquiry were Professor Andrew Coyle from the University of London and the former Bishop of Hereford, the Reverend John Oliver. The Inquiry reported in September 2010.
- 60.16 The preliminary hearing of the Robert Hamill Inquiry was held on 24 May 2005 in Portadown. Sir Edwin Jowitt chaired the Inquiry, the other panel members were Sir John Evans and Reverend Baroness Richardson of Calow. The Inquiry started its full hearings in January 2009 and announced the completion of its final report in February 2011, but this not been published.
- 60.17 The government announced an inquiry into the Pat Finucane case. Sir Desmond de Silva QC headed the Pat Finucane Review, and his report was published in January 2012 (see below).
- 60.18 So far as concerns the two cases referred to Judge Cory by the Irish government:
- (1) In the case of two RUC officers, killed in a PIRA ambush on 20th March 1989, Judge Cory concluded that there was evidence which, if accepted, could be found to constitute collusion. As a result, he recommended a public inquiry into the matter. The Irish Smithwick Tribunal was established in 2005 to investigate whether members of An Garda Síochána or other state agents colluded in the fatal shootings. Judge Peter Smithwick was the sole member of the Tribunal.

- (2) In the case of Lord Justice and Lady Gibson, who were killed by PIRA in a car-bomb explosion on 25th April 1987, Judge Cory concluded that there was no evidence of collusion by An Garda Síochána or any other government agency to warrant holding an inquiry.

60.19 As part of my strategic engagement for Kenova I have met panel members and counsel for each of these inquiries.

61 De Silva

61.1 The De Silva review, announced in October 2011, was commissioned to deliver a full public account of any involvement of the Army, the RUC, MI5 or government in Pat Finucane's murder. Sir Desmond De Silva QC, a criminal barrister and international lawyer who also served as a United Nations chief war crimes prosecutor, carried out the review.

61.2 The then Secretary of State for Northern Ireland Owen Patterson issued a statement: "*The Government accept the clear conclusions of Lord Stevens and Judge Cory that there was collusion.... I want to reiterate the Government's apology in the House today. The Government is deeply sorry for what happened. Despite the clear conclusions of previous investigations and reports, there is still only limited information in the public domain... and I have committed to establishing a further process to ensure that the truth is revealed*".⁷⁵

61.3 Sir Desmond relied on the state agencies to cooperate and to recover and disclose the material he requested. He made extensive requests of MI5, MOD and PSNI and had access to the three Stevens inquiries. In his report, he commented that he had been given access to a significant amount of material not made available to Lord Stevens or Judge Cory.

61.4 Although the review was overwhelmingly a document-based process, Sir Desmond took oral evidence from 11 individuals and received 12 written submissions. He reported that he had received full and unequivocal cooperation from all relevant government departments and agencies. Sir Desmond publicly reported his findings in December 2012.

61.5 His report highlighted that there was no adequate framework for managing agents.⁷⁶ He stated that the RUC Special Branch had no workable guidelines, the FRU worked to Directives and Instructions that were contradictory and MI5 received no external guidance to clarify the extent to which its agents could engage in criminality. He made clear that successive governments were aware that agents were being run in Northern Ireland without effective guidance or a proper legal framework and that there had been repeated attempts to raise this issue with

⁷⁵ NIO, *Statement to Parliament on the Murder of Patrick Finucane*, 12th October 2011:

<https://www.gov.uk/government/speeches/statement-to-parliament-on-the-murder-of-patrick-finucane>

⁷⁶ D De Silva, *The Report of the Patrick Finucane Review*, HC-802, December 2012, paragraphs 21-26:

<https://www.gov.uk/government/publications/the-report-of-the-patrick-finucane-review>

ministers. He powerfully stated that those responsible for upholding the law, “*should never be put in a position of potentially having to break the law in order to discharge their official duties*”.⁷⁷ He concluded, “*My overall conclusion is that there was a wilful and abject failure by successive governments to provide the clear policy and legal framework necessary for agent handling operations to take place effectively and within the law*”.⁷⁸

- 61.6 The report made clear that FRU handlers were aware of the murders and attempted murders Brian Nelson was committing. Sir Desmond also made clear that the counter measures the security forces should have taken to protect people who were known to be under threat were “*very rarely taken in response to intelligence*”.⁷⁹
- 61.7 When considering who was accountable for the security forces’ actions, Sir Desmond was clear that it was not solely the responsibility of the FRU and its commanding officers. There were procedural provisions in place that demanded that the Army senior staff properly supervise the FRU’s actions but they did not. Sir Desmond found that MI5 failed to carry out its advisory and coordinating role properly with regard to Brian Nelson and the FRU. Most seriously, he found that RUC Special Branch failed to act on ‘risk to life’ intelligence. In summary, he detailed the extraordinary situation that both the Army and RUC Special Branch had prior notice of a series of assassinations and did nothing to prevent them.
- 61.8 Sir Desmond credited DPPNI and the Attorney General, Sir Patrick Mayhew QC, for withstanding “*considerable pressure*” aimed at preventing the prosecution of Brian Nelson.⁸⁰
- 61.9 In his executive summary, Sir Desmond observed: “*It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist groups are rigorously pursued*”.⁸¹
- 61.10 Sir Desmond found that there was collusion regarding Pat Finucane’s murder and he concluded, “*I am left in significant doubt as to whether Pat Finucane would have been murdered... had it not been for the different strands of involvement by elements of the state*”.⁸²
- 61.11 In his response in Parliament to Sir Desmond’s report in December 2012, Prime Minister David Cameron made the following comments, among others:⁸³

“The collusion demonstrated beyond any doubt by Sir Desmond, which included the involvement of state agencies in murder, is totally unacceptable. We do not defend our security forces, or the many who have served in them with great distinction, by trying

⁷⁷ *Ibid.*, paragraph 25.

⁷⁸ *Ibid.*, paragraph 26.

⁷⁹ *Ibid.*, paragraph 31.

⁸⁰ *Ibid.*, paragraph 106.

⁸¹ *Ibid.*, paragraph 113.

⁸² *Ibid.*, paragraph 115.

⁸³ *Hansard HC*, 12th December 2012, Vol 555, Cols 295ff.

to claim otherwise. Collusion should never, ever happen. So, on behalf of the Government, and the whole country, let me say again to the Finucane family, I am deeply sorry”.

“In the end, what matters is getting to the truth, and I cannot think of many other countries anywhere in the world that would set out in so much detail and with so much clarity what went wrong. It pains me to read the report, because I am so proud of our country, our institutions such as the police and our security services and what they do to keep us safe. It is agony to read in the report what happened, but it is right that we publish it. We do not need a public inquiry with cross-examination to do that, we just need a Government who are bold enough to say, ‘Let’s unveil what happened, let’s publish it and then let’s see the consequences”.

“We cannot try to draw an equivalence between a state and a terrorist organisation. We have to have the highest standards, and it is right to ask that we live up to them”.

“There are some very shocking things in this report. What perhaps shocked me the most are some of the things that happened after the murder took place. The fact that someone who was effectively one of those responsible for the murder was then hired as an agent is truly shocking. The fact that the Army - it says here - did not co-operate properly with the Stevens inquiry, and effectively lied to it, is shocking. That is why it is so important that we lay this bare”.

“...specifically about wrongdoing by the IRA, the report could not be clearer that it bears an enormous responsibility, as I read out in my statement, for an extremely bloodthirsty campaign and for a huge amount of the suffering caused. Sir Desmond de Silva could not be more frank about that, but that does not mean that we should not do what a proper democratic state under the rule of law does, which is to explain what went wrong and how we learn lessons from it”.

“It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist groups are rigorously pursued. Perhaps the most obvious and significant lesson of all, however, is that it should not take over 23 years to properly examine, unravel and publish a full account of collusion in the murder of a solicitor that took place in the United Kingdom”.

“Everyone has to face up to what they did and what they got wrong. It is up to those people responsible for violence, for terror, for murder to do that; they should apologise for what they did. But let me repeat: we should not put ourselves in this House, in government and in a state that believes in the rule of law, democracy and human rights, on a level with those organisations. We expect higher standards and when we get it wrong, we need to explain and completely open up in the way that we have done today”.

“I have no doubt, however, that PIRA was the single greatest source of violence during this period and that a holistic account of events of the late 1980s in Northern Ireland would reveal the full calculating brutality of that terrorist group”.

62 Summary

- 62.1 Previous legacy investigations discovered the same information sharing and agent issues that have been uncovered in the Kenova investigations. The recommendations from these previous reports were not addressed and many of them remain classified. The failure to address legacy recommendations has undoubtedly had grave consequences for agents and those suspected of being agents.
- 62.2 These inquiries were conducted by senior police officers or officials. Keeping their recommendations and findings secret has inhibited learning lessons that would have almost certainly saved lives. Such secrecy prevents trust being built between the authorities and the communities they serve. This mistrust continues to this day, reports that remain classified should be reviewed and their classification lowered to allow as much information as possible to be placed in the public domain.
- 62.3 Since the end of the Troubles, various legislative and policy measures have significantly reformed the regulation and oversight of the security forces and their handling of agents. This does not mean that they cannot make mistakes, but it should at least ensure that they do not repeat the mistakes they undoubtedly made during the Troubles.

Recommendation

Review the security classification of previous Northern Ireland legacy reports in order that their contents and (at the very least) their principal conclusions and recommendations can be declassified and made public.

Section 3: Outcomes and findings

63 The alleged agent ‘Stakeknife’

- 63.1 In order to avoid causing prejudice to the significant number of Kenova prosecution files which relate to the alleged agent Stakeknife and are currently with PPSNI, I cannot yet report in detail about his alleged criminal activities. That said, PPSNI has been reviewing those files for some considerable time and it is therefore obvious that they are neither empty nor insubstantial. For my part, I believe they contain significant evidence implicating Stakeknife and others in very serious criminality and that this needs to be ventilated publicly.

- 63.2 While I cannot go into details about Stakeknife at this stage, I believe I can address and correct certain myths - big and small - about the case.
- 63.3 At the macro level, I have already touched on the widespread belief among some in the security forces that Stakeknife saved 'countless' or 'hundreds' of lives. He did not. The claim that he did emanates from the FRU which made a similar and equally exaggerated claim about Brian Nelson.
- 63.4 Indeed, sweeping claims of this kind, particularly when linked to a single source operating over a long period of time within a security-conscious terrorist organisation, are inherently implausible and should ring alarm bells. Any serious security and intelligence professional hearing an agent being likened to 'the goose that laid the golden eggs' - as Stakeknife has been - should be on the alert because the comparison is rooted in fables and fairy tales.⁸⁴ In theory, a well-placed agent within an active terrorist group could provide valuable information about a series of threats to life over a long period of time. In practice, the use of that information to avoid or prevent such threats on more than a handful of occasions would invariably put the agent under suspicion and lead to their compromise and withdrawal.
- 63.5 Furthermore, and leaving aside cases involving the avoidance or prevention of a single attack, the accurate quantification of lives saved by a single agent over a long period of time is inherently difficult because it depends on counterfactual contingencies and variables which often cut both ways. What would have happened if the relevant intelligence had not been acted upon? What would the agent have done if they had not been recruited to act as such, would they have harmed or killed more or fewer people or been arrested and stopped, who might have been recruited instead and with what results? To what extent, if at all, did the agent cause harm, put lives at risk or generate work for themselves? Was any potentially life-saving intelligence not passed on or acted upon in order to protect the agent, thereby sacrificing someone else? Did the terrorists suspect that there was an agent in their midst and, if so, how many other people did they harm or kill trying to out that agent? How many others might the terrorists have killed if they had not been so preoccupied with the identification of agents and what effect would this have had on the peace process?
- 63.6 The FRU did not grapple with any of the above and its claims about Stakeknife saving hundreds of lives were instead based on unreliable and speculative internal metrics which ascribed notional numbers of lives saved to particular pieces of intelligence. For example, the number of lives that could have been taken by a particular weapon or bomb - had it not been recovered, disabled or destroyed - was estimated and added to the source's tally. An agent providing information about the location of a cache of weapons and ammunition would thus be treated as having saved a certain number of lives, notwithstanding that the cache might have been discovered by other means or might never have been used. Moreover, the FRU maintained

⁸⁴ R Temple, *Aesop: The Complete Fables*, 1998, number 287.

