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STATEMENT BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NORTHERN IRELAND IN RELATION TO DECISIONS AS TO PROSECUTION ARISING OUT OF THE STEVENS III INVESTIGATION

1. The policy of the Public Prosecution Service in relation to the giving of reasons for decisions, which is set out in the Code for Prosecutors¹ issued by the Service, is to give reasons in the most general terms. The Director recognises, however, that there are exceptional cases where it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The Director is satisfied that the enquiries conducted by the Lord Stevens of Kirkwhelpington QPM DL, which have been lengthy and complex, fall within the category of such exceptional cases.
2. In making this Statement the Director is conscious of the need to make available to victims and individuals who have been the subject of investigation such information in relation to the decisions which he has reached as is consistent with his duties under the Justice (Northern Ireland) Act 2002 and the Human Rights Act 1998. The Director has sought to balance the need to provide information to the public and victims with the need to

¹ Note 1 – PPS website address – www.ppsni.gov.uk

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.

3. The historic background to the Stevens Investigations is as follows. In 1989 the Director of Public Prosecutions for Northern Ireland requested the then Chief Constable of the Royal Ulster Constabulary (RUC) to investigate whether the security forces and members of loyalist paramilitary organisations had acted in such a manner as to give rise to prosecution for any criminal offence in relation to the murder of Loughlin Maginn on 25 April 1989. An independent police enquiry was established in September 1989 under the command of John Stevens, who was subsequently appointed Commissioner of the Metropolitan Police Service. This enquiry was known as the Stevens I Investigation.
4. As a result of the Stevens I Investigation forty-six persons were convicted of terrorist-related offences. These persons included Brian Nelson, (now deceased), who pleaded guilty to a number of offences including conspiracies to murder in respect of which he was sentenced to ten years' imprisonment.
5. In June 1992 the BBC broadcast a Panorama programme entitled, "*Dirty War*", which contained allegations relating to collusion between Brian Nelson and members of the Army's Force Research Unit (FRU). Arising out of the broadcast the

Director wrote to an Assistant Chief Constable of the RUC as a result of which the then Chief Constable requested John Stevens to investigate the allegations contained in the programme. This enquiry, which was completed in January 1995, was known as the Stevens II Investigation. Having considered the police investigation files the Director concluded that there was insufficient evidence to meet the Test for Prosecution in respect of any criminal offence.

6. In February 1999 British Irish Rights Watch published a report entitled, *'Deadly Intelligence - State Involvement in Loyalist Murder in Northern Ireland'*. The report contained allegations of collusion between FRU and Brian Nelson in relation to a number of incidents including the murder of Patrick Finucane. Following publication of the report the Director wrote to the then Chief Constable who again requested John Stevens to investigate the allegations. This enquiry is known as the Stevens III Investigation.
7. 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.

8. 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 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 (Northern Ireland) Act 2002 to determine whether prosecutions should be instituted or continued for specific offences in respect of particular individuals.

9. 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 prosecution for certain criminal offences. In this regard, the Director, in his examination of the police investigation files, gave consideration to whether the evidence was sufficient to meet the Test for Prosecution in respect of a range of offences, including murder, conspiracy to murder, manslaughter, misfeasance in public office, firearms and documents offences.

10. Where police investigate and report to the Director the results of their investigation into an alleged criminal offence the Director is required to take a decision as to prosecution. In Northern Ireland

prosecution can only be instituted or continued by the Director where he is satisfied that the Test for Prosecution is met. The Test for Prosecution is met where the Director is satisfied that the available and admissible evidence is sufficient to provide a reasonable prospect of conviction and prosecution is required in the public interest. The Test is set out in full in the Code for Prosecutors.

11. The Director may also be required to consider whether there is a reasonable prospect that a court would find that criminal proceedings would constitute an abuse of the process of the court and thereby stay those proceedings. In such circumstances the Test for Prosecution would not be met. This could arise in a number of situations, including, for example, where fair trial is no longer possible because relevant evidence which would or could assist the defence is no longer available.

12. In deciding whether or not the Test for Prosecution was met in respect of possible offences arising from the Stevens III Investigation the Director had regard to the advices of independent Senior Counsel, a member of the Bar of Northern Ireland. The three Stevens Investigations produced in excess of one million pages of documentation. The prosecution was required to consider a substantial part of that documentation when examining issues arising from the Stevens III Investigation.

