

An Open Letter to Colleagues regarding the call by Lord Stevens for publication of his Stevens 3 Report made to the Director of the Public Prosecution Service in 2003.

Dear Colleagues,

During the last quarter of 2007 several news articles appeared, in the aftermath of meetings between Lord Stevens and the Consultation Group on Dealing with the Legacy of the Past, wherein Lord Stevens called for the full publication of what is known as the Stevens 3 report. Members quite rightly have been concerned by the apparent heavy lobbying of the group by this one individual and much speculation abounds as to his true motive and purpose. This brief article seeks to put some of the issues into a chronological perspective and to address some of the issues raised.

The overview report and recommendations of the Stevens 3rd report was published on 17th April 2003, it made considerable use of the term "collusion" and claimed to have *"highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured"*. The author implied that he had uncovered evidence to substantiate his assertions that "collusion" occurred and that such collusive acts or omissions resulted in serious breaches of the criminal law occurring.

No doubt the publishing of the full report or any selective précis of the same would seek to repeat such alleged findings, albeit in 2007 it became known that the body of evidence produced by Steven's 14yr. long investigation, failed to meet the standard of proof required by the Public Prosecutions Service in respect of any of the "collusion" allegations contained in the full report.

I think it is fair to deduce from the Director's Statement that one area of specific concern was with fact that claims, strongly suggesting that an abundance of evidence of serious criminal behaviour existed, had been put into the public domain, prior to his adjudication on the matter; as a consequence of the publication of the Stevens Overview report in 2003. To address this, the Director in his published Statement was at pains to point out that he had sought to *"balance the need to provide information to the public and victims with the need to ensure that the rights of those who have been reported and in respect of whom proceedings have not been instituted are not prejudiced in circumstances where they do not have the rights and protection that a criminal trial would afford"*

Clearly the Director of Public Prosecutions was also perturbed by the constant usage of the term "collusion" which had no doubt the same widespread usage in the full report as it had in the overview document. He was obviously conscious of the fact that when combined with the word evidence, it had the potential to create a strong image in the minds of the Northern Ireland public, that he had been presented with an abundance of proof showing that there had been unlawful conspiracies between the police and paramilitaries and that breaches of the law had resulted.

To specifically address this concern he took the unique step of including in his statement the following observations: - *"With regard to the allegations of collusion Sir John Stevens as he then was, published a report entitled Stevens Enquiry Overview and Recommendations on 17 April 2003. In that report it was stated that he had concluded from his enquiries which were then ongoing, that there had been collusion in the murders of Patrick Finucane and Brian Adam Lambert and the circumstances surrounding the murders.*

In considering the conclusions which Lord Stevens reached in relation to collusion, both Lord Stevens and the Director recognise that it is necessary to have regard to the respective and differing roles of the police and the Public Prosecution Service. Whilst an investigator may properly reach general conclusions arising from his enquiries, the Director, in the discharge of his functions, is under a statutory obligation under the Justice (N.I.) Act 2002 to determine whether prosecutions should be instituted or continued for specific offences in respect of particular individuals."

Not only was the Director reminding Lord Stevens that it was his, the Director's duty, to pronounce on the probative value of the evidenced adduced and it was not for Lord Stevens to usurp that role, but furthermore the special significance of including this observation in his statement becomes very apparent, when in the next paragraph, the Director points out to Lord Stevens and the public at large that: - *"in relation to collusion it should be noted that whilst there is or may be conduct which may be characterised as collusion, there is no offence of collusion known to the criminal law of Northern Ireland. However, evidence of criminal conduct which could be characterised as collusion may, where there is sufficient available and admissible evidence, give rise to the prosecution for certain criminal offences."*

Clearly if the term "collusion" has no legal definition and an offence of "collusion" does not exist in any Statute, then any so called evidence, characterised as collusion, must in reality be tested against the stated components of other substantive or inchoate offences that are on the Statute books such as conspiracy, incitement, misfeasance in public office etc.

When therefore as in the case of the Stevens report, that so called evidence has been so tested and found to be lacking in probative quality or quantity, then any further reference to it, in such a way that continues to imply guilt of any crime, must be an abuse of process.

The three Stevens investigations painstakingly conducted over the course of some 14 years produced in excess of one million pages of documentation contained within 9,256 statements that were taken 10,391, documents recorded and 16,194 exhibits seized. This was, in the history of the Royal Ulster Constabulary G.C., an unprecedented investigation as open access was given to so much intelligence and evidential material and where matters were subjected to such intense independent scrutiny over such a lengthy period in time.

