

**SUBMISSION BY JON BOUTCHER, OFFICER IN OVERALL COMMAND, OPERATION KENOVA, TO THE NORTHERN IRELAND AFFAIRS COMMITTEE 'ADDRESSING THE LEGACY OF NORTHERN IRELAND'S PAST: THE UK GOVERNMENT'S NEW PROPOSALS' INQUIRY - JUNE 2020**

**1. INTRODUCTION**

- 1.1 I am the Officer in Overall Command (OIOC) of a series of ongoing independent investigations or reviews into Northern Ireland legacy cases that are collectively described in this submission as Operation Kenova cases. The Chief Constable of the Police Service of Northern Ireland (PSNI) has asked me to lead each of these inquiries; the first commissioning was in June 2016 when I agreed to lead an investigation into the activities of an alleged agent known as 'Stakeknife'. This investigation was established following a legal direction under section 35(5) of the Justice (Northern Ireland) Act 2002 from the then Director of Public Prosecutions for Northern Ireland Barra McGrory.
- 1.2 I served for 36 years as a police officer, my career was almost entirely spent as a detective. I have considerable experience of counter terrorism and serious and organised crime investigations; I have led a number of complex and sensitive investigations both nationally and internationally tackling organised crime and terrorist networks. As a Chief Officer, I led the National Police Chiefs' Council (NPCC) portfolios for the Regulation of Investigatory Powers Act (RIPA) 2000 (the oversight and management of covert surveillance and Covert Human Intelligence Sources CHIS – previously described as informants, sources or agents), Undercover Policing and the use of Technical Surveillance Units (TSU) (securing evidence and intelligence from covert equipment). I was also the National Policing lead for Race, Religion and Belief.
- 1.3 I provide this submission at the request of the Northern Ireland Affairs Committee in connection with its Inquiry into the Government's new proposals for dealing with legacy issues in Northern Ireland. I recognise that addressing the legacy of Northern Ireland's past is a significant issue to all communities and, in particular, of vital interest to the families of over 3,700 people killed during the Troubles. We should also never forget those who suffered terrible injuries, including psychological injuries, many of whom continue to seek answers about what happened. My evidence comes from the experience of leading Operation Kenova and my professional history and is intended to assist and inform the Committee in its considerations of the Government's new proposals. I would be willing to provide oral evidence to this inquiry should the Committee require.
- 1.4 Operation Kenova has submitted a number of files to the Director of Public Prosecutions for Northern Ireland containing evidence regarding serious criminal offences that include murder, kidnap, torture, misconduct in public office, perverting the course of justice and perjury. This evidence presented relates to the activities of terrorists and the security forces. For operational and legal reasons, I am restricted in the information I can provide in relation to specific cases. I am grateful for the Committee's understanding of these constraints.
- 1.5 Before beginning these cases and designing an investigative structure to examine them, indeed throughout the investigations, I have consulted those who previously led legacy investigations or have knowledge of legacy issues. It was critical to the

potential success of a future investigative process to learn the lessons of those previous inquiries and acquire such knowledge.

- 1.6 Those I have spoken to include; victims and their families, Lord Stevens, Sir Desmond De Silva, the Historical Enquiries Team (HET), Judge Smithwick and his legal team, Judge Corey's senior counsel (now) Judge Pomerance, retired Chief Constables who served in Northern Ireland, the author of Her Majesty's Inspectorate of Constabularies (HMIC) report on the HET, Lord Eames, Denis Bradley, Sir John Chilcot, the Commissioner for Victims and Survivors in Northern Ireland, victim advocacy groups, political parties and individual politicians (serving and retired - including government Ministers), senior religious leaders, solicitors representing those affected by legacy, academics, senior serving and retired members of the security forces, ex-combatants, human rights organisations and human rights advocates.

