

# Country Report England and Wales

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## Introduction

Although commonplace in civil law jurisdictions, limitation periods are rare for serious offences in common law jurisdictions other than the United States of America.<sup>1</sup> In England and Wales, the maxim *nullum tempus*

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<sup>1</sup> The USA is an exception that proves the rule. The impact of a statute of limitations is clearly demonstrated in relation to the prosecution of celebrities for historic sexual offences in England and Wales compared to the USA. A number of celebrities have been successfully prosecuted recently in England and Wales, including Rolf Harris and Stuart Hall, but in the USA the majority of allegations of historic sexual offences levelled against Bill Cosby fell outside the proscribed time limit and could not be prosecuted.

*occurrit regi* (time does not run against the Crown) applies, thus the passage of time is generally no bar to prosecution. There is no statute of limitations setting out time limits for all offences. Instead, the common law position applies by default, so that there is only a limitation period for the prosecution of an offence if specifically imposed by statute.

Criminal offences in England and Wales are classified as indictable, summary and either way offences. *Summary* offences (the least serious offences), can only be tried by the Magistrates' Court;<sup>2</sup> *indictable* offences (the most serious) can only be tried by the Crown Court;<sup>3</sup> and *either way* offences can be tried in either court.<sup>4</sup> There is no limitation period for indictable offences, or either way offences unless specified in statute, such statutory limitation periods are very rare and include treason which has a three year limitation period.<sup>5</sup> This lack of a general limitation period for serious offences reflects the public policy that *prosecutions should fail on their merits, rather than on procedural grounds*. The lack of a limitation period is of particular importance in relation to allegations of historic sexual abuse due to the fact that victims are often minors at the time of the offence who are too scared, or ashamed to tell others what is happening to them, or who are disbelieved. However, Operation Yewtree<sup>6</sup> and the #MeToo movement have had a significant impact which together with changing attitudes and the removal of the associated stigma has led to victims being more willing to come forward and a greater willingness to prosecute defendants for historic offences.

In the case of minor offences, summary only offences that must be tried summarily in a Magistrates' Courts, a statutory limitation period applies. For these offences the proceedings must be commenced within 6 months of the commission of the alleged crime.<sup>7</sup>

Thus the general position in England and Wales is that for all but summary offences, there is no limitation period. A defendant may be tried and if found guilty sentenced long after the offence was committed; there is no limitation period in respect of either prosecution, or the execution of the sentence.

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2 Magistrates' Courts Act 1980 section 2.

3 Crime and Disorder Act 1998 section 51.

4 Magistrates' Courts Act 1980 sections 17–27.

5 Section 5 Treason Act 1695.

6 A police investigation of (primarily child) sexual abuse committed by celebrities.

7 Magistrates' Courts Act 1980 section 127(1).

## A. Abstract analysis of the national rules

### First Complex: Prescription in criminal law as a legal concept

#### I. The rationale for limitation periods

Limitation periods are often justified by the procedural rationale that evidence to support a conviction is less likely to be available or to be sufficiently reliable a long time after the commission of the offence, undermining the defendant's right to a fair trial. Oral evidence may present a particular problem. Over time the evidence of a witness of fact may deteriorate as a witness's memory may fade. In the case of physical evidence, it can also deteriorate, although as *Robinson* and *Cahill* point out, DNA testing and other technological advances undermine this rationale by facilitating the provision of reliable physical evidence for historic offences.<sup>8</sup> Although the absence of prescription in England and Wales means that trials may take place many years after the event, deterioration of evidence will be a factor for consideration in determining whether to prosecute the defendant. Prosecutions may only be commenced where the prosecutor is satisfied that there is *sufficient evidence to provide a realistic prospect of conviction* and secondly that a prosecution is required in the public interest.<sup>9</sup> Stale evidence may undermine the case for prosecution under the first test. If the defendant is tried, the reliability of the evidence will fall to be considered by the jury.