'success books' for some of its agents, but (remarkably given his 'crown jewel' status) one for Stakeknife has never been recovered.

- 63.7 Stakeknife was undoubtedly a valuable asset who provided high quality intelligence about PIRA at considerable risk to himself, albeit that this was not always passed on or acted upon and, if more of it had been, he could not have remained in place as long as he did.
- 63.8 While Kenova has reviewed approximately 90% of the written intelligence reports attributable to Stakeknife, the following should be noted: intelligence reports rarely indicate the use made of their contents; the intelligence basis for security force interventions was not always documented; it is possible that Stakeknife provided additional life-saving intelligence which was not documented or for which no record has survived; and agents cannot be held responsible for intelligence not being passed on or acted upon.
- 63.9 That said, my estimate of the number of identifiable individuals whose lives were saved in reliance on information provided by Stakeknife - through relocation, warning or other intervention - is between high single figures and low double figures and nowhere near hundreds. Crucially, this is not a net estimate because it does not take account of the lives lost as a consequence of Stakeknife's continued operation as an agent and, from what I have seen, I think it probable that this resulted in more lives being lost than saved. Furthermore, there were undoubtedly occasions when Stakeknife ignored his handlers, acted outside his tasking and did things he should not have done.
- 63.10 Most fundamentally, even if it were possible accurately and reliably to say that a particular agent within a terrorist group did more good than harm, the morality and legality of agents doing any harm - with the knowledge of or on behalf of the state - are very different matters.
- 63.11 Other myths about Stakeknife persist at the micro level. Kenova has thoroughly investigated his activities and what he reported to the FRU during his time as an agent and, without identifying him, we have been able to correct inaccuracies previously reported to families. Examples include various suggestions that Stakeknife was responsible for crimes when he was not and claims that the security forces directed loyalist paramilitaries away from Stakeknife and towards other more valuable targets in order to protect him when they did not:
- (1) The book, 'Stakeknife Britain's Secret Agents' thus makes claims about a 'name swap theory' which posits that the security forces directed loyalists to target someone other than Stakeknife.⁸⁵ This did not happen.
 - (2) The book also attributes a number of murders to Stakeknife which (irrespective of the truth or falsity of claims about his identity) had nothing to do with the relevant individual.

⁸⁵ G Harkin and M Ingram, *Stakeknife: Britain's Secret Agents in Ireland*, 2004, chapter 12.

(3) Claims that Stakeknife met Prime Minister Margaret Thatcher at Chequers and that she was involved in directing, or received briefings on, his activities are also untrue. We have established that none of this took place.

63.12 I address the lack of regulation, supervision and oversight in relation to the recruitment, handling and use of agents in Northern Ireland during the Troubles in part 67 below. Had these been properly provided for at the time, the Stakeknife case would have been subject to greater scrutiny and challenge and I believe significant wrongdoing and harm would have been avoided.

63.13 I would also draw another cautionary lesson. I recognise that the idea of an agent being someone who was themselves responsible for the identification of agents is inherently satisfying and attractive because it is so rich in irony, symmetry and poetic justice. It instinctively feels like a coup. However, these qualities can have a beguiling effect and I suspect that this contributed to the Stakeknife case becoming so encrusted with and obscured by myths and legends and ultimately to his agent status not being managed properly.

64 Prosecution of Freddie Scappaticci for possession of extreme pornography

64.1 As part of the Kenova investigations, Freddie Scappaticci was first arrested on 30th January 2018 in relation to offences connected with the Kenova ToR. A search warrant was executed at his home address following his arrest. Searching his property, we recovered numerous exhibits including electronic devices.

64.2 A laptop recovered from the sitting room at his address contained 329 images of an extreme pornographic nature. Kenova officers and Hi-Tec crime forensic experts were able to prove that Mr Scappaticci was responsible for accessing and downloading these images.

64.3 On 1st February 2018, while in police custody, we further arrested Freddie Scappaticci for being in possession of extreme pornographic material contrary to section 63 of the Criminal Justice and Immigration Act 2008. Mr Scappaticci admitted viewing the material but not storing the images, he accepted that he was the sole user of the laptop. He was charged with two specimen counts of possession of extreme pornographic images contrary to section 63, covering a period from October 2015 to January 2018.

64.4 On 4th December 2018, at Westminster Magistrates' Court in London, Mr Scappaticci pleaded guilty to possessing extreme pornographic material. The Chief Magistrate sentenced him to three months in custody suspended for 12 months. In sentencing, the Magistrate said, "*You have not been before the court for fifty years and that's good character in my book*". These remarks frustrated many victims and families who have engaged with Operation Kenova and I can understand why.

65 Perjury decision

- 65.1 In May 2003, Freddie Scappaticci was named in a number of national newspapers as being an Army agent who operated under the codename 'Stakeknife'. Following this reporting, a series of further media stories repeated the allegations with journalists seeking to interview Mr Scappaticci.
- 65.2 On 21st May 2003, in the presence of his solicitor, Mr Scappaticci swore an affidavit which, amongst other things, stated that he was not a security force agent, whether known as Stakeknife or by any other name.
- 65.3 On 6th August 2003, again in the presence of a solicitor, Mr Scappaticci swore and signed an additional affidavit linked to the allegations made against him.
- 65.4 On 3rd February 2004, again in the presence of a solicitor, Mr Scappaticci swore and signed a further affidavit associated with the allegations being made against him.
- 65.5 These affidavits were sworn and signed for the purpose of court proceedings. Each was examined in a court 'pre-hearing' to determine whether to permit those proceedings to continue.
- 65.6 Kenova established that British Irish Rights Watch and a former member of the FRU had made at least 18 written referrals to PSNI, PONI and PPSNI claiming that Freddie Scappaticci had committed an offence of perjury in February 2004. Prior to these complaints, the allegation had been made directly to Lord Stevens and a copy of the February 2004 affidavit provided to him. Lord Stevens passed the letter making this allegation and the copy affidavit to PSNI as the matter did not fall within his ToR.
- 65.7 Upon receipt of these materials, an initial decision was taken by PSNI that the matter was not capable of being investigated as it engaged NCND.
- 65.8 In a letter to a complainant's solicitor, PSNI made reference to the abovementioned decision of Lord Chief Justice Carswell dated 18th August 2003 in *Re Scappaticci's Application* as justification for not investigating.⁸⁶ This decision dismissed Mr Scappaticci's application for a judicial review seeking to require the Northern Ireland Security Minister to state publicly that he was not the agent Stakeknife. The Lord Chief Justice explained that he had to balance the risk to Mr Scappaticci's life against the government's policy of making no comment on intelligence matters. In his judgment, he said, "*Once the government confirms in the case of one person that he is not an agent, a refusal to comment on the case of another person would then give*

⁸⁶ [2003] NIQB 56:

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20an%20application%20by%20Freddie%20Scappaticci%20for%20Judicial%20Review.pdf>

rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger”.

- 65.9 The litigation was publicly reported at the time and attracted considerable media attention. Indeed, in May 2003, Mr Scappaticci had staged a filmed interview at his solicitor’s office in the presence of two journalists proclaiming that he was not the agent Stakeknife.
- 65.10 PSNI’s decision not to investigate the original perjury allegation in 2004 engages my concern about the blanket application of the NCND policy in a way that prevents wrongdoing and criminality from being fully investigated.
- 65.11 After repeated lobbying for an investigation, a PSNI SIO was appointed in the spring of 2006 but was not provided with either the February 2004 affidavit, previously supplied to Lord Stevens, or indeed any of the other affidavits. PSNI has been unable to provide a satisfactory explanation for this.
- 65.12 Following his appointment and as part of his investigation, the SIO attended MI5 HQ in London on 31st July 2006 and was provided with information about the May 2003 affidavit only. At the meeting, no mention was made or disclosure provided of the affidavits of August 2003 or February 2004. Most notably, a fourth affidavit had been sworn by Freddie Scappaticci, dated 26th June 2006, and this was also not disclosed to the SIO despite the fact that it had only been made some five weeks earlier. MI5 knew about all four affidavits.
- 65.13 The above events represent another example of information not being disclosed by the security forces when it should have been. MI5 and those legally representing the MI5 officers interviewed under caution by my team made representations to me about what they described as a poor investigation by PSNI being the fundamental issue at play. It is abundantly clear to me that additional information about the further affidavits should have been disclosed by MI5 to PSNI. MI5 had played a significant role in the first proceedings overseen by Lord Chief Justice Carswell not least because the government was a party and they concerned the application of its NCND policy.
- 65.14 Each of the affidavits after 21st May 2003 refers to the existence of the previous documents and relies upon their contents although the statement sworn by Mr Scappaticci that he was not the agent Stakeknife or an agent for the security forces was only made in the May 2003 affidavit.
- 65.15 The PSNI SIO did not interview Mr Scappaticci and submitted a file to PPSNI in December 2006 regarding the May 2003 affidavit only. The matter was considered by a senior reviewing lawyer on behalf of PPSNI. This file was limited to the first affidavit only and, during subsequent interviews with Kenova, both the SIO and the senior reviewing lawyer maintained that they had no knowledge of the other three affidavits until told about them by my team.
- 65.16 As part of the PPSNI decision making process at that time, the senior reviewing lawyer met with MI5 Legal and a disclosure process occurred in connection with relevant material held by MI5. The question of relevance could only be dealt with by MI5 lawyers at that time and the

PPSNI lawyer was entirely reliant upon their candour. During this process, the existence of the 6th August 2003, 3rd February 2004 and 26th June 2006 affidavits was not disclosed to PPSNI.

- 65.17 On 21st December 2007, a non-prosecution decision was taken by PPSNI on the file submitted by the PSNI SIO, but this decision was later reviewed and set aside by Mr Barra McGrory QC when he was DPPNI.
- 65.18 As I have already described in this report, Mr McGrory QC issued requests for information under section 35(5) of the Justice (Northern Ireland) Act 2002 in late 2015 requiring CC PSNI to investigate a range of offences relating to the activities of the alleged agent Stakeknife. One of these requests specifically related to the perjury allegations made against Mr Scappaticci and they were all referred to Operation Kenova for action. The inclusion of the perjury allegations in Operation Kenova's ToR reflected the fact that he was (rightly or wrongly) alleged to have been Stakeknife and this then led to his claim for judicial review and the related allegations of perjury.
- 65.19 Under this heading, we conducted an extensive and detailed investigation into all of the relevant circumstances and evidence and submitted reports to PPSNI. The investigation resulted in significant additional information being provided which was not previously available to prosecutors.
- 65.20 As part of the Kenova investigation, we spoke to those involved at the time including, the former Lord Chief Justice, Lord Carswell, the former Attorney General, Lord Goldsmith QC, the former Northern Ireland Security Minister, Jane Kennedy, the PSNI SIO, staff at PPSNI and legal representatives. My team also interviewed under caution two former members of MI5, a former lawyer within PPSNI and Mr Scappaticci. The case file ultimately submitted to PPSNI by Kenova reported four individuals and a decision of 'no prosecution' was reached in relation to each of them by DPPNI on 29th October 2020.
- 65.21 In order to prove an allegation of perjury there are a number of elements that must be demonstrated to the criminal standard. These are that:
- (1) a person was lawfully sworn as a witness;
 - (2) the witness was sworn in a judicial proceeding;
 - (3) the witness made a statement which they knew to be false or did not believe to be true;
 - (4) the statement was made wilfully; and
 - (5) the statement was material in the judicial proceedings.
- 65.22 In applying the test for prosecution, a prosecutor is also required to consider any potential defence that may arise in the particular circumstances.
- 65.23 The current DPPNI Stephen Herron considered that there was a reasonable prospect of proving that one of the affidavits under consideration contained a statement which the reported individual knew to be untrue or did not believe to be true. However, he concluded that there

would be a significant difficulty for the prosecution in establishing that the false statement was material to the legal issue to be determined in the judicial proceedings in which it was sworn.