## 2. OPERATION KENOVA'S APPROACH TO ITS INVESTIGATIONS PROCESS AND MANAGEMENT OF CASES

- 2.1 I am currently responsible for the following investigations:
- 2.2 **Operation Kenova.** The investigation into the activities of the alleged agent known as 'Stakeknife' and related matters. It includes investigating the activities of the Provisional IRA and its Internal Security Unit as connected to the alleged agent. The investigation is also examining any potential complicity of the state in multiple cases of murder, torture or other related criminality.
- 2.3 **Operation Mizzenmast.** The investigation into the killing of Jean Smyth-Campbell in June 1972.
- 2.4 **Operation Turma.** The investigation into the killing of three RUC officers in October 1982 – the pre-cursor to the 'shoot to kill' investigations conducted by John Stalker and Sir Colin Sampson.
- 2.5 **The Barnard Review.** The review of the Glenanne Gang series of murders committed during the 1970s – this is estimated to encompass over 100 incidents involving around 120 cases of murder.
- 2.6 **The Strategy for Operation Kenova.** To provide an effective, efficient and independent investigation that seeks to meet the standards imposed by Article 2 European Convention Human Rights (ECHR). The investigations apply transparency wherever possible with a focus upon and due consideration towards the victims and families of the offences being investigated. The investigations apply an equal and fair approach towards all those we engage with, treating everyone with courtesy and respect.
- 2.7 **The Vision for Operation Kenova.** To be trusted by victims, their families and the wider public. 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 or other organisation or individual, including those who might seek to prevent the truth from being established.
- 2.8 Further information can be obtained from the Operation Kenova website at <https://www.kenova.co.uk/>

- 2.9 **Staffing.** The Kenova team is subject to competitive selection processes. As a demonstration of independence, no ex-military, intelligence agency or RUC/PSNI personnel are part of the team.
- 2.10 The total staff is currently 72. The team is made up primarily of experienced investigators but also includes analysts, Major Incident Room staff, forensic experts and intelligence and support staff.
- 2.11 A number of staff are on secondment from police forces (excluding the PSNI) whilst others are retired detectives (excluding any who served with the PSNI or the RUC) with long-standing experience of investigating terrorist and serious and organised crime offences.
- 2.12 All staff undertake an induction process supported by partners to enhance their skills regarding family liaison and to build on their knowledge of Northern Ireland and their understanding of the Troubles. Staff also regularly attend Continuous Professional Development (CPD) days to ensure they are up to date professionally and legally as regards their roles. These CPD events have involved speakers from the various sectors of the Troubles. Speakers have included victims, a widow of an RUC officer, retired RUC, WAVE Trauma Centre, the Pat Finucane Centre, representatives of the military – serving and retired, members of the PSNI, Lord John Stevens, Baroness Nuala O’Loan (Former Police Ombudsman for Northern Ireland), Lord Robin Eames, Sir John Chilcot, the journalists Peter Taylor and John Ware. Topics addressed by subject matter experts include forensics, disclosure, security, intelligence collection and family liaison.
- 2.13 All staff are vetted to Developed Vetting level.
- 2.14 **Major Incident Room.** The investigations are managed via a Major Incident Room (MIR) based in London. The MIR is the focal point for all incoming information and intelligence. Staff in the MIR process and evaluate all material coming into the investigation and direct lines of enquiry. The MIR uses the Home Office Large Major Enquiry System (HOLMES) to manage the investigation. This is classified at Secret because of the protective marking of the material that is managed by the system.
- 2.15 **Investigation Process.** In every case, the Operation Kenova team seeks to connect with the victims’ families through a face-to-face meeting setting out the ethos of the Kenova approach of openness and transparency. Each family has direct access to me as OIOC, my Senior Investigating Officer (SIO), a Family Liaison Coordinator (FLC) and on occasion, a separate Family Liaison Officer (FLO). Maintaining the trust and confidence of families is paramount.
- 2.16 In Kenova’s experience, families and associates of victims have been able to provide direct evidence and information about matters under investigation, including the identities of suspects, once trust and confidence have been established. Significant evidence provided by families or others to Kenova was not provided to previous investigations for various complex reasons including mistrust and fear. Some of those previously involved in terrorist activity and members of the security forces have agreed to assist the investigation after careful and sensitive approaches over a protracted period.