The second element of the test for commencing prosecutions requires the prosecutor to be satisfied that a *prosecution is required in the public interest*. Limitation periods may be seen as public policy instruments, but it is suggested that public policy is multifaceted. A commonly used justification for limitation periods is the defendant's 'right to repose'.<sup>10</sup> This argument suggests that individuals should not be exposed to perpetual liability for their actions or omissions, that with the passage of time they should be

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<sup>8</sup> *Robinson/Cahill*, *Law without justice: why criminal law doesn't give people what they deserve*, 2006, OUP, at 58.

<sup>9</sup> *The Code for Crown Prosecutors*, 8th Edition, Oct. 2018, 4 <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf>. The Threshold Test (5) is used in limited circumstances where the Full Code Test is not met but the seriousness or circumstances of the case justify the making of an immediate charging decision and there are substantial grounds for objecting to bail.

<sup>10</sup> See for example *United States v. Toussie*, 397 U.S. 112, 115 (1970).

able to relax safe in the knowledge that they can no longer be prosecuted. A recent suggestion to this effect was made by the then Defence Secretary Gavin Williamson, suggesting that a 10-year time limit should be introduced in relation to the prosecution of soldiers accused of committing crimes during military engagements.<sup>11</sup>

In relation to the public interest in finality, it is argued that defendants should be able to move on from their crimes and to know that they will no longer face prosecution long after the event, although it is difficult to argue that offenders should escape justice merely because of the passage of time. Nevertheless, it can be argued that the potential for rehabilitation and the deterrence value of a successful prosecution become less compelling justifications for punishment after a lengthy period of time, an argument that when coupled with the economic cost of prosecuting historic offences might tip the balance in favour of prescription. Indeed, there is some recognition that limitation periods can be justified in England and Wales, at least in relation to minor offences triable summarily. A six-month limitation period cannot be justified on the basis of protecting the defendant's right to a fair trial, rather other policy considerations come into play: the expense of prosecuting a relatively minor offence may seem disproportionate to the public interest in public order. The individual may have reformed him/herself, or been rehabilitated in the interim period, even if that is not the case she or he can be prosecuted for more recent offences. Moreover, there is an argument that limitation periods encourage prosecutors to commence proceedings in a timely manner and this can be seen to underlie the limitation period applied to summary offences. However, it is important to note that the rule set out in section 127 Magistrates' Courts Act 1980, requiring that an information be laid, or a complaint be made, within six months of the offence being committed does not require that the trial take place within that time period, it only requires that the court be informed of the complaint.

In England and Wales it is clear that public order policy considerations, at least in relation to more serious offences, have been prioritised.<sup>12</sup> Where the prosecutor is satisfied that the evidential test is passed (there is a realistic prospect of conviction based upon the evidence) and the public interest supports a prosecution, it is suggested that it would be inappropriate to bar

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11 <https://www.telegraph.co.uk/news/2019/03/06/theresa-may-admits-concern-prosecutions-troops-ahead-bloody/>.

12 See also Higgins, *Time and the Law: International Perspectives on an Old Problem* (1997) 46 *International & Comparative Law Quarterly* 501, at 514.

a prosecution due only to the passage of time. However, in the case of more minor offences, those triable summarily, there is an acceptance that finality should be prioritised, that it would be disproportionate to prosecute minor offences committed more than six months ago.

## *II. Legal nature of the limitation periods*

In England and Wales limitation periods are imposed by statute, the primary example of this is section 127(1) Magistrates' Court Act 1980 that requires an information to be laid, or a complaint to be made, within six months of the time the offence was committed. Where no statutory limitation period has been introduced, the common law maxim *nullum tempus occurrit regi* applies and the lapse of time will not bar a prosecution. Limitation periods are the province of criminal procedure, rather than the criminal law. Where a limitation period exists in England and Wales, it acts to preclude prosecution after the time limit has expired unless there is some other mechanism in the statute, for example an extended period for a prosecution to be started with the approval of the Director of Public Prosecutions. An example of this can be seen in the Violent Crime Reduction Act 2006, relating to the less serious firearms offences which are classified as summary only offences. Although the usual prosecution time limit of 6 months applies, that time limit is extended in the case of specified offences, applying the limitation period for prosecutions set out in section 51(4) Firearms Act 1968.<sup>13</sup> This means that rather than proceedings being barred after 6 months, summary proceedings for these offences may be instituted at any time within four years after the commission of the offence, if instituted by, or by the direction of, the Director of Public Prosecutions.

