**KENOVA INVESTIGATIONS**

**CONSULTATION**

***Draft ‘*PROTOCOL ON PUBLICATION OF PUBLIC REPORTS’**

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

**28 October 2021**

1. **Summary**

In this Consultation Response:

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

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

1. **Introduction**

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

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

The Operations are:

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

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

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

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

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

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

1. **The absence of lawful authority**

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

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

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

(*emphasis added*)

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

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

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

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

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

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

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

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

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

1. **Due process requirements**

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

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

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

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

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

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

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

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

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

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

1. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with advance notice of the matters which are of interest to the inquiry. This need not take the form of a list of each question to be put to a person, but should identify the areas about which questions will be asked (with as much detail as the Chair considers appropriate in all the circumstances).
2. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with the main documents about which questions will be asked orally or which written evidence will be expected to address. This material should be provided to the person a reasonable time prior to the giving of evidence.
3. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, unless there is some compelling reason to the contrary, be provided with a summary of any adverse material which has been obtained and/or damaging evidence which has been given against them during the course of the inquiry. This summary should be provided to the person a reasonable time prior to that person giving evidence.
4. Where the inquiry receives adverse material and/or damaging evidence against a person after that person has given evidence, consideration should be given to whether that person should be invited to give supplementary evidence (whether orally or in writing). “

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

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

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

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

**5. Other problems**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Their welfare must also be considered and protected.

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

Para 11.1 suggests that

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

Clearly, in the overall public interest (as set out in section 6 of the draft Protocol) the security checking process of stage 4 must be the final stage of the publication process. But there is at least a potential problem. The conclusions of the report might contain criticism of an individual or public authority but also some explanation of the actions of the individual or public authority by way of balance. However, if the checking process in stage 4 required (for security reasons in the public interest) the excision of the individual’s explanations, then the Report would become unbalanced. It would be unfair to that individual or public authority that their explanation for their actions would not be included in the Report.

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

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

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

* *Meaning of para 11.2 of the draft Protocol*

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

*Peter Smith CBE QC and Neil Faris Solicitor*