Statutes of Limitation in the United Kingdom

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A. Introduction

Within the United Kingdom there are three distinct legal jurisdictions, each with its own legal system, history and origins: England and Wales, Scotland and Northern Ireland. One feature that is common to all them, however is that, unlike most other European jurisdictions, generally speaking, there are no statutes of limitation for any criminal offence, except for minor or summary offences tried in the lower courts where criminal proceedings must be brought within six months from the time the offence was committed.[1] The Latin phrase invoked for the absence of statute limitations is *nullum tempus occurrit regi* (time does not run against the crown). Although it is sometimes stated that the UK is unique in not having a general limitation period for criminal offences,[2] a distinction has traditionally been recognised between, on the one hand, the Romano-Germanic family of law, which inherited the institution of limitation in criminal cases from Roman law, and, on the other, the Common Law family which has generally excluded it in principle.[3] A number of common law jurisdictions including Canada, Ireland, New Zealand and Australia do not generally have statutes of limitation in criminal cases. The US is an outlier in this respect as there is a general federal statute of limitations for felonies and many states have statutes of limitations.[4]

This difference of approach between common law and civil law jurisdictions would seem to be attributable to the fact that traditionally prosecutors and judges in common law systems have much greater discretion than their civil law counterparts to refuse to prosecute or to dismiss cases even where there is evidence that an offence has been committed. When it comes to prosecutions, the Council of Europe Recommendation on the role of public prosecution draws a distinction between 'mandatory' and 'discretionary' systems of prosecution.[5] The three UK prosecution systems have been firmly associated with the

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[1] Magistrates' Courts Act 1980 s 127; Magistrates' Courts (NI) Order 1981 art 18; Criminal Procedure (Scotland) Act 1995 s 136(2).

[2] See https://en.wikipedia.org/wiki/Limitation_periods_in_the_United_Kingdom

[3] Directorate-General for Library, Research and Documentation, *Limitation Rules in Criminal Matters* (Curia, 2017).

[4] See 18 USC §3282: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed."

[5] Council of Europe Recommendation REC of the Committee of Ministers to member states on the role of public prosecution in the criminal justice (2000) Explanatory Memorandum, 12.

discretionary principle.[6] The locus classicus for this principle is to be found in the statement of the Attorney General, Lord Shawcross, in 1951 that "it has never been the rule in this country – I hope it never will be – that suspected criminal offenders must automatically be the subject of prosecution".[7]

There is arguably a greater need for statutes of limitation to protect defendants in states with a mandatory system of prosecution than in states with a discretionary system. The European Court of Human Rights (ECtHR) has proclaimed that limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.[8] The UK is a signatory of the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 gives effect within the UK to the rights and freedoms guaranteed under the ECHR. But it is noteworthy that although the ECtHR has said that the purpose of limitation periods is to protect defendants, defendants have no right under the ECHR not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed and the ECtHR has not considered limitation periods to be a necessary element of a fair trial. Under the discretionary system of prosecution in the UK, prosecutors who as public authorities are obliged under the Human Rights Act 1998 to act compatibly with the ECHR, can comply with their obligation to act in accordance with the right to a fair trial simply by refusing to prosecute cases which because of the passage of time may undermine the accused's right to a fair trial. Even when cases have been prosecuted, we shall see that judges in the UK have the power to dismiss prosecutions which may lead to unfairness.

In this article we look, first of all, in Part B at the legal position in each of the three UK jurisdictions and how each has been able to protect defendants without the need for statutes of limitation. Although there has been a general absence of statutes of limitation for all non-summary cases, in Parts C, D, and E we consider three kinds of cases where statutes of limitations or time limits have been considered because of special circumstances that have been said to apply in these cases and consider alternative approaches towards dealing with them. Part C considers historic sex abuse cases; Part D considers cases where crimes are alleged to have been committed by service personnel; and Part E considers youth cases. Although we shall see that these cases can pose challenges for investigating and prosecuting authorities and there are arguments for pursuing alternative approaches to prosecution, we conclude in Part F that it is questionable whether they justify the use of statutes of limitation.

B. England and Wales, Northern Ireland and Scotland

[6] B Hancock and J Jackson, *Standards for Prosecutors: An Analysis of the UK National Prosecuting Agencies* (Wolf Legal Publishers, 2006) 31.

[7] HC Debs vol 483 col 681, 29 January 1951. Although this was the statement of the Attorney General for England and Wales, the statement holds equally true for Scotland and Northern Ireland. See Hancock and Jackson ibid.