## *III. Limitation periods in the light of the Constitution*

There is no written constitution in England and Wales and as a result no constitutionally guaranteed time limit. However, there are safeguards to ensure the efficient and effective prosecution of the case. Whilst in police custody the way the suspect is treated by the police is governed by the Police and Criminal Evidence Act 1984 and once the case comes to court

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13 Section 50(3)(b) Violent Crime Reduction Act 2006.

the Crown Prosecutor is subject to the Criminal Procedure Rules 2015<sup>14</sup> and Code for Crown Prosecutors.<sup>15</sup> The defendant can put forward arguments that evidence should be excluded, that there has been an abuse of process because time limits have not been met, or obligations under the rules have not been complied with and ask for the case to be dismissed.

### *Second Complex: Prosecution limitation period*

#### *I. Unlimited crimes*

In England and Wales there is no limitation period barring the prosecution of *serious offences*. Serious offences are those for which trial will be by indictment only in the Crown Court or for either way offences for which there is a choice of trial either in the magistrate's court or the Crown Court. Whilst a limitation period is common in other jurisdictions, irrespective of the gravity of the offence, the arguments put forward for drawing a line under the possibility of pursuing an alleged offender do not hold sway in England and Wales. The justification for maintaining an open-ended period for commencing criminal proceedings is that for the most serious offences the perpetrator should never be able to consider themselves free from the risk of detection.<sup>16</sup>

#### *II. Limitation period*

##### *1. Parameters for the length of the limitation period*

Section 127(1) Magistrates' Courts Act 1980 specifies a time limit of 6 months for starting criminal proceedings which can only be heard in the magistrates' court (summary offences):

Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.

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14 Criminal Procedure Rules 2015, SI 2015/1490.

15 Supra fn. 9.

16 Samuels, *A matter of time* (2019) *New Law Journal* 12.

The criminal procedure rules mirror the requirements of the Magistrates' Courts Act 1980<sup>17</sup> and pursuant to CrimPR, r 7.2(10) an application for a summons must be made within 6 months from the date of the offence. If the court does not immediately issue proceedings the time limit is not exceeded so long as the statutory limit for making the application is met.

Other limitation periods are imposed as specified by statute, for example section 176(1) Representation of the People Act 1986 requires that proceedings relating to any offence within the Act be commenced within one year of the offence being committed.

## *2. Commencement and calculation of the limitation period*

Any applicable limitation period in England and Wales generally runs from the *commission* of the offence, however in calculating the limitation period, the day on which the offence was committed is not included. With continuing offences, the clock will start to run on *the last day* the offence was committed.<sup>18</sup> Calculation of the limitation period is imposed by the Magistrates' Courts Act 1980 section 127 unless prescribed differently in other legislation. Certain categories of regulatory offences relating to consumer protection such as trading standards and food safety, sometimes considered quasi criminal matters, have a different method of calculation. In these matters the prosecutor has typically three years to commence proceedings from commission of the offence, or between six months to one year from the date when the necessary evidence was discovered by the prosecutor, whichever is the sooner. Examples of this type of offence can be found in sections 7, 8, 14 and 15 of the Food Safety Act 1990.