13. The files submitted by the Stevens III Investigation included files relating to the murder of Patrick Finucane. The Investigation established evidence as a result of which the Director concluded that the Test for Prosecution was met in relation to two persons who were prosecuted for the murder of Patrick Finucane and other offences. Kenneth Barrett pleaded guilty to a number of offences including the murder of Patrick Finucane; William Stobie (now deceased) was acquitted of the murders of Patrick Finucane and Brian Adam Lambert and other offences.

14. In relation to the prosecution of William Stobie, the Director received medical reports immediately prior to the commencement of the trial in relation to the principal prosecution witness upon whose evidence the prosecution was substantially based. Having considered these reports, the Director concluded that the witness was not then capable of giving evidence upon which a Court could be invited to rely. The Director also concluded, on the basis of the medical opinion then available to him, that there was no reasonable prospect of the witness becoming so capable at a future time and that, accordingly, the Test for Prosecution was no longer met. In those circumstances the prosecution offered no evidence.

15. As a result of other evidence submitted to the Director by the Stevens III Investigation, the Director concluded that the Test for

Prosecution was met in relation to six persons² who were prosecuted to conviction for offences relating to the possession of documents containing information likely to be useful to terrorists contrary to section 22 of the Northern Ireland (Emergency Provisions) Act 1978.

16. The Stevens Investigation team carried out enquiries into whether the relationship between certain members of FRU and Brian Nelson gave rise to the commission of any criminal offence in connection with the murder of Patrick Finucane. The Director concluded that the available and admissible evidence was insufficient to meet the Test for Prosecution in respect of criminal offences against those members of FRU. In particular, the evidence was insufficient to establish that any member of FRU had agreed with Brian Nelson or any other person that Patrick Finucane should be murdered or had knowledge at the relevant time that the murder was to take place. The evidence was also insufficient to establish that any RUC officer agreed with William Stobie or any other person that Patrick Finucane or Brian Adam Lambert should be murdered or had knowledge at the relevant time of William Stobie's alleged involvement in the murders.

17. The Stevens Investigation team carried out enquiries into whether certain members of FRU had been party to other conspiracies to murder, including certain conspiracies in respect

² Note 2 – R -v- Mark Barr, Paul Alexander Givens and William Hutchinson
R -v - Frank James Caldwell, Edward Stinton and Colin Stephen Lyndsay

of which Brian Nelson had been convicted. The Director concluded that the available and admissible evidence in respect of those members of FRU was insufficient to meet the Test for Prosecution in relation to any of those conspiracies. In particular, the evidence was insufficient to establish an agreement between any member of FRU and Brian Nelson that persons should be murdered.

18. The role of FRU included giving assistance to the RUC by obtaining and providing intelligence in relation to terrorist activities. The Director considered whether there was evidence of the commission by members of FRU of an offence of misfeasance in public office arising from the handling of Brian Nelson as an agent. This included the extent of knowledge held by FRU as to Nelson's activities, the degree of supervision of Nelson exercised by members of FRU and the extent to which FRU informed the RUC of Nelson's activities.

19. The offence of misfeasance in public office is a common law offence which is often referred to as wilful neglect of duty in public office. The elements which require to be proved were set out by the Court of Appeal in Attorney General's Reference (No 3 of 2003) and are:
 - i. A public officer acting in his capacity as such;
 - ii. wilful neglect to perform his duty and/or wilfully misconducts himself;

- iii. the degree of wilful neglect or misconduct amounting to an abuse of public trust in the office holder; and
- iv. the failure to meet standards has to occur without reasonable excuse or justification.

20. In considering this offence the Director took into account a number of factors. These included the absence of relevant evidence, including records which are now unavailable and witnesses who are now deceased, the use of certain intelligence records as evidence and the inability of the prosecution to prove that the police had not been informed of Nelson's activities. The Director formed the view that there was not a reasonable prospect that the prosecution would be able to establish beyond reasonable doubt the commission of the offence. Accordingly, the Director concluded that the evidence was insufficient to meet the Test for Prosecution in relation to an offence of misfeasance in public office.

21. During the course of the Stevens I Investigation consideration was given to whether the circumstances in which a member of FRU had instructed Nelson to destroy a typewriter, which may have been potential evidence in an investigation of an incident of intimidation, amounted to an offence of attempting to pervert the course of justice. It was then concluded that the evidence was insufficient to afford a reasonable prospect of conviction. The evidence was reconsidered during the course of the Stevens III Investigation both in respect of offences of attempting to pervert

the course of justice and misfeasance in public office. Whilst the Director considered that the decision as to prosecution was finely balanced he concluded that the evidence was insufficient to meet the Test for Prosecution. The Director also concluded that had he taken a different view of the strength of the evidence, there was no reasonable prospect that the prosecution would be able to meet an application by the defence to stay proceedings on the grounds of abuse of process. In reaching this conclusion the Director had regard to the fact that the accused was informed of and would be entitled to rely upon a previous decision of no prosecution and that no new evidence had become available. In addition there was a risk that a fair trial could not now be obtained due to the passage of time.