- 2.17 **Forensics.** Kenova has applied modern forensic techniques not available to previous investigations. In some cases, families have provided us with exhibits relevant to investigations not previously shared with investigators. Modern day forensic examination of these exhibits has resulted in the recovery of DNA evidence identifying suspects for murder and other serious offences. Further compelling DNA evidence identifying those responsible for serious crimes has been obtained from exhibits originally seized from crime scenes. Operation Kenova has its own dedicated forensic lead focused on the exploitation of new techniques providing a full assessment of new forensic opportunities. The correlation of families trusting Kenova and therefore providing evidence and exhibits not previously available is an important success factor for these investigations.
- 2.18 **Access to Information.** Much of the information relevant to our enquiries is held by the PSNI, the Ministry of Defence (MOD) and MI5. Information sharing protocols have been agreed with each of these organisations. One of the critical success factors of Operation Kenova has been access to information not made available to previous investigations. **A critically important factor is that any investigation or review is only as good as the information which is available to it.**
- 2.19 Kenova has staff embedded within the PSNI and as a result we have been able to search records and obtain information not previously accessed by other legacy investigations.
- 2.20 We have access to records held by the MOD and MI5 through agreed protocols and information handling arrangements. Kenova staff have been granted access to the estate of the MOD and MI5 not previously given to previous legacy investigations.
- 2.21 **Learning from previous investigations.** Where families and stakeholders trust in a legacy process, their engagement will lead to previously unavailable information being provided. In Operation Kenova through the bravery and trust of families and wider stakeholders, information has been provided that was not disclosed to prior investigations.
- 2.22 The learning can be summarised as follows:
- When families and stakeholders trust a legacy process as being independent and fair they will provide evidence and information that can lead to cases being solved.
  - Where Government agencies are reassured about the information handling and security arrangements of a legacy investigative body they will share information that will potentially enable cases to be solved.
  - Legacy reviews or investigations that do not reach out to and connect with families and stakeholders or that do not relentlessly pursue the records held by agencies relevant to these events, will fail to identify investigative opportunities.

### **3. WHAT STEPS THE OPERATION TEAM TAKES TO TRY TO ENSURE THAT ITS INVESTIGATION ARE ECHR ARTICLE 2 COMPLIANT**

- 3.1 Article 2 ECHR requires that we deliver investigations into deaths that are independent, effective, prompt, open to public scrutiny and involve the next of kin. The investigative process set out above seeks to establish a basis for such Article 2 compliance. Further evidence of ECHR compliance is reflected below.

- 3.2 **Independence.** I have previously described the employment model that provides for an independent structure and workforce. Funding is allocated to Kenova by the PSNI, this is a major concern to some stakeholders and families. They raise concerns of the risk of restrictions being exerted on Kenova’s capabilities through reduced or inappropriate levels of funding. This has not been the case and would be highlighted by me should it occur. However, to reassure families and to ensure operational independence, Kenova’s business functions, including budget management and our employment framework, are delivered through Bedfordshire Police. We are not an arm of the PSNI, but a detached part of an England and Wales police force providing it with special assistance under section 98 of the Police Act 1996.
- 3.3 **Legal Advice.** From the outset, Operation Kenova has retained independent criminal and civil senior counsel to provide advice regarding the Kenova investigations and related civil matters. This has proved invaluable. Further legal advice is available through Bedfordshire Police and where necessary, as decided by me, the Crown Solicitor and the PSNI.
- 3.4 All **Media** communications are managed through Bedfordshire Police Communications Team under my direction and control.
- 3.5 **Oversight Mechanisms.** In order to deliver effective high quality investigative processes and to ensure the Operation Kenova cases are conducted as well as they possibly can be, I introduced a number of oversight mechanisms. These mechanisms also address the learning from previous investigations whereby victims, families and stakeholders have expressed concern about their independence and robustness. The groups described below provide independent scrutiny of Operation Kenova, reassuring families and stakeholders as regards the independence of the inquiries, ensuring the thoroughness of investigations and the application of fairness and thereby delivering public confidence as regards investigative rigour.
- 3.6 **The Independent Steering Group (ISG).** Provides robust challenge and scrutiny of our approach and decision making. I established this group of international renowned policing leaders and investigators with considerable experience of complex and sensitive investigations. This group provides a diversity of thought and expertise, contributing significantly to both the independence and effectiveness of the investigations. I provide further details about the ISG below as requested by the Committee. The group has exceptional experience of leading investigations in politically challenging environments and of delivering the truth for victims.
- 3.7 **The Governance Board.** To provide further ECHR compliance, I have established a Governance Board responsible for the oversight of the business and broad investigative functionality of Kenova. The Board will not have access to investigative information, as that is the remit of the ISG. However, the Board will ensure the ISG is functioning properly. The Board held its first meeting on 2 June 2020, and will meet quarterly. It will review all public facing reports of our findings produced by Kenova ahead of publication to ensure that legal and investigative due diligence has been applied and that the reports are robust and accurate for families and stakeholders.
- 3.8 **Membership of the Governance Board.** The Board comprises: Professor Monica McWilliams; Bertha McDougall OBE; Sir John Chilcot GCB; Reverend Harold Good OBE; Father Martin Magill; and Iain Livingston QPM, Chief Constable Police Scotland. The Board will provide families, stakeholders and the public with additional reassurance that Operation Kenova is independent, rigorous and effective.