In the case of inchoate offences, the same limitation period will apply as that applicable to the substantive offence. Therefore, incitement to commit a summary offence will be subject to the six-month limitation period applicable to the substantive summary offence. The Director of Public Prosecution's consent is required in order to institute proceedings in the case of conspiracy to commit a summary offence and if the time-limit for prosecuting the summary offence committed has expired, a charge of conspiracy to commit the offence will be barred, section 4 Criminal Law Act 1977. Section 1 Criminal Attempts Act 1981 excludes summary offences from

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<sup>17</sup> Criminal Procedure Rules 2015, SI 2015/1490, r 7.2(10).

<sup>18</sup> *Hertfordshire County Council v. National Grid Gas plc* 2007 EWHC 2535 (Admin).

the ambit of a criminal attempt. In the case of either way, or indictable offences any time limit applicable to the substantive offence will be applicable to the attempt.

### *III. Consequences of limitation periods*

Limitation periods relate to the commencement of an action and as such should the period expire during the currency of the proceedings there is no bar to continuation; the timeliness of the prosecution is a distinct issue. The important matter in these circumstances is whether the steps to commence proceedings were completed within the applicable limitation period and after this point the limitation period is of no relevance.

However, it may come to light that proceedings commenced within the correct time limit require amendment outside of that limit. The question is whether amendment is possible outside the period within which proceedings must have commenced. In *R v. Scunthorpe Justices, ex p McPhee and Gallagher*<sup>19</sup> Dyson J (as he then was) stated that 'The purpose of the six-month time limit imposed by section 127 of the 1980 Act is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.'<sup>20</sup> Nevertheless, he held that where an information has been laid within the six-month period, it can be amended after that period expires even to allege a different offence, or different offences, under the proviso that '(i) the different offence or offences allege the 'same misdoing' as the original offence; and (ii) the amendment can be made in the interests of justice.'<sup>21</sup>

It may be that whilst the replacement offence being issued outside the limitation period is based on the same facts as the offence issued within time it is not in the interests of justice to proceed. If there is a failure to comply with procedural requirements set out in the criminal procedure rules that may result in refusal of permission to proceed even when the new offence arises out of the same facts as the original offence.<sup>22</sup>

In cases where a limitation period operates and has expired, barring prosecution, the time-barred allegations may be relevant to a subsequent prosecution. The Criminal Justice Act 2003 sets out the circumstances in

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19 [1998] EWHC 228 (Admin), (1998) 162 JP 635.

20 At 639F.

21 *Ibid.*

22 *Williams v. Director of Public Prosecutions* [2009] EWHC 2354 (Admin).

which previous matters may be admitted in current proceedings. Section 98 CJA clarifies that evidence of a person's 'bad character' is 'evidence of, or of a disposition towards, misconduct on his part.' Section 112(1) CJA defines misconduct as 'the commission of an offence or other reprehensible behaviour'. Thus, this definition is not limited to previous convictions, it can include matters that have not been prosecuted. As such time-barred allegations may be drawn upon in future prosecutions in the same way as previous acquittals and allegations of misconduct.<sup>23</sup>

#### *IV. The extent of limitation periods*

The Proceeds of Crime Act 2002 sets out the procedure to confiscate assets associated with the benefit gained from criminal conduct. Section 28 Proceeds of Crime Act 2002 imposes a time limit of 12 years from the date on which the Director's cause of action accrued for a recovery order in respect of any recoverable property.

#### *Third Complex: Enforcement limitation period*

In England and Wales there is no limitation period for the enforcement of a penalty.

Once convicted sentences remain enforceable until served. Should a convicted criminal abscond, no matter how long justice is evaded, the sentence will be waiting to be completed upon return. The notorious 'Great Train Robber' Ronnie Biggs could not hope for his sentence to elapse and his only prospect of a reduction was through the parole procedure. Mr Biggs was sentenced to 30 years imprisonment for his part in the robbery, but escaped from prison. He lived in Brazil for many years, in 1997 the Brazilian Supreme Court refused the UK's request that he be extradited on the basis of Brazil's twenty-year prescription period. 36 years after escaping from prison, he voluntarily returned to the UK in 2001 and was met at the airport by police who escorted him back to prison.<sup>24</sup> Refused parole in

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23 *R v. Z (Prior acquittal)* [2000] UKHL 68.