- 65.24 DPPNI further considered whether, if it were possible to prove that the false statement was material, the prosecution would be able to disprove beyond a reasonable doubt any defence of duress of circumstances. Having carefully considered all of the evidence obtained by Kenova he concluded that it did not provide a reasonable prospect of doing this and the evidential test for prosecution was not met.
- 65.25 The information provided in this section is deliberately high level as I am mindful of the other Kenova files that remain to be considered by PPSNI.
- 65.26 In response to the DPPNI decisions, I wrote to stakeholders and families and published a press release on 29th October 2020 explaining that (Appendix 32):

“This is the first decision of the Director of Public Prosecutions on a number of files submitted by Operation Kenova. The challenges of bringing a prosecution for Northern Ireland legacy cases, both from a legal and practical perspective, are well-known and have been described in my evidence to the Northern Ireland Affairs Select Committee. Today’s decision and such challenges does not mean that prosecutions are out of reach however, and we await the remaining decisions with keen interest.

Most importantly, at the outset of Operation Kenova I made commitments to provide families with our findings as to what happened in their individual cases and to deliver a public-facing report. These two key commitments remain at the forefront of our endeavours.

Legacy should not be judged simply through the prism of prosecutions, it must be considered as a process which provides the truth to those families who have lost loved ones”.

- 65.27 In the opening paragraphs of his public statement about the decisions, DPPNI explained:

“In Operation Kenova a constraint arises from issues touching upon the identity of informants and the Director has to carefully balance the public interest in providing detailed reasons with the potential for the provision of any such reasons to create or increase any risk to life. The Director is also required to weigh the risk of damage to national security arising from any departure from the NCND policy, including any negative impact upon the ability of the security forces to recruit and retain informants as part of their intelligence gathering efforts. The courts have recognised, as does the Director, that the principle of NCND must be applied consistently in order to be effective.

In respect of potential damage to the public interest as referred to above, the Director has sought and received advice from government which he has carefully considered

and balanced, together with the other relevant public interest factor, in determining the level of detail that can be provided. The outcome of that balancing exercise is that the Director considers that the information contained within this statement represents the limits of what he can properly put into the public domain at this time in relation to the reasoning for the decisions that he has taken".⁸⁷

65.28 DPPNI had the unenviable task of explaining the rationale for his decision when confronted with advice from government lawyers as to what he could and could not say. He quite properly sought this advice in order to be as open and transparent as possible. It is my understanding that he was advised that disclosing information that might touch on the identification of the alleged agent Stakeknife would damage the prospects for recruiting and retaining agents and therefore damage national security. I am quite certain that DPPNI could quite properly have gone into more detail about the facts and the rationale for his decision not to prosecute and that doing so would not have had any negative impact on agent recruitment or activity.

66 Interviews with senior leaders of the time

66.1 I decided early on in the investigation that, to understand properly the strategic landscape during the time that Stakeknife was operating, it was important to interview those in senior leadership roles in government and the security forces. First, I wanted to understand what governance and oversight there was 'on the ground' and, second, to establish what, if any, knowledge the senior leaders of each organisation had of the alleged agent Stakeknife, if they even knew he existed. These witness interviews were informed by the career history and postings of each leader especially where they were exposed to the operating practices of agent handling during the Troubles. I decided I would structure the interviews so as to:

- examine their knowledge of agent operations in Northern Ireland and particularly of the agent Stakeknife;
- provide the opportunity to respond to community concerns of collusion in the security forces, allowing agents to commit crimes;
- examine their understanding of the lack of support for agent legislation or guidance for handlers;
- establish any awareness of criminality or malpractice connected to the Kenova ToR.

66.2 I am grateful to those who cooperated with this phase of my investigation. These included Prime Ministers, government ministers, Permanent Under-Secretaries, Director Generals of MI5,

⁸⁷ PPSNI, *Public Statement as PPS Issues Four Decisions In Connection with Operation Kenova Files*, 29th October 2020: <https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Public%20Statement%2029.10.20.pdf>

General Officers Commanding, Commanders Land Forces, Chief Constables, Assistant Chiefs of Staff, Chiefs of Staff and other senior officials (Annex 1).

- 66.3 I would summarise the key themes to emerge from my interviews with these people as follows:
- (1) Those in the most senior positions of government and the security forces did not have, nor did they expect to have, any detailed or specific understanding of agent operations nor any knowledge of the alleged agent Stakeknife.
 - (2) Those in senior positions in government and the security forces at the time claim to be unaware of what has been described as ‘collusion or collusive behaviours’ whereby agents were known to be involved in serious criminality.
 - (3) There was a different approach towards agent recruitment, handling and management by different security forces during the conflict and some expressed concern - without making specific reference to particular cases - about the conduct of agents of the FRU and RUC Special Branch.
 - (4) Those involved in the operational world of agent activity sought clearer guidance including a legislative framework for recruiting, handling and managing informants. These issues were discussed at senior level in government and were the focus of particular attention following the Brian Nelson prosecution. However, it was seen as politically unachievable for such legislation to be successfully formulated and as the peace process gained traction the legislative discussions were put on hold.

67 The recruitment, handling and use of agents by the security forces in Northern Ireland were not properly regulated, managed or controlled

- 67.1 When I interviewed the various former DGs of MI5, some expressed concerns, held during the Troubles, at how the FRU managed its agents. One specifically said that FRU handlers were seen by MI5 as “‘Gung Ho’, not well managed, with little meaningful oversight”.
- 67.2 A former Commanding Officer in the FRU has stated that everything it did was done with MI5’s knowledge and consent. Senior MI5 officers and the various DGs I interviewed deny this categorically.
- 67.3 Some Kenova victims who survived PIRA mistreatment have named those responsible for violence against them and I have established that some of them were agents when they committed acts of torture, including shootings. There is no information about these agents’ criminal activities in their contact records with their handlers and it has not always been possible to tell whether they told their handlers about their criminal acts.
- 67.4 The security forces often audio recorded agent de-briefings, but we have not recovered any such audio recordings and have been told that none now exists. It is not possible to know with

certainty what information agents passed to their handlers. However, from transcripts and other records Kenova has recovered, I am satisfied that, on occasion, handlers were aware that their agents were involved in very serious offences.

- 67.5 As I have already discussed, the approach to managing agents varied across the security forces. MI5 demonstrated elements of reasonable oversight, with evidence of legal input and governance. By contrast, the FRU and RUC Special Branch were generally less rigorous in their legal considerations and oversight, although both were in the front line of intelligence gathering with MI5 and the DCI taking a more strategic role.
- 67.6 At the time, Kenova stakeholders held strong suspicions that FRU and RUC Special Branch agents were not operating in compliance with the principles of Home Office Circular 97/1969 or their respective organisational directives. Nothing was done then or subsequently to identify or correct any such failures.
- 67.7 My overriding concern is the lack of understanding at a senior level within the Army as to what was happening in the field and the lack of meaningful senior supervision or oversight. While I appreciate the enormous challenges faced at the time, this was an area that should have been the subject of much closer scrutiny. There was a conscious lack of professional curiosity from the very senior leadership of the Army in relation to the recruitment and running of FRU agents. Despite other security forces having suspicions of poor tradecraft and behaviour within the unit and notwithstanding their oversight responsibilities, those responsible failed even to scratch the surface of what was happening.
- 67.8 All the security forces targeted potential agents for recruitment specifically because intelligence suggested that they were involved in terrorist activity. Their activities and access to terrorist information was precisely why they were recruited. Our Kenova investigations have established that agents were regularly involved in inciting and committing serious criminal acts.
- 67.9 The priority for those recruiting, handling and managing agents was to retain their sources and maintain the flow of intelligence rather than to prevent crime or apply the criminal justice system.
- 67.10 The lack of a proper framework for the security forces to operate within and the absence of oversight and governance are underlying failures and had dire consequences both for agents and those that they came into contact with. Those in the security forces involved in recruiting, handling and managing agents during the Troubles were expected to penetrate terrorist groups while being instructed in their training and guidelines that agents could not commit crime. This was a charade, with the official and formal position that agents could not commit crime being delivered in training whilst 'on the ground' agents were inevitably members of proscribed organisations and routinely involved in terrorism.
- 67.11 Working as an agent, handler or supervisor was challenging and complex and should have been governed by a legal framework, with accompanying policy guidelines appropriate to the hostile environment of those times and the threats that agents and the security forces faced.

Each person involved or conspiring in a criminal act, whether a terrorist or member of the security forces, is accountable in law.

- 67.12 Units handling these agents were left to manage themselves. There was little or no strategic oversight. A lack of governance, accountability and scrutiny allowed agents to progress to positions of responsibility and leadership within the organisations they infiltrated. The longer a person is inside a terrorist group, the more trusted they become and liable for promotion to senior positions. Senior leaders should have been more alive to these risks and the immense complexities surrounding agent issues.

68 Legacy cases can be investigated successfully

- 68.1 Although we still await PPSNI charging decisions on outstanding Kenova cases, the investigation has demonstrated that it is possible to uncover the truth of what happened to victims in unsolved legacy cases. It is correct to say that in some cases we have found very little, but in most cases we have discovered information that the families did not know and that we can now share with them. Much of this information should have been shared many years ago and without compromising national security interests.
- 68.2 Kenova has shown it is possible to find the truth of what happened for many victims and families. This requires an absolute commitment to examining events thoroughly, a dedication to and openness with families and an uncompromising approach towards those that seek to stop the truth from being uncovered. Some remain dismissive about legacy investigations, but we should not underestimate the determination of those who seek to undermine and invalidate those seeking the truth in legacy.
- 68.3 Often we have found a wealth of intelligence about legacy murders. It is a basic principle in homicide investigations that to identify how and why someone was murdered, those enquiring into that death must establish how they lived their life. In these cases, the information about how some of those accused of being agents lived their lives was deliberately and unhelpfully withheld from investigators.
- 68.4 It is deeply troubling that we have found no cases where a prosecution was brought in connection with a victim who was murdered because they were accused or suspected of being an agent. In the vast majority of these cases, intelligence exists about those responsible and yet PPSNI has informed me that it knows of no cases (outside of Kenova) where a full police investigation file was submitted to it in connection with such a murder. This should be concerning to everyone. While raw intelligence cannot always be developed into actionable evidence, this is often possible and the practicability of criminal proceedings requires active and thorough testing by investigators and prosecutors. The reality is that this did not happen in these cases - they were not properly worked or pursued when they undoubtedly could and should have been.