[8] *Coëme and Others v Belgium*, 22 June 2000, para 146. See also *Stubbings v UK*, 22 June 1996.

Although the ECHR does not require member states to institute limitation periods in criminal cases, Article 6(1) provides that everyone charged with a criminal offence is entitled to a "fair and public hearing within a reasonable time". The UK domestic courts have accepted that the right to be brought to trial within a reasonable time is an independent right and there is no need to show that as a consequence of delay a defendant's trial was prejudiced.[9] But different approaches have been adopted as to what the remedy should be for breach of such a right. In a landmark decision in 2003 the Judicial Committee of the House of Lords, now the UK Supreme Court, whose decisions are binding in all criminal matters on the courts in England and Wales and Northern Ireland, held that breach of the reasonable time requirement does not entail that the criminal proceedings should be stopped and refused to recognise that defendants have a right not to be tried after an undue delay.[10] In the Court's view, it would not be appropriate to stop the proceedings unless it was no longer possible to have a fair trial or it would otherwise be unfair to try the defendant. By contrast, shortly before this decision the Judicial Committee of the Privy Council whose decisions on devolution matters were binding on the Scottish courts until the Supreme Court was established in 2008, held that in continuing to prosecute charges in respect of which there has been unreasonable delay the Lord Advocate, who is Scotland's top prosecutor, would be acting incompatibly with the defenders' right to the determination of a criminal charge within a reasonable time under Article 6 of the ECHR.[11]

i England and Wales and Northern Ireland

The House of Lords' decision that there is no right per se not to be tried after there has been an undue delay is in line with the general approach in England and Wales and Northern Ireland not to impose time limits on bringing criminal cases to trial other than for summary offences. In these jurisdictions, summary offences are tried in magistrates' courts and more serious indictable offences are tried in the Crown Court by a judge and jury. There has, however, been a move to impose time limits on when trials should begin from the period when defendants first appeared in court for offences. In 1985 provision was made in England and Wales for overall time limits in relation to this period and for custody time limits prescribing the maximum period for which a defendant may be kept in custody awaiting trial, although in the event only custody limits were introduced.[12] These limits may only be extended where the prosecution has acted with all due diligence and expedition and there is good and sufficient cause for doing so. In the event only custody time limits were introduced in England and Wales, although as we discuss later statutory time limits for young persons were piloted for a period from 1 November 1999 in England and Wales. If a custody time limit expires, a defendant is entitled to be released on bail but the case will still progress to trial. The custody time limit for defendants awaiting trial in the Crown Court is ordinarily 182 days, although this period was been temporarily increased to 238 days recently as a result of the coronavirus pandemic.[13] Provision was made in 2003 for the introduction of statutory time limits in

[9] *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465.
[10] *Attorney-General's Reference (No 2 of 2001)* [2003] UKHL 68.
[11] *HM Advocate v R* [2002] UKPC D3; [2002] 2 WLR 317.
[12] Prosecution of Offences Act 1985 s 22.
[13] See Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020.

Northern Ireland.[14] But they have never been implemented, despite calls in various reports for them to be introduced.[15] .

Custody time limits only relate, of course, to the period from first court appearance and the reasonable time requirement in Article 6 of the ECHR only relates to the period from charge to trial. This leaves a large gap almost totally unregulated by legislation from the period an offence was committed up to charge which is filled in other jurisdictions by limitation statutes. Magna Carta guarantees that "to no one will we deny or defer, right or justice" and it has been argued that this protects defendants from facing trial when it takes place after a time which is longer than that normally required. But the English Court of Appeal has construed deferment or delay to mean "at its lowest, *wrongful* deferment or delay, such as is not justified by the circumstances of the case".[16] The courts recognise that they have an inherent jurisdiction to regulate their own proceedings and to prevent anything that may be considered an abuse of process.[17] They have accepted that an abuse of process may be based upon delay but in 1990 the Court of Appeal expressed concern about the growing number of applications to stay proceedings on the grounds of delay and held that no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. The Court emphasised the exceptional nature of the jurisdiction to stay proceedings and referred to other steps that could be taken to mitigate unfairness, short of a stay. These included the power of the judge to exclude evidence which may be prejudicial to the accused, the ability of the trial process to ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration and the powers of the judge to give appropriate directions to the jury before they consider their verdict. The court hoped that its ruling would result in a significant reduction in the number of applications to stay proceedings.