24 Sadoff, *Bringing International Fugitives to Justice: Extradition and its Alternatives*, 2016, Cambridge University Press, 114, 215.

2009, he was granted compassionate release on health grounds a few months later.<sup>25</sup>

## *B. Problems and development trends*

### *I. The Prosecution of Exceptionally Long Past Crimes – The Guidance for Crown Prosecutors*

The more serious indictable only offences (which must be tried at the more senior Crown Court) and either way offences (which can be tried in either the Magistrates' or Crown Court) generally do not have limitation periods for issue of proceedings attached to them. As there is no time limit for the prosecution of these offences this can theoretically result in exceptionally long past crimes which are still capable of prosecution at some unspecified date in the future. The sexual abuse scandal that came to light after the death of Jimmy Savile (a popular entertainer) and the #MeToo movement have led to prosecutions of high profile offenders, particularly in the world of media and entertainment, many years after the offences were committed.<sup>26</sup> However, more commonplace low-profile offenders have also been pursued for historic offences, giving rise to *guidance for Crown prosecutors* in considering such matters. The guidance identifies a number of factors that should be considered in assessing whether it will be in the public interest to prosecute a non-recent case where a nominal penalty is likely, including the gravity of the offence; whether a prosecution is required to uphold public confidence in the administration of justice; the offender's culpability in hiding the offence so that it was not taken into consideration in a previous sentence; and whether a prosecution would deliver justice to the victim, in view of the likely outcome.<sup>27</sup>

In cases where the crime is investigated and a suspect is arrested but the police and prosecution take the view that there is insufficient evidence to charge at that time, the suspect will be released. He could however be re-arrested at a much later date if, for example, a new witness emerges, additional real evidence is discovered (such as a weapon) or there are ad-

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25 'Ronnie Biggs to be released from prison' <https://www.theguardian.com/uk/2009/aug/06/ronnie-biggs-release>.

26 *Rothwell, Child Abuse: Out of the Shadows* (2 July 2018) *Law Society Gazette* 20.

27 <https://www.cps.gov.uk/legal-guidance/non-recent-cases-and-nominal-penalties> (22.03.19).

vances in forensic evidence techniques which uncover new evidence not available at an earlier date. Similarly, a case might be investigated where there is no evidence pointing to a particular individual as a suspect, but new evidence or advances in forensic techniques might help identify a suspect at a later date.

Where a suspect is innocent, the fact that they do not know whether or when they might be rearrested and charged with a crime they were investigated for many years before must subject them to uncertainty, stress and a lack of finality that must seem intolerable and unjust (just as it does for victims and their families in cases where a prosecution is delayed); this must be particularly so if evidence favourable to the defence has since deteriorated or has become unavailable (where for example a defence witness has forgotten details of an incident or has died, or moved away and cannot be traced). Some prosecution evidence, especially evidence of eye witnesses may also be adversely affected by the passage of time in a similar way. Factors affecting both the prosecution and the defence should be considered before a prosecution in these circumstances is allowed to proceed.

In the case of historic offences, there may be concerns about stale evidence. However, there are a number of safeguards to ensure that, despite the absence of a limitation period within which most criminal proceedings must be issued, any trial that takes place is fair.

