**PUTTING THE PAST BEHIND US**

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News Letter

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The coincidence of the Queen’s Speech on 11 May and the collapse of the prosecution against Soldier A & Soldier 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 NI Secretary of State, Brandon Lewis’s sparse statement in March 2020 did presage a narrowing of the ludicrously overblown Stormont House Agreement arrangements on re-investigation and ‘truth recovery’.

These were not agreed by all parties, while the NIO’s 2018 draft Bill went far beyond Stormont House 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 to judge past crimes, a travesty of our human rights commitments in Articles 6 and 8 of the European Convention on Human Rights.

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.

The NIO’s 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 on the Boston Tapes which became a 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 3,000 families is impossible. Anyway in South Africa it was the barb of possible prosecution that brought people to offer ‘truth’ on the promise of amnesty.

Continuing lawfare only worsens community relations. Nobody will be reconciled by inevitably one-sided victim-focused justice.

Is this proposal an amnesty? First we have 75% of an amnesty already in place with early release of prisoners, the ‘On The Run’ letters of comfort given to the IRA, no inspection for evidence of the decommissioned arms or the bodies of the disappeared.

An end to all prosecutions, perhaps in the form of a ‘stay’ has been advocated by many including former Attorney General John Larkin. 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 investigations into all the 300+ security force-caused deaths. And they were overwhelmingly proper and lawful.

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

There is no sign however that our Ambassador at Strasbourg is succeeding at working to that end on the 46 other member states, many which would be pleased to avoid the Court’s lash. Ireland can however be excluded as it has the whip hand already being one of the six countries on ‘the Bureau’ that controls the Committee agenda.

Operation Kenova under Jon Boutcher with its currently limited remit of five commissions (including Stakeknife and the Glenanne Gang) is very willing to take on all 3,000 historic cases with a required budget of several billion 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 Bedford?

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 local courts and eventually at Strasbourg on a charge of discrimination plus lack of ‘Article 2 compliance’. Fear of such court action has probably been key to the general no-prosecution being notioned, one that will please no one. It would be best to proceed with veteran equivalence and deal with the inevitable and colossal storm of rage from Dublin, Amnesty International (who oppose an amnesty), most funded victims’ groups, the Alliance Party, and Sinn Fein (whose members have had an amnesty). The NIO has few friends when it acts decisively.

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-investigations 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 or the enormous cost. It could be done but the NIO would have to steel itself and get the support of the Stormont Minister of Justice. This is unlikely, so all wounds will remain open and festering.

We await the detail on a possible Bill in the Queen’s Speech although it may not be provided.

There is no holistic solution and never has been, only putting the past behind us.