- 3.9 **Expert reviews.** Further ECHR related mechanisms include a regime of independent expert reviews that have been conducted to examine investigative and business functions throughout the lifetime of Operation Kenova. Currently, an NPCC Homicide Working Group Review of Kenova is being organised with draft terms of reference written and review leads identified, this will be overseen by a UK chief officer (the Deputy Chair of the NPCC Homicide Working Group).
- 3.10 **Prompt outcomes.** Having met the families of victims in the cases for which I am responsible, I am acutely aware that relatives have already been waiting far too long to be told the truth about what happened to their loved ones. Part of my role and that of the ISG is to ensure that the investigations are comprehensive, but also progress at pace. The oversight of this will sit with the Governance Board.
- 3.11 **The Victim Focus Group (VFG).** The role and work of the VFG is set out in more detail below, as the Committee has requested. The group provides further challenge regarding ECHR compliance by scrutinising the Kenova Victims Strategy and victim related issues encountered in our investigations. I was conscious of the role and rights of the families and next of kin with regards to Article 2 ECHR compliant investigations and therefore introduced this panel of independent international victim experts to provide advice and scrutiny on behalf of victims and their families to Operation Kenova.
- 3.12 **Openness to public scrutiny.** Although there is limited detail that I can give publicly regarding ongoing (live) investigations, I am keen that Operation Kenova is open to public scrutiny as far as possible. The abovementioned Kenova website provides details of investigations and is updated regularly with media appeals, statements or events to keep families and stakeholders engaged.
- The website provides ongoing information and updates on Operation Kenova, setting out the terms of reference for each investigation.
  - The website describes the oversight groups including biographies of the respective members and functions of each group. (Governance Board, ISG, VFG)
  - The website explains the process for making complaints against Operation Kenova.
  - I report on Operation Kenova to the Northern Ireland Policing Board, as required and provide broad quarterly updates to the Chief Constable of the PSNI.
  - Where evidence is obtained of criminality against suspects, reports are provided to the Director of Public Prosecutions for Northern Ireland for prosecutorial decisions.
  - At the conclusion of any prospective criminal justice process, I have agreed with the Chief Constable of the PSNI to provide a public facing report setting out our findings in response to the requirements made of me in the terms of reference for each investigation.
- 3.13 Through such openness and transparency and the publication of our findings we will reveal the truth about what happened and build public confidence that these crimes have been investigated independently and robustly.
- 3.14 **Involving Next of Kin.** As stated earlier, placing support for the families of victims at the centre of Operation Kenova has always been my aim. I give more detail on this in my answer to the next question set by the Committee.