Key safeguards relating to evidence that can be brought before the court are contained in sections 76, 78 Police and Criminal Evidence Act 1984 (PACE). According to section 76 PACE if a confession from an accused person has been obtained by oppression or as a result of something said or done likely to render it unreliable the court *must* exclude it and the confession will not be put before the jury. Section 78 PACE applies to all forms of evidence (for example DNA and forensic evidence, hearsay, ID evidence, evidence of witnesses and confessions), enabling the court to refuse to allow prosecution evidence to be admitted if, in all the circumstances, it would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

Moreover, at the end of the prosecution case, before the defence case starts, the defence can make a submission to the court of 'no case to answer' and to ask for the case to be dismissed. In so doing the defence allege that the prosecution has not satisfied the evidential burden in presenting sufficient evidence to the court to justify a finding of guilt. A submission of no case to answer will usually be made by the defence if the prosecution has failed to put forward evidence to prove an essential element of the alleged offence (e.g. that in a theft matter the property belonged to someone else) or that the prosecution evidence has been so discredited by

cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.<sup>28</sup>

There is also the possibility that the defence might want to make an application to stay, or dismiss a case for abuse of the process of the court. These applications are often based on misconduct by the police or prosecuting authorities that is so grave as to threaten the rule of law. In such cases the court will not merely exclude evidence obtained as a result of the misconduct (for example under section 78 PACE) but will stay the proceedings against the defendant for an abuse of process. The proceedings against the defendant will not be permitted to go any further.<sup>29</sup>

## *II. Development trends*

There is no proposal to introduce a general limitation period for criminal offences. However, recently it has been suggested that a ten-year time limit should be introduced in relation to the prosecution of soldiers accused of committing crimes during military engagements. This suggestion arose from a report from the House of Commons Defence Committee following investigations into fatalities in Northern Ireland involving British military personnel.<sup>30</sup> The investigation concerned the military campaign in Northern Ireland between August 1969 and July 2007 known as 'Operation Banner'. Operation Banner resulted in the deaths of 1,441 serving personnel, 722 of whom were killed in paramilitary attacks. Over the same period, British Soldiers were responsible for the deaths of around 300 people, half of whom were civilians. Some former service personnel had been through repeated investigations and enquiries before finally being charged 30, 40 or more years after the alleged crimes occurred. Some of these servicemen are now of advanced age and in ill health. The committee concluded:

'The enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces. This should be coupled with the continuation and development of a truth recovery mechanism which would provide the best possible prospect of bereaved families finding out

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28 Blackstone's Criminal Practice D14.32.

29 Blackstone's Criminal Practice Appendix 10.

30 House of Commons Defence Committee Report *Investigations into fatalities in Northern Ireland involving British military personnel*, HC 1064, 26<sup>th</sup> April 2017: <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1064/1064.pdf>.

the facts, once no-one needed to fear being prosecuted. [...] We believe that to subject former Service personnel to legal pursuit under the current arrangements is wholly oppressive and a denial of natural justice. It can be ended only by a statute of limitations. [...]’<sup>31</sup>

At the time of writing no Bill has been put forward to give effect this recommendation.

### *C. Practice relevant case study*

- 10.01.2004 A rapes B, a 12 year old girl.
- 16.11.2016 A interviewed by police officers.
- 10.03.2017 A arrested by police officers, but not charged.
- 02.08.2017 A re-arrested and charged with the offence of rape of a child under 13 contrary to section 5 Sexual Offences Act 2003
- 07.08.2017 A charged with indictable only offence and appears before the magistrates’ court for the first time. A is sent ‘forthwith’ to the Crown Court.
- 28.08.2017 A has first appearance at Crown Court. Within 50 days there is service of the prosecution evidence.
- 06.02.2018 A is tried and convicted of raping a child under 13 and sentenced to life imprisonment.
- 14.05.2020 A escapes from prison and goes on the run.
- 24.12.2041 A returns to the UK to visit his family, is apprehended and returned to prison.

The offence of raping a child under the age of 13, contrary to section 5 Sexual Offences Act 2003 is an indictable offence. No limitation period is set out in the Act and therefore prosecutions are not time barred and A can be prosecuted thirteen years after the offence. He is sent to prison, but whilst there escapes and goes on the run for 21 years. A returns to the UK to visit his family and is apprehended. There is no time limit for the enforcement of penalties and therefore he is returned to prison to serve the remainder of his sentence. None of his time spent on the run will count towards time served.

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31 *Ibid* [52, 55].