- 68.5 Some stakeholders say that terrorists did not keep records while the security forces were obliged to and that this is unfair. Our investigations have shown that these records rarely demonstrate security force wrongdoing, but do identify terrorists that were involved in legacy crimes. The records held by the security forces also show that on occasions intelligence existed that could have been used to prevent people from coming to harm or to bring those responsible for serious crimes to justice but this was not acted upon. The reasons for not taking action have been outlined in this report and often arose out of the separation of intelligence collection from investigations.
- 68.6 We must always remember what terrorism has cost the security forces in lives lost and injuries suffered. For the most part, they did their very best to keep people safe. On rare occasions, their members were involved in assisting terrorists and even in committing terrorist acts. The bravery, courage, dedication and sacrifice of the majority must never be forgotten, but these noble efforts cannot and do not excuse wrongdoing by the minority. Nor can they prevent the pursuit of those who harmed people they were meant to protect.
- 68.7 Kenova has pursued more than 12,000 lines of enquiry, taken more than 2,000 statements, interviewed some 300 people, over 40 under caution, conducted comprehensive forensic reviews in more than 80 cases and submitted 35 files to PPSNI covering in excess of 50,000 pages of evidence. We have gathered evidence from previously undisclosed official records, by engaging with families, some of whom have not previously spoken to investigators, and by harvesting new forensic evidence using cutting edge scientific techniques. This data and the successful engagement with victims, families and stakeholders demonstrates that legacy cases can be successfully investigated.
- 68.8 That said, it is important that all those with an interest in addressing Northern Ireland's legacy are realistic about the scope for prosecutions. There are significant legal and practical obstacles to bringing cases from so many years ago before the criminal courts today. Challenges include: the effects of time on the ability to provide best evidence and the memories, availability and fitness of witnesses and suspects; the continuity and completeness of records; legal arguments regarding the admissibility of intelligence materials, particularly when they incriminate their source; and further legal arguments about delay and abuse of process.
- 68.9 So far as concerns abuse of process, criminal courts have the discretionary power to stay proceedings where a trial would not be fair, would offend the court's sense of justice and propriety or would damage public confidence in the justice system. It is undoubtedly the case that some FRU and RUC Special Branch agents disclosed their involvement in criminality to their handlers (both before and after the event) and were assured that their anonymity and status would always be protected and they would never stand trial or spend time in jail. In some cases, the commission of offences by agents was not only condoned by their handlers, it was impliedly and even expressly encouraged. An agent who exposed himself to serious risk by providing information to the security forces could easily have been led to believe that their

conduct was authorised and could not lead to prosecution. However, the simple fact is that the security forces had no power to authorise the commission of crimes or confer prospective or retrospective immunity on offenders and any assurances given to the contrary were themselves unlawful.⁸⁸ Indeed, the abuse of process jurisdiction exists to protect the integrity of the legal system and the rule of law and it would make little sense if it operated to immunise breaches of the law and deny justice to victims and families.

69 Families not provided with proper disclosure deserve to be acknowledged, listened to and know the truth

- 69.1 It should never be the case that we protect those responsible for crimes such as murder by not examining those cases thoroughly.
- 69.2 Without prejudice to the PPSNI decisions that we await, I should be clear that the prospect of prosecutions in some cases is more likely than I had expected when I began these investigations. Compared with serious crimes committed elsewhere in the United Kingdom during the same period, many legacy cases have not undergone a modern and meaningful investigative process.
- 69.3 However, prosecutions are exceedingly challenging in legacy cases and I would expect them to be very much the exception. The Secretary of State and NIO described the prospect of prosecutions in legacy cases as vanishingly rare. The starting point for any legacy case should be to find the truth of what happened for the families affected. Families want to be heard, they want to be acknowledged and they want a robust and independent investigation to find the truth. They are realistic about the prospect of bringing the culprits to justice. Many, for a variety of reasons, do not want criminal prosecutions. In the Kenova cases these reasons include toxic residual attitudes within some communities towards suspected agents, the time that a prosecution might take and the unwanted media and public attention that such cases attract. Families often want something far more straightforward and achievable without the need for lengthy court hearings and the inevitable appeals that follow. They simply want the truth.
- 69.4 It is important to insist that we do not judge legacy issues through the criminal justice prism alone. The number of prosecutions is only one measure. Everyone should accept that these will be rare, given how difficult it is to prosecute cases from so many years ago.
- 69.5 Many families whose loved ones were murdered during the Troubles have not been given even the most basic and uncontroversial information about what happened. There are many reasons for this, including the dangerous operating environment which made it difficult for the police

⁸⁸ See the decision of the Court of Appeal and the arguments of the government in the recent 'Third Direction' case, *Privacy International v Foreign Secretary* [2021] EWCA Civ 330, [2021] QB 1087.

even to meet them during those times. However, as families will testify, there was also a strong police culture of withholding information.

- 69.6 It should be remembered that Kenova's findings are reflective of the Troubles and not the present day. Our findings reflect that the security forces' operating practices failed to protect people, especially agents and those accused of being agents. We must disclose the mistakes made during this period and demonstrate that they would not happen today if agents are to be recruited and have confidence in the assurances they are given.
- 69.7 To reassure society and those who might want to work for the public good as agents, it is imperative that where agents were not protected this is disclosed and learned from. Where agents and non-agents were tortured and murdered, we must acknowledge those cases and demonstrate that such events would not be allowed to happen today. Properly investigating these cases requires no public acknowledgement as to whether a person was or was not an agent.
- 69.8 The current leadership of the security forces recognise the need to provide information about what happened during the conflict and that this can be done without compromising national security interests. In particular, with regard to the disclosure of records, the current DG MI5, Ken McCallum, to whom others look for guidance, has demonstrated a willingness to explore a way forward that gives families the truth while protecting national security interests and the identities of agents.
- 69.9 I am certain that the significant majority of veterans, who did their best in extraordinarily dangerous circumstances, would want families to know the truth. This applies to all victims including those from the security forces who made the ultimate sacrifice. Some in the security and intelligence community who were heavily involved in separating intelligence from investigations do not appreciate the mechanisms and safeguards that permit sharing such information whilst protecting its origins.
- 69.10 Those advocating for the status quo - with no bespoke statutory body existing to examine legacy cases - often claim that such work amounts to a criticism of the security forces and that exposing wrongdoing threatens their reputation. Examining legacy cases is not a criticism of actions others took in unimaginably dangerous times, nor is it a threat to the integrity or reputation of the security forces. On the contrary, fair and professionally conducted legacy investigations enhance the reputation of both government and the security forces especially when cooperation and transparency are forthcoming. Such independent and fair investigations are a reflection of a healthy democracy that is open to scrutiny resulting in public confidence in our institutions.
- 69.11 Reasons not to release information should be limited to preventing harm to a person or the disclosure of tactics that would negatively impact our ability to keep people safe. There is almost always a way to 'gist' information by providing a form of words that explains the general meaning of sensitive intelligence without compromising its source. With regards to conflict related cases, these crimes were committed so long ago and at a time of such comprehensive

intelligence coverage, that efforts to find out where information came from today would, in almost all cases, be practically impossible.

- 69.12 As a result of the treatment they received, many families feel that the state has let them down and abandoned them. There remain many complex and painful issues across all sides of the conflict that people endure each day. The Eames Bradley 'Report of the Consultative Group on the Past' of 2009 recommended an annual day of reflection and reconciliation as a shared memorial to the conflict.⁸⁹ The introduction of such a day could help communities join together to remember the lives lost, the injured and those scarred by the Troubles. There will undoubtedly be some legacy stakeholders who will be dismissive of such a proposal because of the enduring hurt and their understandable wish not to acknowledge those who perpetrated the violence. I understand and respect those feelings and the anger that remains for many people. However, to build a healthy and prosperous society for future generations a point has to come when the crimes of the past no longer shape the attitudes of the future.
- 69.13 A day of remembrance would allow everyone to reflect on what more we might have done and what we might still have to do in order to ensure that such loss, as experienced during the Troubles, is never allowed to happen again. I have witnessed at first hand the positive impact of such a day on victims and families. Until we acknowledge victims and survivors and the transgenerational trauma inflicted as a result of the Troubles, society will not properly heal. I strongly support such a day being set aside and call on everyone to do the same.

Recommendations

PPSNI should pay due regard to the views, interests and well-being of victims and families when considering the public interest factors relevant to prosecution decisions in Northern Ireland legacy cases.

The longest day, 21st June, should be designated as a day when we remember those lost, injured or harmed as a result of the Troubles.

70 False and misleading information is often passed to families

- 70.1 Many had hoped that after the GFA those who had worked so hard to achieve peace would then focus on the victims. For various reason this did not happen. One of the ongoing consequences of this inaction is that false and misleading information is frequently passed to families.

⁸⁹ *Report of the Consultative Group on the Past*, January 2009:

https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf

- 70.2 As I discussed previously, many legacy families are contacted through a variety of means by people who claim to know what happened in their particular case and give false and misleading information. This can be about what happened in a case or more generally about legacy issues. These unhelpful interventions come from a range of sources.
- 70.3 Misinformation about legacy cases is immeasurably traumatising for victims and families. Inaccurate claims can also undermine investigations by damaging trust and confidence. Victims and families find information posted on social media, in news articles, books, television and film. In some rare cases, these provide a partially accurate account of what happened, but in our experience of the Kenova cases, this is the exception.
- 70.4 My team has spent considerable time investigating, tracing and meeting people who have made such claims, including some who have 'named' those responsible for murders and promoted conspiracy theories. These claims are not always malicious. On occasion, people pass information on in good faith, for example from something they have heard or overheard. However, in each case we have examined, the account came from a source who had no direct knowledge of the offence and may have been suffering with poor mental health and their claims were always wrong.
- 70.5 Having obtained the permission of the families involved, it may be useful to give some examples of inaccurate information they have received:
- One family received a social media message naming the person 'responsible' for their loved one's murder. We investigated and established the person named had been in prison at the time of the offence.
 - In another case, a person was named on Twitter as being responsible for a murder. Again, we established they were unconnected to the crime. When we traced the person making the allegation, he said he was merely trying to give the family new information and genuinely hoped he was being helpful, but he had no direct evidence to suggest the person he had named was responsible.
 - In a further example, someone approached a victim's relative at his workplace, having identified him by his name badge. The man made a number of claims about the victim and his murder. When we examined the claims we proved they were entirely baseless. When we traced the individual, it transpired that he had complex personal circumstances, said he was seeking to help the relative and appeared genuine in his motivation regardless of the impact the inaccurate information had.
- 70.6 By following up on such claims, we have been able to reassure the families involved. The interventions we have made to correct false information, at both strategic and tactical levels, have proven important to demonstrate that Kenova is independent and most importantly to lessen the trauma that misinformation can cause to victims and families. This serves to demonstrate again why a legacy unit for all families, not simply those known to Kenova, is

essential. Many legacy families receive false information far too frequently and without a legacy investigation unit in which they can have trust and confidence, conspiracy theories will continue to thrive and to impact negatively the families concerned.

70.7 Troubles cases in which the state might have been involved or that raise allegations of state failings draw huge interest from the media. I have lost count of the number of journalists, authors and documentary and film makers who have approached me with their plans to write or produce programmes about Kenova. Against this background the overwhelming majority of families seek privacy. Many do not have legal representation and do not work with victims groups. This silent majority of families simply want a confidential and trusted relationship with a legacy investigation team and to be told what happened in their case.

70.8 The only way to stop this continuing information manipulation and trauma for families is to establish and maintain a legacy unit that can provide accurate information and verify or rebut such claims by examining robustly any account given about a Troubles related matter.

71 The security forces sometimes failed to protect those accused or suspected by PIRA of being agents and failed to bring those responsible for harming them to justice

71.1 The separation of intelligence from investigations that evolved during the Troubles resulted in a number of terrorists not being arrested and pursued through the criminal justice system as they should have been. We have identified incidents in which the intelligence sections of the security forces were aware that someone was at risk of being kidnapped and interrogated by PIRA and did not pass on this information. They neither warned the person concerned about the danger that existed nor took action to protect them.

71.2 The situation in which people were not warned or no efforts were made to protect them came about as a direct result of PIRA's violent and murderous actions. The security forces feared that passing such information to the person under threat or taking action to protect them would potentially lead to the agent who provided that information being identified and harmed. However, I find it difficult to reconcile the failure to intervene and protect life with my understanding of the state's fundamental responsibility to keep citizens safe and its obligations under the ECHR. As discussed in this report, these were incredibly difficult times and on occasions there was no 'right answer', rather a number of unattractive choices each of which presented risk to one person or another.

71.3 Recognising the unique and hostile operating environment at the time, what we cannot and should not continue to do is to hide these cases from view through the blanket application of the NCND policy. In cases where the state failed victims and has stood behind the shield of secrecy - in the absence of any meaningful process to challenge it - it must make amends and

disclose what happened. This process does not require agents to be identified nor does it threaten national security.