- 3.15 **Ongoing review by Alyson Kilpatrick BL.** In 2019, I commissioned an independent examination of Kenova's Article 2 ECHR compliance led by Alyson Kilpatrick BL. Operation Kenova published her interim report on 1 June 2020. This concludes 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 which has already contributed to securing public confidence in the rule of law*". **The Kilpatrick interim ECHR report is provided as appendix A to this submission.**
- 3.16 I wish to publicly acknowledge the work of the independent oversight groups assisting Operation Kenova. Those on the ISG, VFG and Governance Board do not receive financial recompense. Their members are each dedicated to ensuring professional scrutiny and independent challenge is applied to Operation Kenova on behalf of victims and their families.
- 3.17 At the commencement of Operation Kenova an ECHR framework document was devised with advice of legal counsel to facilitate an ECHR compliant investigation. For openness and transparency The ECHR framework document is posted on the Operation Kenova website. **The Operation Kenova ECHR framework document is provided as appendix B to this submission.**
4. **HOW THOSE WORKING UNDER OPERATION KENOVA MANAGE FAMILY LIAISON AND ENGAGEMENT AND MAINTAIN CONFIDENCE IN THE PROCESS FROM VICTIMS, FAMILIES AND INTERESTED PARTIES**
- 4.1 Families are at the centre of Operation Kenova's strategy and its vision. Our experience has been that the families in many cases feel strongly that the authorities have failed them. It is of paramount importance that a positive and trusting relationship with families is actively sought through engagement and openness.
- 4.2 **Lack of information in previous investigations.** In many cases, families had no contact with the police following the murder of a loved one. In some cases families were not made aware that an inquest into the death was due to be or had been held. As a result, what they know about how their loved one died has been based on media reports and second or third hand information passed to them by friends, neighbours and others. This is a problem which has affected the relatives of Catholics, of Protestants and of members of the security forces killed during the Troubles and in my experience is rarely experienced by those bereaved by homicide in other parts of the United Kingdom. This has contributed to mistrust by families from across all sectors.
- 4.3 **The HET.** Many victims and victims groups have felt that the HET did not meet their expectations in terms of independence and transparency. Many families did not receive reports into the death of their loved ones before the HET was closed in 2014. This fuelled suspicions that there is a determination not to address the legacy of Northern Ireland's past. It is important to state that some families have expressed confidence in the HET, when engaging with Operation Kenova. I am grateful to HET staff who have assisted Operation Kenova setting out their processes, the obstacles they encountered and how some stakeholders sought to undermine them.

- 4.4 **Operation Kenova Family Liaison Strategy.** Kenova has a specific Family Liaison Strategy designed to build trust and confidence in our investigations. Meeting and updating the families in a timely and professional manner is central to this. For transparency the strategy is posted on the Kenova website. **The Family Liaison Strategy is provided as appendix C to this submission.**
- 4.5 **Meeting families.** I seek to meet each family in person. We explain why we are undertaking the investigation and offer ourselves up for any questions about how the investigation will be conducted. These meetings are held away from police premises at a place where the families feel comfortable and safe. I will then periodically contact families sharing my contact details, including my mobile number, with them.
- 4.6 **Updating families.** As already mentioned, Operation Kenova has an FLC and FLOs who specifically maintain contact with families. They provide updates to families at a frequency of the family's choice, typically monthly at first and then either quarterly or when there is information of significance to share with them. Each family is able to contact me directly and I encourage them to do so if they have any concerns. I will speak to each family personally in advance of the publication of the public facing Operation Kenova findings report to explain what we have discovered in their individual case, set out the broader Kenova findings to them and answer any questions.

## 5. **THE ROLE AND IMPORTANCE OF THE INDEPENDENT STEERING GROUP AND VICTIMS FOCUS GROUP IN OPERATION KENOVA**

- 5.1 **The ISG.** As already described, to ensure Operation Kenova investigations are conducted as well as they possibly can be, an ISG was established comprising renowned international policing and investigative leaders to advise and support the investigative process. I am very grateful for their contribution to our work and their ongoing commitment to the independence, rigour and effectiveness of Operation Kenova. These groups are not required by law or by any regulatory process, however they provide excellent due diligence and good practice for Article 2 ECHR compliance and the reassurance of victims and families.
- 5.2 **Membership of the ISG.** The ISG comprises: Baroness Nuala O'Loan, former Police Ombudsman for Northern Ireland; Kathleen O'Toole, former Commissioner, Boston Police Department, former Chief of Seattle Police Department, former Chief Inspector of the Garda Inspectorate, and member of the Patton Commission; John Miller, Deputy Commissioner, New York Police Department; Mike Downing, Deputy Chief of Los Angeles Police Department (retired); Nick Kaldas, Deputy Commissioner of New South Wales Police (retired) and United Nations Senior Investigator; and Iain Livingston QPM, Chief Constable Police Scotland.
- 5.3 **Challenge and scrutiny.** Under its terms of reference, the ISG volunteers its experience and expertise to provide me as OIOC and my senior investigators with independent challenge and scrutiny of our investigative approach.<sup>1</sup> The ISG meets the Kenova team at least twice yearly for meetings that take 3 days to test our lines of enquiry and examine our progress and to ensure all that can be done is being done to discover the truth.