According to the Director of the PPS, the prosecution was required to consider a substantial part of that massive documentation when examining all the issues arising from the Stevens 3 investigation. There can be no doubt that the PPS gave extremely detailed attention to this virtual mountain of paper and exhibits for according to the Director, it took over 4 years to examine and evaluate the totality of the evidential submissions made and independent counsels advises were obtained throughout the entire process.

The outcome of this very thorough and professional analysis of the evidence submitted by Lord Stevens was that no charges were to be laid against any police officer let alone prosecutions commenced, for any of the so called "collusive" acts or omissions alleged by Lord Stevens and his team of investigators. Throughout the Director's statement we are told that the evidence was either insufficient or that it was incapable of showing that the police had knowledge at the relevant time of incidents that occurred, or were to occur.

The question, that quite rightly is now posed most frequently by members is, what is left of Lord Stevens report after the abstraction of the mass of "collusive evidence" that was cited in support of the charges recommended to the PPS? That so called evidence has been found at all stages to be absent, inconclusive or incapable of supporting any one of the many specific charges available on the Statute books.

To find the answer in part, it is necessary to look again at the introduction to the Stevens overview document and in paragraph 1.3 we find that what is left are allegations of acts or omissions, which in the opinion of the author, constitute collusion i.e. the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence

Unfortunately there is no further explanation given in the overview document to enlighten the reader as to what specific instances or aspects of general activity the investigator was referring to. Some clues may be deduced from some of the issues addressed by the Director's Statement where reference is made to such matters as the lack of evidence in respect of intelligence flows and the issue of firearms deactivation, as to the remainder we can only speculate in a generalised way.

However, to label such matters as are identifiable as being collusive acts is strongly debatable, for they may fall into that class of situations which arise in the world of intelligence, which, if viewed solely from a criminal investigation perspective can be regarded as irregular or suspicious behaviour, but which in fact are eminently sensible and acceptable when viewed from an intelligence perspective. This is particularly so where it involves an examination of events where there has been a balancing on the one hand, of the duty of care owed to covert intelligence sources and on the other, the disclosure of the intelligence they provide.

In such instances, the occasion invariably arose whereby some information had to be held back or not fully exploited in order to preserve the life of a source. Whether this a collusive act worthy of sanction, i.e. the withholding of intelligence, or is it the necessary and prudent action required to protect the life of a valuable agent is open to debate. How you interpret such matters is strongly influenced by the breadth of the perspective adopted. As the intelligence world never viewed its existence as being solely a vehicle by which to service the needs of crime investigation, it therefore, on specific occasions, quite justifiably adopted, in its opinion, the position that the priority to preserve life and property came at the expense of solving crime.

Interestingly Lord Scarman, as far back as 1981 in his report into the Brixton riots, recognised this dichotomy in priorities that arises from the dual responsibilities of the police, on the one hand, in preserving the peace and on the other in investigating crime. Latterly, Deputy Assistant Commissioner Peter Clarke in 2007 saw fit to again draw attention to this state of conflicting priorities in a lecture, addressing the current terrorist threat to the United Kingdom from Islamic extremism wherein he pointed out very effectively the impact this had on methods used to combat such terrorism. So whilst the issues that arise are not of recent origin, the investigative protocol that once accommodated the two perspectives has changed to one that appears to allow for only one interpretation and that has been to the detriment of the intelligence world.

If we accept that the task of combating terrorism over the past three decades was predicated on an intelligence lead effort and that decisions were taken from that perspective any attempt now to conduct a reappraisal of past events from a perspective that ignores that reality or gives it little or no credence, is bound to produce results that are at odds with accepted operational environment and priorities of that era.

What serves to illustrate this point is the situation whereby intelligence agencies, desirous of protecting their covert methodologies particularly in the area of substitution and deactivation, insisted that there was the minimum of disclosure, even within the intelligence world, as to how precisely such matters were achieved. Detailed record keeping therefore was viewed as a potential area of weakness in maintaining the strict "need to know" policy

that surrounded the security of such technology and its exploitation in the protection of life and property, or the making of persons amenable to the courts.

However when such matters are now opened up for investigation the absence of detailed record keeping can be viewed with suspicion and the perspective that once dominated and promoted a policy and practice of secrecy, can now be viewed as a "wilful failure to keep records" as part of a deliberate policy to avoid accountability in the future.

An appreciation of the substantial differentials that existed in the operational perspective of the intelligence agencies and those of their counterparts in criminal investigation is a factor that is often missed, or worst still, deliberately disregarded, when incidents that occurred are now subjected to a criminal investigation by external agencies. The outcome as we have already seen can be very damaging especially when contested issues are put into the public domain and covert methodology is unnecessarily disclosed.