- 71.4 Furthermore, the state has a duty under article 2 to conduct an effective formal investigation of any suspected wrongful killings and this duty is enhanced in cases where state agents may have been responsible for perpetrating or failing to prevent the death. To be effective, an investigation must be timely, independent from those involved in the events and have sufficient oversight and scrutiny.
- 71.5 The ECHR jurisprudence is clear that, even during an ongoing security emergency such as the Troubles, the state is obliged to ensure that an effective independent investigation is conducted. Clearly, at the time these crimes were committed such an effective investigation would have been near impossible because of the danger to the security forces. However, following the GFA, such investigations could and should have been carried out.
- 71.6 Faced with the dilemma of protecting a valued agent and maintaining their ability to report on terrorist activities, an informal policy evolved whereby people suspected by PIRA of being agents were not protected. This is not something any member of the security forces would have contemplated outside such dangerous times, but it is clear to me that more should have been done to protect people. Retired RUC officers have made the point that the large number of people PIRA's ISU 'interviewed' made the reality of keeping all of them safe nigh on impossible.
- 71.7 We have identified occasions when agents were under surveillance by the security forces and the surveillance team was withdrawn leaving the victim exposed to torture and murder. Failings extend to PIRA ISU members not being arrested and prosecuted when the evidence was readily available. This permitted murderers, and those involved in torture and abduction, to escape the rule of law and this happened repeatedly. There were occasions when it would have been better for the security forces to have accepted the need to arrange new agent coverage and to have protected the person in danger, thereby applying the rule of law.
- 71.8 We have also established that agents were involved in murder. There is no evidence to suggest that the authorities considered holding these agents liable for their criminal acts. In some instances, the RUC was not even informed of the involvement of Army agents in criminality. After his resettlement, one agent assisted the security forces providing lectures to new agent handlers and other security force personnel. These training presentations included admissions to serious criminal offences that have not been dealt with by the criminal justice system.
- 71.9 The dangerous times in which these events took place, the volume of serious offences being committed and the embryonic state of the mechanisms to manage complex agent handling, collectively conspired against victims and their families. The often fractured relationship between the different security forces - particularly the FRU and RUC Special Branch - and the lack of rigour and oversight from senior leaders exacerbated this further.

- 71.10 It is time the government apologised to these families for its failure to intervene and protect life in circumstances where the state has a fundamental responsibility to keep its citizens safe and legal obligations to do so under the ECHR; its failure properly to investigate the crimes committed against their loved ones; and its failure to treat them with the fairness, compassion and respect they deserve. Such an acknowledgement and apology should be made privately to each family concerned, as most do not want any public attention for their case.
- 71.11 Any nervousness that an official apology to the families of those the state has failed to protect might encroach on the NCND policy - some perhaps presuming that a victim or perpetrator must therefore have been an agent - is mitigated by the exceptional circumstances and the fact that the state failed to prevent harm to both agents and non-agents.
- 71.12 There is a view among some that to accept that the security forces got things wrong somehow hands the moral high ground to the terrorists. It does not. To expose failings is a sign of the strength of a working democracy. It is certainly not a weakness. Disclosures from independent and effective investigations are what separate the security forces, and the application of the rule of law, from terrorist organisations.
- 71.13 On 3rd May 2011, in his oral evidence to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Lord Stevens disclosed that of the 210 people his team arrested, only three were not agents:

“What I am saying is that certainly what we discovered - and some of it may never see the light of day, I don’t know - as we have 100 tonnes of documentation now over there - and that is not a matter for me, it is a matter for other people - is that there has to be a proper, transparent process and there has to be a meeting. There was the RUC, MI5 and the army doing different things. When you talk about intelligence, of the 210 people we arrested, only three were not agents. Some of them were agents for all four of those particular organisations, fighting against each other, doing things and making a large sum of money, which was all against the public interest and creating mayhem in Northern Ireland. Any system that is created in relation to this country and Northern Ireland has to have a proper controlling mechanism. It has to have a mechanism where someone is accountable for what the actions are and that has to be transparent, especially in the new processes and the new country which, thank the Lord, Northern Ireland is becoming and, God willing, will continue to be.”⁹⁰

- 71.14 There existed then, and more so now, tactics that allowed the security forces to act on information while disguising and protecting agents. The approach to agent handling, taken together with the absence of any meaningful evaluation of lives saved versus lives lost, meant

⁹⁰ Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, *Oral and Associated Written Evidence*, 8th June 2011, p 142:

<https://www.parliament.uk/globalassets/documents/joint-committees/detention-terrorists-suspects-bills/DTSoralwrittenev.pdf>

that a core number of suspects were allowed to commit offences repeatedly while intelligence which could have been used to stop them went unexploited.

Recommendation

The United Kingdom government should acknowledge and apologise to bereaved families and surviving victims affected by cases where an individual was harmed or murdered because they were accused or suspected of being an agent and where this was preventable or where the perpetrators could and should have been subjected to criminal justice and were not.

72 The republican leadership have failed to acknowledge and apologise for PIRA's murderous activities and the intimidation of families

- 72.1 The republican leadership have failed to acknowledge and apologise to victims and families for PIRA ISU's brutal actions. They were responsible for torture, inhumane and degrading treatment and murder, including of children, vulnerable adults, those with learning difficulties and many who were entirely innocent of the claims made against them. A core part of the activities of the ISU included physical beatings with iron bars and hammers and the shooting of victims in their legs, elbows, knees or feet, sometimes simply because they were accused or suspected of being involved in crime or anti-social behaviour. These assaults and human rights violations were perpetrated to intimidate and subjugate the community.
- 72.2 The sickening crimes committed by the PIRA ISU against those accused or suspected of being agents represented the worst of what one human being will do to another. The inhumane treatment the families suffered at the time was unimaginably callous. Families not only endured the loss of a spouse, child, parent or other relative, but they then faced verbal, physical or psychological abuse and being unfairly ostracised by sections of their community. The abuse that children related to those accused of being agents suffered added to their pain.
- 72.3 The narrative some people have that PIRA was a group of freedom fighters following a set of rules contained in a 'Green Book' providing protections and fairness for suspected agents is entirely false. It is utterly wrong that small sections of society supported these murderous acts and themselves intimidated and harassed victims' families. PIRA was not concerned with the truth; its violent and abhorrent acts were committed primarily to deter people from working as agents. There was no fairness, there was no justice, and there were no protections in place for its victims.
- 72.4 Our investigations have established that PIRA even murdered victims who cooperated with its ISU and told it everything about their arrest and detention by the RUC. Furthermore, it obtained 'confessions' that people were agents, whether by audio recordings or in writing, through violence or deception and by making false promises. None of these so called confessions is reliable and they should all be ignored.

- 72.5 Those involved in these events, the perpetrators and senior members of the republican movement who allowed these abhorrent behaviours to occur, were themselves as likely to have assisted the security forces, as those they accused.
- 72.6 When I consider those responsible for commissioning the PIRA ISU as well as condoning its actions, I am reminded of the Nobel Peace Prize winner, founding member and former leader of the Social Democratic and Labour Party (SDLP) John Hume's words, when describing the murder of someone accused of being an agent. As reported in the Derry Journal: "*Another callous murder carried out in the name of Ireland by self-appointed judge, jury and executioners. If this is the sort of value these people place on human life what sort of values would be held dear in their new Ireland?*"⁹¹
- 72.7 We have interviewed senior members of PIRA who should be contrite about their actions. They remained defiant, dismissive and unrepentant about how they mistreated alleged agents. They have no grounds to be so, particularly when some covertly assisted the security forces. Encouragingly, we have also interviewed other senior PIRA members who are more reflective and accepting about the circumstances of how and why people might have assisted the security forces and seem willing to move forward without recrimination towards those accused of being agents or their families.
- 72.8 In the Northern Ireland conflict, the security forces infiltrated the paramilitaries to a significant degree and many people were involved in giving them some kind of information. The overwhelming majority were not discovered. They ranged from people who were not involved in the Troubles giving basic low-level information to the police, up to and including senior members of terrorist organisations providing key strategic and tactical information. Those who assisted the security forces as agents did so for many reasons, including but not limited to those who: bravely and willingly risked their lives to stop violence and save lives; claim to have been coerced by the security forces; motivated and excited by the risk and lifestyle; and were motivated by greed or self-interest.
- 72.9 Some individuals who have engaged with Kenova continue to face questioning, pressure, intimidation and threats from those opposed to cooperation with state agencies. This is a continuing problem causing distress to those concerned. The way in which they have been treated has been unwarranted and inhumane. Although this has not happened in every case, it has occurred all too frequently.
- 72.10 Some families approached senior PIRA leaders when the organisation abducted their loved ones, attempting to find out why they were being held and to plead for their release. The leadership of PIRA showed little or no compassion. Indeed, they encouraged some members of the local community to ostracise those whose loved ones they accused of being agents. The

⁹¹ Report of the funeral of John Joseph Brown on 25th September 1973.

comments republican leaders made about the victims and their families incited much of the community backlash.

- 72.11 The republican leadership should apologise both for PIRA's disgraceful treatment and murderous acts and for inciting and encouraging communities to intimidate and abuse families of people often innocent of the claims it made against them. The victims and their families should be allowed to live free from accusation and demonisation for their supposed connections to alleged agents.

Recommendation

The republican leadership should issue a full apology for PIRA's abduction, torture and murder of those it accused or suspected of being state agents during the Troubles and acknowledge the loss and unacceptable intimidation their families have suffered.

73 The absence of a legacy structure continues to stop families from discovering the truth

- 73.1 A new and independent legacy structure is needed. Such a unit should incorporate and benefit from the issues raised in this report.
- 73.2 The lack of an independent legacy structure for all victims to have their case examined in an ECHR compliant way has created a 'hierarchy of legacy victims'. Families with legal or advocacy group support often eventually secure some type of legacy inquiry while the significant majority remain concerned about media and community attention and feel unable to obtain information about their cases.
- 73.3 The Northern Ireland conflict was a period in our recent history that remains traumatic for so many who lost loved ones or colleagues or suffered life-changing injuries or unseen psychological consequences. It is against this backdrop that we, and other legacy investigations, have sought to uncover the truth. In other sections of this report, I describe the experiences previous legacy inquiries have had that would not normally be expected in a murder investigation or review which was not Troubles related.
- 73.4 There are residual elements within the authorities and the republican and loyalist movements who continue, consciously or unconsciously, to seek to prevent or delay the cooperation necessary for any investigation of legacy to progress. I have put on record certain challenges we have confronted. Some of these will have obstructed, frustrated or delayed my investigation, perhaps unintentionally. However, the culture of secrecy that prevails in parts of the authorities and the unwanted often subtle intimidation by some republicans of Kenova families and witnesses are deliberate and an unacceptable hangover from the conflict.
- 73.5 In Part C of this report, I describe the difficulties I faced in setting up Kenova which had to be designed and built from a standing start. There was no article 2 compliant legacy model to

follow. This inevitably delayed the start of our investigative work, notwithstanding excellent support from the NCA, MPS, NCTPHQ and Bedfordshire Police. The lack of a scalable framework built on past legacy structures represents a failing of successive governments.

- 73.6 Families remain confused about how they can have their cases properly examined. Kenova is an example of the unfairness inherent in the fact that some Troubles cases are investigated properly, while others are not. Despite setbacks, delays and unfulfilled promises, many families have endured. Their strength, determination and dignity in respectfully pursuing the truth is perhaps the most inspirational aspect of legacy. The humility and grace with which victims and families conduct themselves is a lesson for us all. It is legacy families who gave up the most under the GFA. We owe them a huge debt. We must at least acknowledge their loss, listen to their stories and establish and then tell them what is known about what happened.
- 73.7 We must resource and fund any future legacy structure appropriately to allow it to properly undertake and complete its work. We must define outcomes that victims, families and society can expect from such a structure including any scope for criminal justice, civil justice and inquest proceedings.
- 73.8 In this report, I have described the different strategic approaches from government and the contradictory messages from different Secretaries of State for Northern Ireland about legacy. I commend any government commitment to resolve legacy for victims and families. The issues I highlight in this report represent failings of the state for many legacy victims that are incomprehensible in the modern history of an established democratic society. Having passed the 25th anniversary of the GFA, it is time for an independent and effective legacy structure to be provided to give all families access to the truth of what happened.