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<sup>1</sup> <https://www.opkenova.co.uk/isg-terms-of-reference>

- 5.4 **ISG stakeholder engagement.** The ISG has met a number of victim advocacy groups, the Commissioner for Victims and Survivors, families of victims, the Commissioner of An Garda Siochana, the current and previous Chief Constables of PSNI, the chair of the Retired RUC Police Officers Association, senior military personnel, the Northern Ireland Minister for Justice and other stakeholders. I engage the members of the ISG outside of the formal meeting regime for advice and to provide them with updates.
- 5.5 **Reassurance for victims.** The role and work of the ISG provides families and victims with additional reassurance that our work is robust, effective and independent. I am aware its contribution is appreciated by families and victims. The ISG has previously written to the Northern Ireland Department of Justice raising concerns relating to Operation Kenova's funding being dependent on the PSNI. This demonstrates the value of the ISG in ensuring Operation Kenova's operational independence.
- 5.6 **Wider public confidence.** The ISG has committed to raising publicly any concerns it has about Operation Kenova's work and I am confident that it would do so, should it identify any shortcomings. I am equally confident that the ISG is willing to provide publicly any necessary reassurances about the independence, rigour and effectiveness of Operation Kenova's work should the need arise.
- 5.7 **The VFG.** At the beginning of Operation Kenova I introduced a VFG to support and advise me on victim related issues. Under its terms of reference, the VFG provides independent challenge and scrutiny to Kenova's Victims Strategy and how it is implemented, to evaluate the experiences of families.<sup>2</sup> It helps identify best practice, make recommendations and ensure that Operation Kenova victims have access to the right support throughout the investigation.
- 5.8 **Membership of the VFG.** The VFG comprises: Judith Thompson, Commissioner for Victims and Survivors, Northern Ireland; Alan McBride, Co-ordinator of WAVE Belfast; Sue O'Sullivan, former Victims Ombudsman, Canada; Mary Fetchet LCSW, founder of Voices of 9/11 (victims group); Maria McDonald, founder of the Victims' Rights Alliance; and Levent Altan, Executive Director of Victim Support Europe.
- 5.9 **Independent assessment of how Operation Kenova treats victims.** The VFG is currently preparing its own report on how Kenova engages with families. I will invite the VFG to share and to discuss this report with the Kenova Governance Board. I expect the report to be completed later this year and it will be published on the Kenova website.

## 6. WHAT LESSONS THE GOVERNMENT COULD LEARN FROM OPERATION KENOVA AND APPLY TO ITS NEW LEGACY INVESTIGATION PROCESS

- 6.1 **The truth can be uncovered.** Although charging decisions on Operation Kenova's main investigation files are awaited (further Kenova evidential files are being delivered to the DoPP at the time of this submission) and the report of our findings are awaited, I believe we have already demonstrated that the truth can be uncovered as regards what happened to victims in unsolved legacy cases. It is of course right to stipulate that in some cases we have found very little, but in most cases we have discovered information that is not known to the families and should be shared with them as it would be in a homicide case anywhere else in the UK.

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<sup>2</sup> <https://www.opkenova.co.uk/vfg-terms-of-reference>