A prime example of this occurred in the "Ballast" report published in 2007, when the Police Ombudsman publicly declared the actions of the Police to be proof of "collusion" when they failed to mount an operation to arrest terrorists in possession of explosives, which had previously been covertly handed over by an agent and substituted for inert material.

From the intelligence perspective any subsequent overt arrest operation would have been a foolhardy exercise as it would have invariably defeated the whole purpose of substitution exercise, as any arrests that followed, would have required the subsequent disclosure of a forensic report declaring that the material in their possession and upon which they would have charged, was inert.

This would have alerted the terrorists as to the source of their compromise and the inevitable consequences for the agent would have been grave indeed. In that instance there appeared to be no awareness of the fact that there were alternatively valid reasons for not acting in the manner suggested nor was any opportunity taken to seek clarification of the action that had been taken from those who could have enlightened the investigators. The outcome was a public vilification of police action as being "collusion".

The Stevens report had its origins in what were relatively narrow criminal investigations and all officers interviewed made their responses as either witnesses or suspects in accordance with the protocols for the conduct of such investigations. As witnesses or suspects they would have formulated their comments according to the legal advice given to them at the time.

Whilst such an approach is right and proper in the protection of individual rights under the criminal law, it nevertheless severely curtails the capacity of

those under interview, or indeed others outside the scope of the investigation, to make general comment on issues under investigation. The focus of any criminal investigation is rightly fixed on adducing all evidence which, on independent assessment, is judged to prove whether the law has been broken or not.

Particularly therefore, because of the necessarily restricted focus of such investigations, there needs to be considerable care taken in the usage made of material uncovered in the process of such criminal investigations. For out with the parameters of a trial process, where the probative value of evidence can be tested, considerable danger is inherent in any attempt there might be to project evidence that has been adduced for one purpose, as being indicative of other wider practices or outcomes.

Adverse observations made by the investigator in the Stevens case could easily be taken out of context and extrapolated to wrongly imply that the Stevens investigations amounted to a wholesale review of intelligence handling procedures within the Police Service, when clearly they were not.

The widespread use of the term "collusion" in relation to the police and MI5 has had an ongoing debilitating effect on the level of public co operation with or trust placed in such organisations, Any continuation of its unwarranted usage serves only to feed the adverse propaganda of the paramilitaries and those with an agenda to portray the work of the State agencies in combating terrorism as having an "equivalence" with that of the paramilitaries.

Furthermore potential prejudice could arise in respect of the forthcoming public enquiries that have just commenced, or will commence during the next few months, if the publication of yet another report is allowed to take place wherein trial by innuendo and conviction on evidence of opinion alone is substituted for due process of law.

In conclusion if the Stevens 3 report is allowed to be place in the public domain now that the evidence contained therein and upon which, Lord Stevens relies so heavily to justify his allegations of "collusion", has been found to be so seriously wanting in terms of weight and probative value, there will be a blatant miscarriage of justice. Not only will those individuals, who were subjected to the rigours of the investigative process, stand accused at the bar of public opinion, but equally important the organisation in which they served will also stand accused. Gone will be the presumption inherent in any criminal investigation, that a person, or by default an organisation, is deemed to be innocent until proven guilty.

In essence the publication would be a circumvention of all the protection the Director of Public Prosecutions had sought to put into place and it would result in an intolerable state of affairs whereby acts or omissions which sat

outside any definitive set of criminal offences or administrative guidelines then in place, are presented to the public with all the overtones of corrupt practice that the term "collusion" implies.

It is time to draw to a halt the practice of investigators, in the aftermath of a failure to secure either the charging or conviction of persons for criminal offences, issuing what amounts to a commentary on their investigation and under the thin veneer of anonymity, presenting to the public the so called evidence which in the first place failed the burden of proof test.

The privilege enjoyed by any investigative body to make comments without penalty of civil action, which potentially can damage individual reputations, or that of any public organisation, or worst still raise public anxieties, needs to be exercised to the highest degree of responsibility. If not, then the public interest is not served by the publication or communication of what amount to misinformation and the privilege itself becomes no more than a licence to distort or misrepresent, in order to bolster conclusions which may have been arrived at more by way of flawed hypothesis than due process .

Members will no doubt be conscious of the trauma such publications inject into their own lives and that of their colleagues and in particular the adverse reactions caused amongst the relatives of those officers who gave their lives in the service of our community when they hear and read of such unsubstantiated allegations.

Consequently we must of necessity be prepared to speak out in our own defence when such assaults on our collective integrity and professionalism occur for if left unchallenged the truth is rapidly replaced by fiction.

The NIRPOA website carries both the Stevens 3 Overview report and the Statement from the Director of Public Prosecutions and they can be downloaded as required.

R White