74 Collusion

- 74.1 The word 'collusion' has become synonymous with Northern Ireland legacy cases in which the state is suspected of having contributed to or having failed to prevent or investigate offences. Any such suspected failure or shortcoming by the security forces is routinely labelled as collusion, most often by victims, families, the media and commentators. There is not a single Kenova case in which the word collusion has not been raised by a victim or family concerned that a state failure to act resulted in harm coming to their loved one.
- 74.2 In September 2021, I undertook a consultation on the terms of a draft protocol concerning the preparation and publication of my investigation reports (Appendices 1 and 6). A number of those who responded urged that the protocol should include a definition of collusion or outline a proposed approach to related matters. I did not consider it necessary or appropriate to deal with collusion in the protocol, which relates to matters of process only, but the submissions I received highlighted the associations frequently made between legacy cases, state failures and the term collusion.

- 74.3 These submissions and my conversations with families more generally have left me in no doubt that many of Kenova’s stakeholders want and expect me to address the subject of collusion in this report.
- 74.4 Previous legacy inquiries have often provided their own definitions of collusion each one drafted against a particular factual matrix and ToR:
- (1) In his April 2003 report, Lord Stevens wrote that in examining collusion between paramilitaries and state forces he described it as ranging, *“from the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured”*⁹². In applying this definition to his Stevens 1, 2 and 3 inquiries, he reported, *“The coordination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes... Crucial information was withheld from senior investigating officers. Important evidence was neither exploited nor preserved”*.⁹³ Lord Stevens’ observations resonate entirely with my findings across the broad Kenova caseload.
 - (2) In his October 2003 report, Judge Cory asked, *“How should collusion be defined? Synonyms that are frequently given for the verb to collude include: to conspire; to connive; to collaborate; to plot; to scheme; The verb connive is defined as to deliberately ignore; to overlook; to disregard; to pass over; to take no notice of; to turn a blind eye; to wink; to excuse; to condone; to look the other way; to let something ride...”*⁹⁴ He favoured a relatively broad definition and said, *“Army and police forces must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or agents... Nor can the police act collusively by supplying information to assist those committing wrongful acts or by encouraging them to commit wrongful acts. Because of the necessity of public confidence in the police, the definition of collusion must be reasonably broad when it is applied to police actions. Any lesser definition would have the effect of condoning or even encouraging state involvement in crimes, thereby shattering all public confidence in these important agencies”*.⁹⁵
 - (3) In March 2006, at the first public hearings of his tribunal into the murders of Chief Superintendent Breen and Superintendent Buchanan, Judge Smithwick provided the following comments on the subject, *“The issue of collusion will be considered in the broadest sense of the word. While it generally means the commission of an act, I am*

⁹² J Stevens, *Stevens 3 Enquiry: Overview & Recommendations*, April 2003, paragraph 1.3:
<https://cain.ulster.ac.uk/issues/collusion/stevens3/stevens3summary.pdf>

⁹³ *Ibid.*, paragraph 4.9.

⁹⁴ P Cory, *Cory Collusion Report :Patrick Finucane*, HC470, April 2004, paragraphs 1.35-1.36.

⁹⁵ *Ibid.*, paragraph 1.39.

*of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive, or collaborate. In addition, I intend to examine whether anybody deliberately ignored a matter, turned a blind eye to it or pretended an unawareness of something that one ought morally, legally or officially to oppose”.*⁹⁶ His December 2013 report repeated and applied this approach and said, *“In adopting the definition, I was largely endorsing the approach of Judge Cory. No party has challenged his definition and I remain of the view that it is the correct one”.*⁹⁷

- (4) In his December 2012 report into Pat Finucane’s murder, Sir Desmond De Silva QC reviewed various definitions of collusion and adopted what he called a ‘working definition’. He said:

“... omissions by state agencies must be considered alongside positive acts when drawing a definition on collusion. It is, however, important to stress that, in order to fall within the ambit of collusion, such omissions must be classified as deliberate and not merely represent examples of incompetency or inefficiency.

My own working definition, whilst not purporting to be definitive, is one I consider appropriate in relation to the allegations made and for the purposes of this particular case. I consider collusion to involve:

- (i) agreements, arrangements or actions intended to achieve unlawful, improper, fraudulent or underhand objectives; and*
- (ii) deliberately turning a blind eye or deliberately ignoring improper or unlawful activity”.*⁹⁸

74.5 I would not argue with any of the above definitions, but I would caution that they tend to capture a much wider range of conduct than comes to many people’s minds when they hear the word collusion. In the Northern Ireland legacy context, many understand collusion to refer to the security forces actively helping or using terrorists as instruments for achieving their own ends, rather than turning a blind eye to what a terrorist may have done or be about to do. I fully appreciate that omissions can be just as culpable as acts. Indeed, as a member of the security

⁹⁶ *Report of the Tribunal of Inquiry into Suggestions that Members of An Garda Síochána or Other Employees of the State Colluded in the Fatal Shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989*, November 2013, p 5:

http://opac.oireachtas.ie/AWDData/Library3/smithwickFinal03122013_171046.pdf

⁹⁷ *Ibid.*, p 16.

⁹⁸ D De Silva, *The Report of the Patrick Finucane Review*, HC-802, December 2012, paragraphs 129-130:

<https://www.gov.uk/government/publications/the-report-of-the-patrick-finucane-review>

forces sworn to protect life, turning a blind eye to terrorism is almost as abhorrent to me as proactively assisting it. Neither should be contemplated.

- 74.6 Collusion is not an offence and the complexities of its definition and of ensuring that related accusations are investigated and reported in a fair and evidence-based manner remain a fundamental challenge. Without clear evidence that the security forces assisted terrorists or were wilfully blind, it is hugely difficult to prove collusion. It is likewise difficult for them to defend allegations of collusion, particularly when a range of different definitions are used.
- 74.7 I have already touched on the fact that the security forces were often faced with operational dilemmas which had no 'right answer' during the Troubles, where they were not choosing between harmful and harmless outcomes, but balancing alternative harms. There is also a sense, particularly in the counter terrorism context, in which the ordinary interactions which are part and parcel of an agent / handler relationship can easily be described as 'collusive' notwithstanding that they may well prevent or mitigate harm or save lives. In my view, it would not be fair to group situations of this kind together with some of the more obvious instances of collusion by applying such a label.
- 74.8 The collusion debate remains controversial. I understand why some believe that acts and omissions of the security forces have amounted to collusion, especially set against a background of obstruction and obfuscation in the search for the truth. I also acknowledge the frustration those in the security forces feel when a finding of collusion is made and turned into news headlines, but no prosecution or disciplinary action follows and no explanation of what should have happened instead is provided. Between these extremes, collusion has become an emotionally charged and loaded term that is bandied around in a way that can generate much more heat than light and thereby distract attention from the facts and from specific institutional and systemic issues. I am therefore cautious about using it.
- 74.9 Where I have found culpable acts and omissions on the part of the security forces, I will call them out and address them in my final case-specific reports and in discussions with those forces and each affected victim or family. If the term collusion needs to be used, I will not shy away from using it, but neither will I do so too readily or if I think it would be fairer simply to find facts and let them speak for themselves. I do not see it as part of my role to apply a label or tick a box marked 'collusion' simply for the sake of it and I am wary of getting drawn into a territory that is so bedevilled with definitional uncertainty. For these reasons, I have avoided the term collusion in the body of this interim report - whether and when others wish to use it is a matter for them.
- 74.10 In my view, the deliberate and unacceptable obstruction by the security forces of previous legacy investigations and inquiries contributed to Lord Stevens' decision to introduce the term collusion as a means of capturing and highlighting what had been happening. However, this label is so widely and wildly interpreted that it now lacks a shared meaning and obscures the

need to follow due process, independently and fairly prove specific allegations and accurately describe what actually happened.

75 Operational failings

75.1 In order to illustrate the kinds of failings we have found, the following anonymised examples from the Kenova investigations may be helpful. At the time these events occurred the authorities gave the families involved no information:

75.2 Example 1:

PIRA murdered a man on suspicion of being an agent. Detectives investigating the murder identified a highly significant address through their inquiries, but RUC Special Branch prevented them from conducting a search.

Unknown to the detectives, the victim had been under surveillance by the security forces shortly before his murder and they had observed him enter and leave the relevant address before being stood down.

Decisions of this kind, preventing searches and other investigative steps from taking place, were made to protect and maintain sources of intelligence at the expense of recovering evidence which could have allowed the prosecution of those responsible for murder.

75.3 Example 2:

PIRA held and interrogated a man at an address for a number of days before shooting him dead. Before he was murdered, the Army passed intelligence to RUC Special Branch giving the location where he was being held and the identities of those responsible.

Special Branch did not act on this or pass it on to investigators in an apparent attempt to protect the source of the information.

75.4 Example 3:

PIRA abducted a man. His family had no idea where he was or what had happened to him. They spent years searching for him.

The security forces had intelligence that the victim had been murdered within days of his disappearance. They did not inform his family. They made no efforts to find him. The RUC did not carry out a murder investigation.

75.5 Example 4:

A security force agent handler visited an agent at an inadvisable and indiscreet location. This visit raised the suspicions of PIRA and its ISU which abducted and murdered the agent as a result.

75.6 Example 5:

A security force agent handler used a particular vehicle to meet with an agent. Information was then received that the vehicle in question had been identified by PIRA as being used by a member of the security forces. Despite the risk being recognised, the use of the vehicle continued with the result that the agent was compromised and subsequently murdered.

75.7 Example 6:

The security forces became aware that an agent had been compromised and that PIRA knew he was working as an agent, but they did not tell the agent and simply advised him that PIRA might be on the lookout for agents and he should be vigilant and take suitable precautions. PIRA subsequently abducted and murdered this agent.

Part E: Conclusions and recommendations

76 Conclusions

- 76.1 The GFA brought about a long awaited peace process in Northern Ireland ending a 30 year cycle of violence and preventing further suffering.
- 76.2 It should always be remembered how much victims and their families sacrificed as part of the peace agreement. Many of them saw those who took part in violence allowed to join the power sharing arrangements, they had to accept a weapons decommissioning process which would mean that it would be impossible to obtain ballistic evidence for the murders those weapons were used in. They had to watch prisoners being released early, including murderers responsible for killing their loved ones. Those released were responsible for some of the worst atrocities in recent history. The security forces accepted the transformation of policing with the establishment of PSNI.
- 76.3 These measures were brave, innovative and necessary, but they entailed compromises which could never take account of the huge sacrifices already made by victims and their families. For many families, the GFA was acceptable only because they did not want others to experience the trauma, hurt and loss they had experienced.
- 76.4 Victims and families hoped that, once a peace process was established, it would open a route to the truth of what had happened in their cases. This did not happen. Since the GFA, families have fought tirelessly to discover the truth in the continuing absence of any formal mechanism for delivering independent legacy investigations. Their determination remains as strong as ever.
- 76.5 Kenova has shown that legacy investigations can be successful. For some families that wish it, the truth can be uncovered. There will be cases in which little or no information is available, but Kenova has shown that such cases are rare. In most of our investigations, we have had access to records denied to previous investigations, which has enabled us to provide important information to families. The operating model for investigating crimes during the conflict and applied subsequently has been predicated on not sharing sensitive intelligence with investigators or sharing it only in a limited fashion. This is not compatible with the requirements of an ECHR compliant investigation and must stop.
- 76.6 Some suggest the cost of an independent legacy mechanism would be prohibitive. The cost of not offering families such a process is immeasurable for the economic and social future of Northern Ireland. The NPCC's independent review of Kenova described our investigation as exceptional value for money and this and other reviews have concluded that the model provides a template for a future legacy structure.
- 76.7 An independent legacy structure that is truly victim focused is long overdue.