It appears that applications made to stop proceedings on grounds of delay are indeed rarely successful in England and Wales today.[18] Since 1995 the Court of Appeal was given the power to hear interlocutory appeals from the prosecution so that if judges exercise their discretion to grant a stay unreasonably, the Court may overturn such rulings.[19] There has also been little policy debate on whether there should be general statutes of limitations or time limits for bringing prosecutions from the date of an offence, although as we shall see the issue has been raised in two particular types of cases: historic sex abuse cases and cases where crimes are alleged to have been committed by service personnel.

(ii) Scotland

There are two types of criminal procedure in Scotland, summary and solemn. In summary procedure, the trial takes place in the Justice of the Peace Court before lay justices or the Sheriff Court before a judge without a jury. In solemn procedure, the trial takes place in the

[14] See Criminal Justice (NI) Order 2003.
[15] See eg, Criminal Justice Inspection, *Avoidable Delay: A Progress Report* (2012).
[16] *Attorney General's Reference (no 1 of 1990)* [1992] QB 630, 640 (emphasis added).
[17] *Connelly v Director of Public Prosecutions* [1964] AC 1254.
[18] See in relation to delayed prosecutions in child sex abuse cases, P Lewis and A Mullis, "'Delayed Criminal Prosecutions for Childhood Sexual Abuse: Ensuring a Fair Trial"' (1999) 115 *Law Quarterly Review* 265.
[19] See Criminal Appeal Act 1995.

Sheriff Court before a judge and jury or in the High Court of Justiciary before a judge and jury. Traditionally, the Scottish courts have been much stricter than in England and Wales and Northern Ireland in applying time limits relating to the progress of cases through the courts. In Scotland time limits apply to all solemn cases that are prosecuted in Scotland and there can be serious consequences if these time limits are not met.[20] Time limits in solemn proceedings are different for defendants remanded in custody and those who are released on bail. If they are remanded in custody a preliminary hearing (High Court) or First Diet (Sheriff Court) must be held within 110 days of first court appearance and the trial must be held within 140 days of the second court appearance which is when the accused is fully committed for trial within eight days of the first appearance.[21] The defendant can be released from custody and given bail if these time limits are not met and the trial will still proceed. But if defendants are given bail the preliminary hearing must be held within 11 months of the date of first appearance and the trial must commence within 12 months. If these latter time limits are not met then proceedings must be stopped and the defendant cannot be prosecuted for those charges unless an extension can be applied for.

Scotland has followed a similar path to England and Wales and Northern Ireland in having no general statute of limitation from the date of the commission of an offence apart from in summary statutory offences. For these there is a time bar of six months.[22] This means that cases cannot commence beyond six months from the alleged commission of the offence or in the case of continuous offences, from the last date of alleged commission. In 2015 it was reported that nearly 4,000 charges were reported to the Crown Office and Procurators Fiscal Service (COPFS) over the previous six years that were out with the statutory time limits, leaving prosecutors with no option but to scrap the proceedings.[23]

Apart from summary offences, the primary consideration in considering whether proceedings can take place when there have been delays since the commission of an alleged offence is, as in England and Wales and Northern Ireland, whether there can be a fair trial. Proceedings can therefore commence many years after the original offence took place as we shall see in the case of historical sexual abuse cases. There are, however, potentially many difficulties in bringing prosecutions after long periods of time have elapsed and these are exacerbated in Scotland by the requirement in Scots law for corroboration when considering the evidence. As Lord Carloway has described it, "there must first be at least one source of evidence (i.e. the testimony of one witness) that points to the guilt of the accused as the perpetrator of the crime. That evidence may be direct or circumstantial. Secondly each 'essential' or 'crucial'

[20] Criminal Procedure (Scotland) Act 1995. See Scottish Government, *Investigation and prosecution of sexual crime: follow-up review* (2017) for comment on High Court Time Limits.

[21] Criminal Procedure Act 1995 s 65. Extensions can be granted under s 65(3) of the Act as amended by the Criminal Justice Scotland Act 2016. As a temporary measure the Coronavirus (Scotland) Act 2020, Schedule 4, PART 4 s10 introduced a 6 month general limit for solemn cases above the requirement of 140-day limit on bringing the accused to trial. Whilst the court can grant an extension if justified the discussions around the Bill suggested that the impact of the pandemic would be to exert pressure on the courts and that a general time limit applied would be preferred notwithstanding the concerns raised about the impact on the human rights of the defendant see https://www.legislation.gov.uk/asp/2020/7/schedule/4

[22] See Criminal Procedure (Scotland) Act 1995 s136(2).