- 6.2 **The responsibility of terrorists for atrocities** committed during the Troubles is clear and undeniable. This was an incredibly difficult period of history for the UK during which terrorists caused countless and needless loss of life, life-changing injuries and lifetime trauma for so many people. That is an irrefutable position that should never be forgotten or glossed over.
- 6.3 **Records of events and those responsible.** Most of the records held by the security forces reflect information on those terrorists responsible for legacy crimes. Some commentators express the position that terrorists did not keep records whilst the security forces were required to which is considered as unfair to the security forces. In my experience these records rarely reflect wrongdoing by the security forces they almost entirely show the wrongdoing of terrorists.
- 6.4 **Security forces and offending.** The cost of terrorism to the security forces in lives lost and injuries suffered and the fact they mostly did their very best to keep people safe should never be forgotten. Equally, it is evident that on occasions members of the security forces were involved in assisting terrorists or even in committing terrorist acts. Various prosecutions of security force personnel during the Troubles prove this to be the case. The bravery, courage, dedication and sacrifice of the majority cannot excuse wrongdoing by the minority or prevent the pursuit of those that harmed those they were required to protect.
- 6.5 **A realistic approach to prosecutions.** It is important that all those with an interest in addressing the legacy of Northern Ireland's past are realistic about the practicability and utility of prosecutions. There are significant legal and practical obstacles to bringing cases from so many years ago to the criminal courts now. The passage of time impacts significantly on the capability to provide best evidence. We face evidential challenges in relation to fading memories, witnesses and suspects no longer being alive or well enough to provide evidence, be interviewed or stand trial and the continuity and completeness of records. There will inevitably be abuse of process and admissibility arguments in criminal proceedings relating to events from so long ago.
- 6.6 **Wishes of victims and families.** Of significance to the outcome of investigations should be the wishes of families. It has become apparent to me that most Operation Kenova families do not support prosecutions. The reasons for this can be complex. There will always be a spectrum of opinions, even with divergent views within families. Most relatives have told me they want the truth of what happened, in particular the 'how' and 'why' of their loved ones' deaths, rather than a criminal prosecution. The views of families must be taken into consideration when deciding whether or not a prosecution is in the public interest, should the evidence exist to support such a proceeding.
- 6.7 **An investigation is only as good as the information available to it.** It has become apparent that some organisations are unaware or unclear as to what material relating to the Troubles they hold. Many records are uncatalogued and few are digitised. For a legacy investigation or process to be effective, it must actively search for relevant information rather than rely only on what material is readily accessible at the outset. Furthermore, in order to conduct an effective Article 2 ECHR compliant investigation, it is essential that investigators take responsibility for determining the relevancy of material, irrespective of how sensitive it may be. This cannot be left to the organisation holding the material. I recognise this can be challenging for agencies, given the volume of sensitive and classified material they hold. However, this issue

goes to the heart of families having confidence in legacy processes. Many do not trust the security forces to give complete voluntary disclosure and the experiences described to me by previous legacy investigators and my own findings with Operation Kenova have shown that these fears are well-founded.

- 6.8 **The impact of a systematic failure to disclose information to investigators.** It is vitally important that relevant records are not withheld from independent investigators if they are to be effective and inspire the confidence of families and the wider public. No investigation should be hampered by agencies or authorities failing to share sensitive information and yet - in the Northern Ireland context - this has undoubtedly happened in the past and it remains an ongoing challenge for Operation Kenova. We have already obtained official contemporaneous records identifying those responsible for murders and other crimes which were not shared with the original or subsequent investigations. I well understand why our security and intelligence agencies guard their information so jealously, where the culture of secrecy and withholding information comes from. However, the bereaved deserve to know what happened to their loved ones and where the state holds information revealing the truth it should be disclosed or, if this is genuinely impossible, the decision to withhold it should only be taken by an independent judicial body and not by a limb of the executive.
- 6.9 There are accepted mechanisms and legal frameworks to ensure sensitive sources of intelligence are protected whilst the information they provide can be revealed. National Security investigations have modernised significantly since the Troubles when information was collected and not necessarily shared with investigators. The failure to exploit intelligence would not apply today and should not be allowed to continue to inhibit the truth from being revealed about these tragic crimes. Arguments that disclosing information would expose methodology or source identities prevailed during the Troubles and for some in the security forces these remain as obstacles today. On the whole these are issues that modern policing and intelligence practices routinely address. The position should never be that the security of where information came from is prioritised over and above the preservation of a life that such information might protect.
- 6.10 **Learn the lessons.** The progress of Kenova has emanated from previous legacy investigators sharing their lessons learned, from families providing information not previously given, through the application of modern day forensics, through the recovery of records and intelligence not previously disclosed and through ex combatants and security force personnel providing accounts of what they know. None of this would have been achievable through remote examination of these cases.
- 6.11 **Legacy issues are capable of being investigated and will not go away.** Legacy is capable of being investigated to find the truth of what happened for many victims. It requires an absolute commitment to a thorough examination of events, a dedication and openness to families with an uncompromising stance towards those that seek to stop the truth from being uncovered. The attitude towards legacy investigations shown by some quarters is toxic and this capacity to undermine and invalidate those seeking the truth should not be underestimated.