- 76.8 Previous legacy investigations have been frustrated and delayed partly by limitations on their access to information, security force cooperation and resources. Any future legacy framework must have full unfettered access to legacy records and documents. It must not rely on the security forces putting suitable resources in place to facilitate information requests. Legislation should be introduced to provide a future legacy unit with the legal leverage to compel and oversee disclosure from all authorities.
- 76.9 Various legacy reports have highlighted the security forces' cultural resistance and non-cooperation. This has included the erection of barriers by involving lawyers and introducing measures which slow down, frustrate or even stop investigators from conducting legitimate inquiries. These behaviours seem to have been motivated by the misguided view that the security forces should be protected from criticism because this might limit their room for manoeuvre or damage public trust and confidence in them. In reality, the public does not expect perfection or infallibility from any of its institutions and the real keys to securing trust and confidence are external scrutiny and challenge and internal accountability and a willingness to learn lessons. The lack of disclosure and proper candour has merely endorsed negative attitudes towards the security forces.
- 76.10 The inflexible application of the NCND policy to matters that occurred during the conflict requires a comprehensive review. There should be independent safeguards in place to ensure that information is no longer withheld from investigators. The default position must be to share information and not to do so only in the rarest of cases.
- 76.11 I have highlighted a number of previous high profile legacy investigations and inquiries in this report. Their reports, conclusions and recommendations have largely remained classified, keeping their findings out of the public domain. Those responsible should re-examine this restriction with a view to publication. I have read each of these reports and, accepting that security checking should occur, there is no justification for the summaries, recommendations or conclusions contained in them to remain classified and their essential findings should be released into the public domain. These reports contain key lessons for the security forces. I am reminded of the late Judge Smithwick and his leading counsel Mary Laverty's rhetorical question to me when we were discussing his attempts to obtain sensitive information. They asked, "*When will something no longer be considered a national security issue?*"
- 76.12 Having contact with families on a daily basis is a constant reminder to me that successive governments have failed them. So many still have little or no information about their cases. The authorities have made victims and families repeated promises about legacy which they have broken. A resulting lack of trust from those families should come as no surprise. Previously, some legacy stakeholders have called for a day to be set aside to acknowledge and reflect on this tragic period. Many victims, families and stakeholders have adopted the summer solstice, the longest day, for this purpose. In their report, the Consultative Group on the Past called for such a day to be assigned. A day of remembrance would allow everyone to reflect on what

more we might have done and what we might still have to do in order to ensure that such loss, as experienced during the Troubles, is never allowed to happen again. I have witnessed at first hand the positive impact of such a day on victims and families. Until we acknowledge the hurt caused to victims and survivors and the transgenerational trauma inflicted as a result of the Troubles, society will not properly heal. I strongly support such a day being set aside and call on everyone to do the same.

- 76.13 I continue to emphasise that, in the context of our core Kenova investigations, PIRA's actions were the most shameful and evil I have encountered. No doubt others will seek to emphasise the failures of the security forces and the state. However, it was the PIRA leadership that commissioned and sanctioned the activities that its ISU carried out. It was PIRA that committed the brutal acts of torture and murder, each evil act being the epitome of cowardice. Senior republicans who condoned, and still condone, these activities are reprehensible. The republican leadership should acknowledge and accept these crimes were wrong and apologise to the victims and the families of those tortured and murdered.
- 76.14 From the considerable reporting and intelligence the security forces had about the Kenova cases, too often they did not act on information and people who had a legal right and expectation of protection were abandoned to PIRA. Collusion and collusive behaviours are controversial terms in the legacy debate. Where accusations of collusion or collusive behaviours are made, and in the absence of any investigatory evidence of fault or liability, we might refer to such matters as systemic failings. In any future legacy structure, due process must underpin investigative determinations.
- 76.15 PPSNI has taken considerable time to take prosecution decisions on the Kenova files thus far submitted. The methodology it applies when examining case files differs from that which I have experienced when prosecutors examine serious and organised crime or terrorism files in England and Wales. Not investing funding and resources in legacy has a consequential impact on all parts of the criminal justice system and this is certainly the case with PPSNI. It is under-resourced having sought additional funding to help meet the demands of legacy casework unsuccessfully. I understand and appreciate the competing public service budgetary demands, but investing legacy will have long-term benefits for Northern Ireland.
- 76.16 I had planned to work collaboratively with PPSNI on its analysis of the Kenova evidential files. I anticipated a strong relationship underpinned by a rhythm of meetings to consider and discuss each case as the investigations progressed and files were submitted. In my experience such a joined up approach with the prosecuting authority, counsel (appointed by them to advise on evidential issues and potentially prosecute the case) and the investigation team provides the best way for those involved to properly understand the strength and weakness of evidence.
- 76.17 Unfortunately, PPSNI does not adopt such a model in Northern Ireland legacy cases. There has been a general separation between PPSNI, counsel and the Kenova team. Constructive joint case conferences have occasionally taken place, but they have been too few and far

between and have often come too late in the process. In my experience, such a separation is avoided in England and Wales in highly complex cases. A more joined up approach would ensure prosecutors have the most comprehensive understanding of the case. Due to the wider work demands faced by PPSNI beyond Kenova cases, the way in which its case load is prioritised and the separated stakeholder model, the nuances and complexities of the Kenova cases cannot be identified or addressed in a sufficiently timely and joined up fashion.

- 76.18 In the event that decisions are taken to prosecute, navigating the Northern Ireland criminal justice system for legacy cases has proven to be glacially slow. Some of the key participants to such proceedings, the victims, their families and witnesses are in the sunset of their lives and their health and well-being must be taken into account. At present, legacy cases can be expected to take five years to come to a meaningful hearing after a charging decision. This is unacceptable. Any new legacy structure must include funding for PPSNI and the criminal justice process to enable suitably prompt decision making and progression. There should be a legislative framework for case managing legacy cases to speed progress through the Northern Ireland courts.
- 76.19 The intolerable abuse families have suffered is a reminder of the bitter background to the Troubles. It is everyone's responsibility to condemn these actions. Kenova has shown confessions people gave to PIRA admitting agent status were made under duress, including torture, and should be dismissed.
- 76.20 When my team have examined agent related cases, they have often found a rich and actionable evidential picture, with many naming those involved, and yet there have been no convictions in connection with these murders. It is of significant concern that despite the authorities having gathered considerable intelligence, no convictions have been achieved. This strongly indicates failings by the authorities and is, in my opinion, linked to the dogmatic application of the NCND policy. Not only does this prevent disclosure of information to families, when applied internally to investigators, as it has been, it means that legacy investigations have not had relevant material disclosed to them.
- 76.21 It is a core responsibility of government to protect its citizens. When those who assist the security forces do this by putting their own lives at risk, the government has a moral responsibility and legal duty to protect them. When such individuals are let down and abandoned to their fate, we must acknowledge this, apologise and learn any lessons. It is one thing to have been unable to protect every person, including agents, in every situation because of the extremely dangerous environment, volume of incidents and chaotic times. It is entirely another to deliberately not apply the rule of law and to allow people to come to serious harm and be murdered.
- 76.22 We must address legacy and the present government and Parliamentary focus provides a welcome opportunity to do so.

77 Recommendations

- (1) Establish, on a statutory basis and with express statutory powers and duties, an independent framework and apparatus for investigating Northern Ireland legacy cases.
- (2) Subject all public authorities to an unqualified and enforceable legal obligation to cooperate with and disclose information and records to those charged with conducting Northern Ireland legacy investigations under a new structure.
- (3) Enact legislation to provide procedural time limits enforced by judicial case management to handle cases passing from a new legacy structure to the criminal justice system.
- (4) Review and reform the resourcing and operating practices of PPSNI in connection with Northern Ireland legacy cases.
- (5) The longest day, 21st June, should be designated as a day when we remember those lost, injured or harmed as a result of the Troubles.
- (6) Review, codify and define the proper limits of the NCND policy as it relates to the identification of agents and its application in the context of Northern Ireland legacy cases pre-dating the GFA.
- (7) Review the security classification of previous Northern Ireland legacy reports in order that their contents and (at the very least) their principal conclusions and recommendations can be declassified and made public.
- (8) PPSNI should pay due regard to the views, interests and well-being of victims and families when considering the public interest factors relevant to prosecution decisions in Northern Ireland legacy cases.
- (9) The United Kingdom government should acknowledge and apologise to bereaved families and surviving victims affected by cases where an individual was harmed or murdered because they were accused or suspected of being an agent and where this was preventable or where the perpetrators could and should have been subjected to criminal justice and were not.
- (10) The republican leadership should issue a full apology for PIRA's abduction, torture and murder of those it accused or suspected of being agents during the Troubles and acknowledge the loss and unacceptable intimidation bereaved families and surviving victims have suffered.

Jon Boutcher QPM

Former Bedfordshire Chief Constable

4th October 2023

Part F: Postscript

This report has been in substantially its current form for almost a year. Between December 2022 and Easter 2023, outlines and extracts of its draft contents went through the representations process outlined in Kenova's reports protocol. This process took longer than I had hoped to complete, but it needed to be conducted carefully as a matter of procedural fairness to those affected. The full draft report then went into the security checking process referred to in that protocol and this was completed between Easter and summer 2023 without any changes or redactions being made on security grounds. In August 2023, I passed the draft report to DPPNI, Stephen Herron, for his review. We concluded our pre-publication discussions and correspondence and I signed off the final version on 4th October 2023. Again, no changes or redactions were needed in order to avoid a risk of prejudice to the administration of justice. DPPNI Herron's final letter to me was dated 29th September 2023 and my final reply was drafted in consultation with counsel on 3rd October 2023 and sent the next day.

Save for a handful of self-evident amendments made to reflect the passing of Frederick Scappaticci in March 2023 and some minor updating, I have not changed the report to reflect the events of this year, including the recent resignation of Simon Byrne as CC PSNI and the final enactment of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

In parallel with my discussions and correspondence with DPPNI Herron, NIPB decided to appoint an Interim CC PSNI to take over from CC Byrne, I applied for this post and, on 3rd October 2023, I was informed that the Board had selected me as its preferred candidate, subject to formal ratification by the Secretary of State for Northern Ireland acting in consultation with the Northern Ireland Department of Justice. In order to ensure the ongoing independence of Kenova and the completion of its work, provisional arrangements were put in place for the recently retired CC Police Scotland, Sir Iain Livingstone, to take over from me as OIOC.

Given that my appointment as Interim CC PSNI then appeared imminent, I initially thought that there would be no point in formally submitting this report to PSNI for publication following its finalisation as I could simply take it with me when I assumed office and initiate the necessary publication procedures from there. However, as I write this post-script on 6th October 2023, my appointment has not been ratified and it is unclear whether it will be. Accordingly, I have decided to submit this report to PSNI today in the knowledge that it may fall to me as Interim CC PSNI to publish it in the very near future. For the avoidance of any doubt, I would emphasise that none of the above matters or their coincidental timing has made any difference to the contents of this report.