[23] Scottish Legal News April 7 2015 at https://www.scottishlegal.com/article/thousands-of-alleged-offences-reported-too-late-for-prosecution

fact requiring to be proved must be corroborated by other direct circumstantial evidence (i.e. the testimony of at least one other witness)".[24]

C. Historic sex offence cases

(i) England and Wales

One exception to the general rule that there are no limitation periods for non-summary criminal offences in England and Wales is that there was a time limit for commencing prosecutions of one year from the alleged commission of the offence of unlawful sexual intercourse with girls aged 13-15 contrary to section 6 of the Sexual Offences Act 1956. This offence was replaced under the Sexual Offences Act 2003 with a new offence of sexual activity with a child for which there is no limitation period. But allegations of under-age sexual intercourse committed from 1956 up until 30 April 2004 that are still prosecuted under section 6 of the 1956 Act would appear to be still subject to the time limit of one year, although it has been argued that the time limit was removed after the 2003 Act came into force on the basis of the common law principle of statutory interpretation, that statutes which make alterations to procedure as opposed to substantive law – here the provision in the 2003 Act removing the time limits - can operate retrospectively.[25]

It is difficult to find arguments today to justify why the particular sexual offence of having unlawful sexual intercourse with underage teenage girls should be singled out for a time limitation. Had the time limit been restricted to defendants who were young at the time of the offence, there might have been an argument which we shall later consider that young persons should not be stigmatised long after the event for acts committed when they were themselves still at an immature age. There was in fact a substantive 'young man's defence' for the offence of unlawful sexual intercourse with a girl under the age of sixteen, if the defendant was under 24 years of age at the time of the commission of the offence, had not previously been charged with a like offence, and he believed her to be of the age of sixteen or over and had reasonable cause for the belief.[26] But the limitation period for the offence applied to all defendants including older men who groomed young girls, and threatened or seduced them into silence for long periods of time.

It has been suggested that much of the explanation for the time limit lies in "a toxic mixture of misogyny, prejudice and ignorance".[27] The report which led to the enactment of a complete overhaul of sexual offences under the Sexual Offences Act 2003 referred to the limitation being justified as a protection against blackmail.[28] No appreciation was given to the fact that the very wrong of underage sexual intercourse is that the underage girl may be unable to appreciate for a long time that she is being exploited; and that she may be afraid or too immature to address the fact of her exploitation until a long time afterwards.[29] The

[24] Carloway Review, *Report and Recommendations* (2011) para 7.2.6.
[25] See J Rogers, "The Time Limit on Prosecutions for Underage Sexual Intercourse in the Sexual Offences Act 1956: A Continuing Problem" in J Child and A Duff (eds.) *Criminal Law Reform Now: Proposals & Critique* (2018) Hart Publishing.
[26] Sexual Offences Act 1956 s 6(3).
[27] Rogers (n 25).
[28] Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (Home Office, July 2000) para 3.6.6.
[29] Rogers (n 25).

discriminatory aspect of the limit time was underlined by the fact that there was no equivalent time limit for historic sexual offences against young boys. There was a one-year time limit for buggery but a specific exception was made for an "offence by a man with a boy under the age of sixteen", which remained subject to no time limit.[30]

The report that led to the Sexual Offences Act 2003 concluded that time limits were not justified for any sexual offences and recommended that no time limit be applied to the proposed new offence of adult sexual abuse of a child. The abolition of time limits under the Act did not, however, entirely put an end to an argument that there should be a limitation period for historic sexual offences. Shortly before the Act, an independent report was published into investigations of past abuse in children's homes in the light of concern about the fact that an over-enthusiastic pursuit of such allegations may have led to miscarriages of justice.[31] The report considered that the passage time since alleged offences of child abuse created enormous evidential difficulties. Such allegations were often short on detail and the prosecution evidence was mostly testimonial with little medical or forensic evidence to go on. Memories had generally faded and crucial social services' or care home records may have been destroyed.[32] The report concluded that the principal advantage of imposing a time limit in such cases is that it would ensure that defendants did not face prosecution on the basis of fabricated or exaggerated allegations in circumstances where their ability to disprove them was undermined.[33] But the report went on to conclude that the principal disadvantage is that it would bar prosecutions after a number of years regardless of the strength of the evidence and it took note of the fact that significant numbers of complainants are aged 30-40 before they report experiences of childhood abuse.[34] In the end the report declined to recommend a statutory limitation period but in order to safeguard against abuse of process it made a recommendation which was not implemented that the prosecution of cases relating to childhood abuse which is alleged to have taken place 10 years or more since the date of the offence should only proceed with the court's permission. This would in effect have reversed the burden so that the prosecution would have to prove that the proceedings were not an abuse of process rather than on the defendant to prove that they were.