22. The Stevens I Investigation established evidence as a result of which Brian Nelson was convicted of conspiring with members of the Ulster Defence Association to murder a certain person. During the course of the Stevens II Investigation consideration was given to whether other evidence relating to a communication between Nelson and a member of FRU disclosed the commission of an offence of conspiracy to murder the same person. It was then concluded that the evidence was insufficient to afford a reasonable prospect of conviction. The evidence was reconsidered during the course of the Stevens III Investigation and the same conclusion was reached in relation to that offence. The Director also concluded that there was evidence of the commission of offences contrary to section 22(1)(b) of the

Northern Ireland (Emergency Provisions) Act 1978 as a secondary party (unlawful collection of information) and misfeasance in public office in respect of the same incident. However he concluded that the Test for Prosecution was not met on the basis that there was no reasonable prospect that the prosecution would be able to meet an application by the defence to stay proceedings on the grounds of abuse of process. In reaching this conclusion the Director had regard to the fact that the accused was informed of and would be entitled to rely upon a previous decision of no prosecution notwithstanding the fact that the prior decision of no prosecution was not in respect of the same offences and that no new evidence had become available. In addition there was a risk that a fair trial could not now be obtained due to the passage of time.

23. A file was also submitted by the Stevens III Investigation to the Director for decisions as to prosecution relating to the conduct of members of the RUC and a civilian employee of the Police Authority of Northern Ireland with regard to the possession, handling, deactivation and transfer of five firearms which had come into the possession of the Royal Ulster Constabulary through William Stobie in 1989. The firearms had been recovered by police from William Stobie at or about a time when there was information that there was a plan to attack police which did not come to fruition. There was also evidence that steps were taken by police to deactivate one of those firearms, namely a Browning pistol, and to partially deactivate a second firearm.

The deactivated Browning was subsequently reactivated by a person or persons unknown following its return to William Stobie in 1989 and was one of two firearms used in fatal shooting incidents at the Devenish Arms public house in December 1991 and at Sean Graham's Bookmakers in February 1992.

24. In relation to the fatal shooting incidents consideration was given as to whether there was sufficient evidence in respect of any police officer to meet the Test for Prosecution for the offence of manslaughter by gross negligence. Whilst it was noted that the firearms had been recovered from William Stobie with a view to obtaining information with regard to terrorist weaponry and that steps had been taken by police to deactivate the Browning before it was returned to Stobie, there was no available evidence to indicate that there was supervision of Stobie's possession of the firearms including the deactivated Browning after they had been returned or that a recovery plan had been put in place. There was no evidence to identify the senior police officer or officers involved in the decision to return the firearms including the deactivated Browning, nor was there evidence to identify the senior officer or officers responsible for exercising supervision in relation to William Stobie's possession of the firearms. The Director concluded that, in the absence of evidence of identity, one of the key elements of the evidential Test for Prosecution was not met in respect of manslaughter by gross negligence.

25. Whilst there was evidence to identify the constable who had returned the deactivated Browning and other firearms to Stobie, the evidence indicated that the decision to do so had not been taken by him but by other more senior officers. Further, the prosecution would be unable to disprove his assertion that he believed that when the weapons were returned in 1989 they were being returned in a manner whereby they would not be of a danger to the public. Equally the prosecution would not be able to rebut a defence based upon an assertion that he believed that senior officers had put in place a recovery plan. In those circumstances, the Director concluded that there was insufficient evidence in respect of that constable to meet the Test for Prosecution in respect of an offence of manslaughter by gross negligence.

26. The Director also considered the position of that constable in relation to possible offences under the Firearms (Northern Ireland) Order 1981 with regard to the five firearms recovered from William Stobie. The Director concluded that the evidence was insufficient to meet the Test for Prosecution for offences contrary to Articles 17 and 23 of the Firearms Order (respectively possession of firearm with intent to endanger life and possession of firearm in suspicious circumstances) as the necessary state of mind for these offences could not be established against that constable.

27. With regard to other police officers and the civilian employee who had been identified as having been in possession of the firearms, there was insufficient evidence to establish that any of them had been directly involved in the transfer of the weapons to William Stobie or had knowledge that they were to be returned to him. The Director concluded that the Test for Prosecution was not met in respect of any offence by those persons contrary to the Firearms (Northern Ireland) Order 1981.

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