PUTTING THE PAST BEHIND US

The coincidence of the Queen’s Speech this Tuesday and the collapse of the prosecution against Soldier A & C in the McCann case has produced a perfect moment for the NIO to advance a new legacy policy.

To actually deal with the past and stop it from becoming our future, a bold and decisive step has long been needed. The Secretary of State’s sparse statement in March 2020 did presage a narrowing of the ludicrously overblown Stormont House Agreement (SHA) arrangements on re-investigation and ‘truth recovery’.

These were not agreed by all parties, while the NIO’s 2018 draft Bill went far beyond SHA by creating a new offence of historic police misconduct. It also promised a police force of the past, the Historical Investigations Unit (HIU), to both investigate and judge past crimes, a travesty of our human rights commitments in ECHR Article 6 and 8.

In the event, what the NIO is now spinning in the London press is a two-winged policy liable to fail from being neither fish nor fowl. However if the HIU and Stormont House are out we have an advance of sorts.

Their tacked-on truth and reconciliation concept is dead in the water following the A & C case. The advice is already out from retired generals to squaddies. They say have nothing to do with anyone knocking your door wanting to talk about truth recovery and reconciliation. The paramilitaries (and it was only those governed by resentment over the ‘peace process’ who spoke) learnt their lesson after being recorded in the Boston Tapes debacle. That ended in police investigations and prosecutions. Nobody can risk believing that a no-prosecution policy today would not be followed by the opposite tomorrow.

The mantra of truth, justice and reconciliation is a false god. Historians alone can bring you toward a synthesis of what constitutes the truth while lack of evidence for prosecutions means justice for some 2,000 families is impossible. Continuing lawfare only worsens community relations.

Is this an amnesty? First we have 75% of an amnesty already in place with early release of prisoners and the OTR letters of comfort etc.

An end to all prosecutions, perhaps in the form of a ‘stay’ has been advocated by many. But next to no prosecutions against paramilitaries will ever be started. Veterans however are increasingly liable to charge due to the PSNI choosing to re-open investigation into all the 250 security force caused deaths.

This occurred after HET was destroyed in the HMIC Otter report. It discovered what was always the case, that Hugh Orde had created an information recovery operation, not based on standard policing procedures. Yet it had been agreed by the ECHR Committee of Ministers. That proves ‘Article 2 compliance’ can be achieved in a dozen different ways if the Committee can be brought round diplomatically.

There is no sign however that our Ambassador at Strasbourg is working to that end on the other 45 member states. Ireland can be excluded as it has the whip hand being (inevitably) one of six countries on ‘the Bureau’ that controls the Committee agenda.

Kenova under Jon Boutcher with its currently limited remit is very willing to take on all 3,500 historic cases with a required budget of billions and a two-decade operation. But why should a murder case in 1970s Belfast be re-opened without credible and compelling new evidence if the same would never happen in Birmingham?

The NIO has long promised equivalent protection from prosecution and to a degree re-investigation for veterans who served in Northern Ireland as those in Iraq and Afghanistan are getting in the Overseas Operations Act. That Act is no amnesty, rather it has put in place extra hurdles before a prosecution can start. They involve time limits, new evidence, the military context (stress and threat), the public interest in finality and the level of previous investigation. It also allows for a current prosecution to be discontinued.

The NIO seems to have either boldly decided to scrap all future prosecutions or been advised that if it only addresses veterans it will be arraigned in the Courts and eventually at Strasbourg for discrimination. Fear of court action has probably been key to a general no-prosecution decision, one that will please no one. It would be best to proceed with veteran equivalence and deal with the inevitable storm from Dublin, Amnesty and Alliance already being experienced.

It is worth noting that the Supreme Court says on its website, “UK courts are not required, however, always to follow the decisions of the Strasbourg Court. Indeed, they can decline to do so, particularly if they consider that that Court has not sufficiently appreciated or accommodated particular aspects of our domestic constitutional position.” I doubt that Brandon Lewis was advised by government lawyers of that way forward.

The key question is will no prosecutions mean no more re-investigation and thus an end to lawfare? Without closing down new inquests, civil suits, private prosecutions, free legal aid, judicial reviews etc, such a policy will do little or nothing to reduce the hurt, damage or cost. All wounds will remain open and festering.

We await the detail in the Queen’s Speech but may get little.

Jeffrey Dudgeon is Convenor of the Malone House Group on Legacy and Lawfare.

6 May 2021