(ii) Alternative approaches

There has been little debate in recent years specifically on time limits for historic sex offences. But there has been considerable debate on how such cases should be dealt with as allegations of such offences have increased, some involving high profile celebrities and politicians and others revealing shocking incidents of institutional abuse. The considerable complexities in prosecuting such offences have raised a number of concerns. On the one hand, concerns about miscarriages of justice arising from allegations of historic child abuse have not disappeared. There has been concern that certain high-profile politicians and celebrities have been investigated for allegations of crimes of sexual abuse that turned out to be baseless.[35] These cases have focused on the need to improve the police investigation of child abuse

[30] Sexual Offences Act 1967 s 7.

[31] Home Affairs Committee, *The Conduct of Investigations into past cases of Abuse in Children's Homes* (Fourth Report, 2001/2).

[32] Ibid para 75.

[33] Ibid para 85.

[34] Ibid paras 87-88.

[35] See V Dodd, "Leon Brittan's widow intensifies attack on Met over false sex abuse claim", *Guardian* 10 February 2021.

allegations rather than on the need for any limitation period.[36] On the other hand, there has been a concern that the criminal justice system is ill-equipped to prosecute such cases successfully. There have been successful prosecutions of priests and others for cases of historical institutional abuse.[37] But there have also been a number of unsuccessful prosecutions and successful not guilty pleas which have led to reviews of how such cases were investigated and prosecuted.

As noted above, in Scotland the evidential challenges for the prosecution have been exacerbated by the requirement of corroboration. It can be particularly difficult in historical cases to obtain two separate sources of evidence for the case to go to trial. A recent report from the Lord Justice Clerk's Review Group has suggested that a Specialist non-jury Court be put in place to consider sexual offence cases due to these complexities, although this would not deal with the corroboration concern and raises concerns of its own about the legitimacy of holding trials without a jury in these types of cases.[38] There have also been concerns about the way in which the court process deters survivors from coming forward to be a witness. The concerns were highlighted recently in the Independent Inquiry into Child Sexual Abuse (IICSA, England and Wales) and the Scottish Child Abuse Inquiry (SCAI, Scotland). The IICSA reported that children and young people are "often accused of lying" by the police when disclosing that they have been sexually abused and, worryingly, that their privacy and confidentiality were sometimes not well maintained which had led to retaliation by those accused.[39] Even when perpetrators are convicted, there have been concerns that the sentences imposed do not reflect the harm caused to survivors.

The difficulties in prosecuting historic sex offences have led to a focus on additional ways of responding to these cases and of providing some further recognition and acknowledgement for survivors. In Scotland The Time To Be Heard Forum (TTBHF) was set up in 2010 as a pilot to provide an opportunity for survivors who were abused in care as children, to come forward and talk about what happened to them.[40] The pilot focused on adult survivors of in-care historical abuse and focused on one institution - former residents of Quarriers.[41] Ninety-eight survivors took part in the pilot. The purpose of the TTBHF "was to test the appropriateness and effectiveness of a confidential forum in giving former residents of residential schools and children's homes the opportunity to recount their experiences in care, especially abusive

[36] See R Henrique, *The Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence* (2019).

[37] Examples can be seen in both England, Wales, Northern Ireland and Scotland. In 1998 Norman Bulloch was sentenced to 8 years for sexual assault of two boys at St Joseph's in Dumfries between 1972 and 1976. More recent cases include Fr John Farrell and Paul Kelly, convicted in 2016 of physical and sexual abuse of boys between 1979 and 1983, Peter Toner, a teacher at St Columba's was convicted in 2019 of sexual and physical abuse of pupils between 1980 and 1982 – over 100 charges involving 35 boys and in June 2020 Fr. Neil McGarrity was convicted of numerous offences and given a community-based sentence.

[38] Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases* (2021) Final Report from the Lord Justice Clerk's Review Group.

[39] IICSA, *Engagement with Children and Young People* (2021).