Jon Boucher QPM

Former Bedfordshire Chief Constable

6th October 2023


Glossary

The following abbreviations are used in this report:

Article 2	article 2 of the European Convention on Human Rights (the right to life)
ACC	Assistant Chief Constable
ACPO	Association of Chief Police Officers
AG	Attorney General
AGS	An Garda Síochána
ASP	Assistant Secretary Political
CAIN	Conflict Archive on the Internet
CC	Chief Constable
CCRC	Criminal Cases Review Commission
CHIS	covert human intelligence source
CIA	Central Intelligence Agency
CID	Criminal Investigation Department
CLF	Commander Land Forces
COS	Chief of Staff
CPD	Continuous Professional Development
CPS	Crown Prosecution Service
CTD	Counter Terrorism Division
CTP	Counter Terrorism Policing
DAC	Deputy Assistant Commissioner
DCC	Deputy Chief Constable
DCI	Director and Coordinator of Intelligence
DG	Director General
DHAC	Derry Housing Action Committee
DPPNI	Director of Public Prosecutions for Northern Ireland
ECHR	European Convention on Human Rights

FLC	Family Liaison Coordinator
FLO	Family Liaison Officer
FRU	Force Research Unit
FSNI	Forensic Science Northern Ireland
GCHQ	Government Communications Headquarters
GFA	Good Friday Agreement
GOC	General Officer Commanding
HET	Historical Enquiries Team
HIU	Historical Investigations Unit
HOLMES	Home Office Large Major Enquiry System
HMIC	Her Majesty's Inspectorate of Constabulary
HMICFRS	His Majesty's Inspectorate of Constabulary and Fire and Rescue Services
ICIR	Independent Commission for Information Retrieval
ICRIR	Independent Commission for Reconciliation and Information Recovery
IICD	Independent International Commission on Decommissioning
IOPC	Independent Office of Police Conduct
IPCC	Independent Police Complaints Commission
IRG	Implementation and Reconciliation Group
ISG	Independent Steering Group
ISU	Internal Security Unit
KEG	Kenova Executive Group
KFT	Kenova Forensic Team
KRC	Kenova Remuneration Committee
LIB	Legacy Investigation Branch
MACER	a joint police and Army database
MI5	Security Service
MI6	Secret Intelligence Service
MOD	Ministry of Defence

MOD HIT	MOD Historical Inquiries Team
MOU	Memorandum of Understanding
MPS	Metropolitan Police Service
MRF	Military Reaction Force
NCA	National Crime Agency
NCND	neither confirm nor deny
NCTP	National Counter Terrorism Policing
NCTPHQ	National Counter Terrorism Policing Headquarters
NDD	No Downward Dissemination
NGO	Non Governmental Organisation
NIAC	Northern Ireland Affairs Select Committee
NICRA	Northern Ireland Civil Rights Association
NIO	Northern Ireland Office
NIPB	Northern Ireland Policing Board
NPCC	National Police Chiefs' Council
OHA	Oral History Archive
OIOC	Officer in Overall Command
OPSY	Operational Security Advisor
OTR	On the Run
PCC	Police and Crime Commissioner
PCR	Police Conduct Regulations
PIRA	Provisional Irish Republican Army
PMQs	Prime Ministers Questions
PONI	Police Ombudsman for Northern Ireland
PPE	Personal Protective Equipment
PPSNI	Public Prosecution Service for Northern Ireland
PSNI	Police Service of Northern Ireland
QUB	Queen's University Belfast



RIPA	Regulation of Investigatory Powers Act 2000
RPM	Royal Prerogative of Mercy
RUC	Royal Ulster Constabulary
SHA	Stormont House Agreement
SIFT	Specialist Investigation Forensic Team
SIO	Senior Investigating Officer
SMIU	Special Military Intelligence Unit
SPOC	Single Point of Contact
TCG	Tasking and Coordination Group
ToR	Terms of Reference
UDA	Ulster Defence Association
UDR	Ulster Defence Regiment
UKIC	United Kingdom Intelligence Community
USC	Ulster Special Constabulary
UVF	Ulster Volunteer Force
VFG	Victim Focus Group

Annex 1: Senior leaders interviewed for Operation Kenova

A

Sir Robert Andrew: Permanent Under Secretary Northern Ireland Office 1984-1987

Sir Hugh Annersley, QPM: Chief Constable Royal Ulster Constabulary 1989-1996

B

Rt Hon Sir Tony Blair, KG: Prime Minister 1997-2007

Peter Brooke, Baron Brooke of Sutton Mandeville, CH, PC: Secretary of State for Northern Ireland 1989-1992

Frederick Robin Butler, Baron Butler of Brockwell, KG, GCB, CVO, PC: Cabinet Secretary and Head of Civil Service 1988-1998

C

Rt Hon Sir John Chilcot, GCB: Permanent Under Secretary Northern Ireland Office 1990-1997

Major General Peter Chiswell, CB, CBE, DL: Commander Land Forces Northern Ireland 1982-1983

E

Jonathan Evans, Baron Evans of Weardale, KCB, DL: Director General MI5 2007-2013

F

Sir Ronnie Flannigan, GBE, QPM: Chief Constable Royal Ulster Constabulary 1996-2002

H

Michael Heseltine, Baron Heseltine of Thenford, CH, PC: Secretary of State for Defence 1983-1986

Major General Robert Hodges: Commander Land Forces Northern Ireland 1988-1989

I

Lieutenant General Sir Alister Irwin, KCB, CBE: General Officer Commanding Northern Ireland 2000-2003

K

Tom King, Baron King of Bridgwater, CH, PC: Secretary of State for Northern Ireland 1985-1989 and Secretary of State for Defence 1989-1992

L

Sir Stephen Lander KCB: Director General MI5 1996-2002

General Sir Richard Lawson, KCB, DSO, OBE, KCSS: General Officer Commanding Northern Ireland 1980-1982

M

Rt Hon Sir John Major, KG, CH: Prime Minister 1990-1997

Baroness Eliza Manningham-Buller, LG, DCB: Director General MI5 2002-2007

Paul Murphy, Baron of Torfaen, KCMCO, KSG, PC: Secretary of State for Northern Ireland 2002-2005

O

Sir Hugh Orde, OBE, QPM: Chief Constable Police Service of Northern Ireland 2002-2005

P

Andrew Parker, Baron Parker of Minsmere, GCVO, KCB, PC: Director General MI5 2013-2020

General Sir Robert Pascoe, KCB, MBE: General Officer Commanding Northern Ireland 1985-1988

Lieutenant General Sir Hew Pike, KCB, DSO, MBE: General Officer Commanding Northern Ireland 1990-2000

Sir Joseph Pilling, KCB: Permanent Under Secretary Northern Ireland Office 1997-2005

The Honourable Renée Pomerance: Senior Counsel to Cory Collusion Inquiry 2002-2003

Rt Hon Michael Portillo: Secretary of State for Defence 1995-1997

Jonathan Powell: Chief of Staff to Tony Blair 1997-2007

R

Rt Hon Sir Malcolm Rifkind, KCMG, QC: Secretary of State for Defence 1992-1995

Dame Stella Rimington, DCB: Director General MI5 1992-1996

George Robertson, Baron Robertson of Port Ellen, KT, GCMG, PC, FRSA, FRSE: Secretary of State for Defence 1997-1999

S

John Stevens, Baron Stevens of Kirkwhelpington, KstJ, QPM, DL, FRSA: Head of Stevens 1, 2 and 3 Inquiries 1989-2003

T

Major General David Thomson: Commander Land Forces Northern Ireland 1989-1991

Lieutenant General Sir Phillip Trousdell, KBE, CB: General Officer Commanding Northern Ireland 2003-2005

W

Daniel Wallace: Deputy Chief Constable Royal Ulster Constabulary RUC 1955-1998

General Sir Charles John Waters, GCB, CBE: General Officer Commanding Northern Ireland 1988-1990

General Sir Roger Wheeler, GCB, CBE: General Officer Commanding Northern Ireland 1993-1996

Raymond White, OBE; BEM: Assistant Chief Constable Royal Ulster Constabulary RUC 1965-2002

List of Appendices

No	Document	Link
1.	Protocol on publication of public reports dated October 2022	https://www.kenova.co.uk/A%20Kenova%20Reports%20Protocol%20for%20Publication%20with%20Logo%20(002).pdf
2.	Terms of Reference for Operation Kenova dated June 2016	https://www.opkenova.co.uk/operation-kenova-terms-of-reference/
3.	Terms of Reference for Operation Mizzenmast dated September 2019	https://www.opmizzenmast.co.uk/opmizzenmast-terms-of-reference/
4.	Terms of Reference for Operation Turma dated September 2019	https://www.opturma.co.uk/operation-turma-terms-of-reference/
5.	Terms of Reference for Operation Denton dated February 2020	https://www.thebarnardreview.co.uk/barnard-review-terms-of-reference/
6.	Review of written submissions on draft protocol dated October 2022	https://www.kenova.co.uk/B%20Kenova%20Protocol%20Responses%20for%20Publication%20with%20Logo%20(003).pdf
7.	Statement following the death of Frederick Scappaticci dated April 2023	https://www.kenova.co.uk/statement-released-following-death-of-frederick-scappaticci
8.	Submission on Consultation Paper dated October 2018	https://www.kenova.co.uk/7.%20D13489%20Response%20to%20Stormont%20Agreement%20Consultation.pdf
9.	NPCC Homicide Working Group Kenova Thematic Peer Review: Executive Summary and Conclusions dated January 2021	https://www.kenova.co.uk/NPCC%20HWG%20Kenova%20Thematic%20Review%20Executive%20Summary%20and%20Conclusions.pdf
10.	Family Liaison Strategy dated June 2020	https://www.opkenova.co.uk/FLO%20STRATEGY%20OP%20KENOVA.V3%20(002).doc
11.	NIAC submission dated June 2020	https://www.kenova.co.uk/SUBMISSION%20BY%20JON%20BOUTCHER%20-%20NIASC%20-%20Final.pdf
12.	Forensic Strategy dated February 2019	https://www.kenova.co.uk/Forensic%20Strategy.pdf
13.	Independent Steering Group Members and Terms of Reference dated October 2016	https://www.opkenova.co.uk/meet-the-isg https://www.opkenova.co.uk/isg-terms-of-reference
14.	Victim Focus Group Members and Terms of Reference dated October 2016	https://www.opkenova.co.uk/meet-the-vfg https://www.opkenova.co.uk/vfg-terms-of-reference

No	Document	Link
15.	Governance Board Members and Terms of Reference dated June 2020	https://www.kenova.co.uk/governance-board/
16.	Remuneration Committee Terms of Reference dated February 2021	https://www.kenova.co.uk/19.%20D13488%20Kenova%20Remuneration%20Committee%20Updated%20ToR.pdf
17.	Professional Reference Group Members and Terms of Reference dated June 2020	https://www.kenova.co.uk/20.%20D13502%20Op%20Kenova%20Reference%20Group%20Terms%20of%20Reference.pdf
18.	ECHR compliance document dated May 2017	https://www.kenova.co.uk/21.%20D13616%20ECHR%20-%20Fundamental%20Freedom%20Compliance%20&%20Appendices.pdf
19.	Alyson Kilpatrick First Interim Report dated February 2020	https://www.kenova.co.uk/assets/boutcher/images/Independent%20review%20of%20Article%202%20compliance.pdf
20.	Alyson Kilpatrick Second Interim Report dated January 2021	https://www.kenova.co.uk/OpK%20Update%20Jan%202021%20AK.pdf
21.	Alyson Kilpatrick Covering Letter dated August 2021	https://www.kenova.co.uk/25.%20D12041%20Kilpatrick%20Covering%20Letter%202021.pdf
22.	Alyson Kilpatrick Final Report dated August 2021	https://www.kenova.co.uk/INDEPENDENT%20REVIEW%20OF%20ARTICLE%202%20ECHR%20ALYSON%20KILPATRICK%20update.doc
23.	NPCC Homicide Working Group Operation Kenova Progress and Thematic Peer Review dated September 2020	https://www.kenova.co.uk/26.%20D13497%20NPCC%20Timetable%20(30.09.2020)%20Redacted.pdf
24.	Victim Focus Group Review dated May 2021	https://www.kenova.co.uk/Kenova%20Report%20May%202021%20web%20v1.pdf
25.	Victim Focus Group Response to Command Paper dated August 2021	https://www.kenova.co.uk/victim-focus-group-responds-to-government-proposals
26.	NIAC letter dated June 2020	https://www.kenova.co.uk/29.%20D13490%20Letter%20from%20NIAC%20Re%20Legacy%2010062020.pdf
27.	Introductory remarks to NIAC dated June 2020	https://www.kenova.co.uk/NISC%20JB%20opening%20remarks.pdf
28.	Evidence to NIAC dated June 2022	https://committees.parliament.uk/oralevidence/10440/pdf/
29.	Paper on the Northern Ireland Troubles (Legacy and Reconciliation) Bill dated June 2022	https://www.kenova.co.uk/32.%20D13486%20Kenova%20response%20to%20Legacy%20Bill.pdf

No	Document	Link
30.	Submission to Tom Lantos dated September 2020	https://www.kenova.co.uk/33.%20D13359%20Submission%20to%20Tom%20LANTOS.pdf
31.	Information sharing agreement with PONI dated October 2021	https://www.kenova.co.uk/34.%20D12425%20Kenova%20and%20PONI%20MOU.pdf
32.	Statement following PPSNI announcement dated October 2020	https://www.kenova.co.uk/kenova-statement-following-pps-announcement

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