Dear Mr Boutcher,

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

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

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

In principle I have no objection to your proposed interim report. Anything which adds to the information in the public domain about what was done during the troubles is always to be appreciated. And I note that your interim report will address ‘generic, high-level themes and issues and concentrate on organisations, rather than individuals, and confirm - at a relatively high level of generality and without going into specifics – [y]our findings about what was, and was not, happening during the Troubles as between (a) organisations, (b) the Provisional IRA and its Internal Security Unit, (c) the police, armed forces and intelligence services and (d) their agents and informants’. You say that you want to make it clear where you have, and have not, ‘found patterns of State intervention or non-intervention in particular types of circumstance and address types of circumstance in which steps were, or were not, taken in relation to the disclosure of intelligence about serious criminal conduct, either prospectively before it happened or retrospectively when it was being investigated’.

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

It strikes me that the kind of report you are envisaging would be comparable to one that is issued by the HMICFRS, or by the Police Ombudsman, or by a public inquiry, bang in the middle of ongoing criminal proceedings which are very closely related to the subject-matter of the report. It would also be akin to a television company broadcasting a programme about some of the incidents involved, and drawing some conclusions about them at a higher level, in the course of a prosecution or trial process. Lawyers, journalists and partisan observers could make hay out of such a report and the net result may be to (unfairly) undermine the credibility of your report but also, and more seriously, to disrupt if not terminate the on-going criminal proceedings.

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

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

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

Kind regards,

Brice Dickson