**7. ANY OTHER COMMENTS YOU MIGHT LIKE TO MAKE ON THE GOVERNMENT'S NEW PLANS FOR LEGACY INVESTIGATIONS**

7.1 In 2018, I responded to the then Government's previous consultation on legacy cases. **My submission to 'Addressing the legacy of Northern Ireland's Past' is provided as appendix D to this letter.** The new proposals put forward by the Secretary of State on 18 March 2020 are not detailed but represent a welcome opportunity to progress legacy in Northern Ireland. I have shared my experiences of Operation Kenova with the Secretary State and his officials, especially my views on the importance of working with the families of victims, victim advocacy groups and the Commissioner for Victims and Survivors in Northern Ireland. I hope that a consensus around how legacy should be taken forward can and will emerge - one backed by political will and legal teeth.

7.2 **Scope.** The previous draft legislation indicated that only those cases that had not been reviewed by the HET would be in scope for the Historic Investigation Unit. In my view, it is essential that the scope should include all murders committed during the Troubles including those previously reviewed by HET and those committed on the British mainland. Operation Kenova has already submitted files to the Director of Public Prosecutions for Northern Ireland in cases which were examined and closed by others who were unable to find evidence identifying those responsible.

7.3 **The Republic of Ireland.** In addition, I suggest that consideration is given to the Republic of Ireland being encouraged to set up its own counterpart unit to independently investigate murders relating to the Troubles. The Republic faces very similar issues regarding a lack of confidence of victims in certain cases.

7.4 **Speed of Investigations.** These investigations take time, skill and resources. Since June 2016, Operation Kenova has had an average of 60 staff working full time. The operating model of the HET changed during its tenure however in broad terms it completed 1,713 reviews (not investigations) of murders over 9 years. Any reviews requiring full investigation were passed by them to the PSNI Serious Crime Branch. I support the Government's desire for investigations to be completed speedily, this is in the interests of everyone. However, there must be no compromise in the quality of the investigations/reviews and this is a concern families have routinely raised with me. The aim of everyone should be to establish a process that has broad consensus and that will finally provide families with confidence that everything that reasonably can be done, has been done to find the truth of what happened in their cases, with proper access to records provided by all agencies.

7.5 **The closing of investigations of unsolved murders so that they cannot be re-opened would be a new legal stance.** The proposal to close down investigations of murder in legacy cases after a quick review process where those cases could not be re-opened would, I believe, be a legal novelty in the United Kingdom for serious crimes such as murder. In light of the opportunities identified by Operation Kenova this proposal should be approached with extreme caution especially as regards the processes applied to establish what information exists about those cases. An investigation/review which starts and finishes only with the information available at the outset and does not allow for the development of lines of enquiry would not be Article 2 ECHR compliant.

7.6 **Most families simply want to be listened to, acknowledged and know the truth.** It should never be the case that those responsible for crimes such as murder are protected by a lack of a thorough examination of the facts. Prosecutions are

exceedingly challenging in legacy cases and I would expect them to be very much the exception. The starting point for legacy should be finding the truth for families of what happened. Families want to be listened to, acknowledged and for an investigation to take place that is an independent and robust search for the truth. They are generally realistic about the scope for seeing culprits brought to justice and punished and about the practical utility of such an exercise at this point in time.

- 7.7 **Official records.** A major constraint on the speed of an investigation is the availability of relevant data in a usable format. I deploy a considerable amount of resource to ensure that all relevant material is recovered. This is very time consuming but essential work. To be able to sign off an investigation as complete and unable to be reopened, the Director of the Historic Investigation Unit or its equivalent needs to be satisfied that all relevant material has been recovered and reviewed. We have seen how challenging this can be with the recent disclosure issues in the Ormeau Road, Belfast, bookmakers' case. In 2016 the PSNI conducted a proof of concept exercise to provide an estimate of time and cost involved in digitising legacy only records. They discovered a total of 104,000 files comprising 43,000,000 pages. These records were on paper, microfiche and stand-alone computer systems. Other agencies similarly have a large amount of data in different formats. It would greatly speed up investigations if all agencies that have records relating to legacy investigations began work now to ensure the material is preserved in an accessible and searchable format.
- 7.8 **The determination of legacy families is remarkable.** 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.
- 7.9 **Final Comment.** 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.

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