[40] T Shaw, *Time to be heard: A pilot forum, An Independent Report* (2011) quoted in J Johnstone and I McDonough, "Restorative 'Justice or 'Approaches' and its Potential in Cases of Historical Abuse" (2017) 5 *Scottish Justice Matters* 15.

[41] A Magnusson, *The Quarriers Story* (Birlinn Press, 2016), details at http://www.quarriers.org.uk/en/HeritageAndEducation/History.aspx

experiences, to an independent and non-judgemental panel."[42] Although the Scottish Human Rights Commission developed a Human Rights Framework recommending how the TTBHF should proceed,[43] survivors groups raised concerns about the independence of such a group, what protections or safeguards were in place as well as ethical considerations.

In addition to the Forum, Sacro, a Scottish community justice organisation, has developed a restorative approach in which survivors were able to meet with the Chief Executive of the institution involved. Survivors had been expressing a wish to do that but a concern as to what that approach should look like led to a consultation and pilot study. A process was developed and a small number of those survivors took part in a restorative approach.[44] This has led to other Inquiries or Commissions considering this approach and Bolitho and Freeman undertook work as part of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse to understand how restorative approaches had been applied in cases of sexual abuse and historical sexual abuse.[45] One of the concerns is that the survivor would not be meeting with the perpetrator but rather a representative of that institution. In some cases the perpetrator may have passed away or not admitted responsibility for what had happened. That acknowledgement and accepting responsibility is crucial to survivors when thinking about the appropriateness of the process:

> Survivors will want a proper apology and acceptance of responsibility is a key part. Institutions talk of the insurance companies restricting their ability to say sorry but recognise that there are a number of people who want an extra acceptance of responsibility. Setting it up on a more formal statutory basis might provide more protection. There are well worn formulas regarding confidentiality and the limits of it – but the purpose would be to establish a confidential space in which you can explain experiences and can have a dialogue based on mutual respect … but that comes with a caveat that they will be required to report it if anything is revealed that leads them to believe that serious mistreatment is occurring. To be effective it needs to be as open as possible … If you are looking at a process established by the state to have a forum where individuals are recounting experiences of serious mistreatment then it is a blurry area as to what degree of confidentiality you can maintain..[46]

Facilitators involved in the process recognised that survivors may also be involved in related criminal and civil proceedings for which the restorative process cannot be a substitute.[47]

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[42] Shaw (n 40).
[43] Scottish Human Rights Commission (SHRC), *A human rights framework for the design and implementation of the proposed "Acknowledgement and Accountability Forum"* (2010) and SHRC *InterAction on Historic Abuse of Children in Care, Action Plan on Justice for Victims of Historic Abuse of Children in Care* (2013).
[44] Sacro, *Time To Be Heard – Final Report of Pilot* (2011).
[45] Bolitho J and Freeman K, *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms* (2016) Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.
[46] J Johnstone and D Brookes, *Potential for and Development of an RJ Toolkit for survivors of historical abuse*. (Scottish Government, 2011) 38. See also Sacro (n 44).
[47] J Johnstone and McDonough, "Restorative 'Justice' or 'Approaches' and its potential in cases of historic abuse" (2017) SJM (Special Issue), April 2017.

When deciding on the appropriateness of a referral for these cases to a restorative approach there might be a need to take this into consideration. However, the outcomes that survivors were looking for in respect of the restorative approach were varied ranging from an apology and acknowledgement to some form of symbolic gesture to recognise what had happened and to ensure it did not happen again and not necessarily financial compensation. In terms of outcome the restorative approach needs to be able to adapt to the individual survivor and provide the time needed for that to be able to happen and not compromise any other proceedings.

There is potential then for restorative approaches to improve outcomes for survivors provided the cases are handled sensitively and that time, resources and commitment are provided to encourage input by all key stakeholders, including survivors.[48] In Scotland a recent Act encourages such approaches by providing that any apologies cannot be used in civil proceedings to the prejudice of the person by or on behalf of whom the apology was made.[49] However, an apology does not include statements of fact or admissions of fault.[50] .It is important that restorative approaches do not conflict with any civil or criminal proceedings that may be taking place or are in contemplation and do not prejudice the rights of survivors to seek compensation. Any civil claim usually has to be brought within three years of the injury occurring or three years from the claimant's sixteenth birthday. The Limitation (Childhood Abuse) (Scotland) Act 2017 amended section 17 of the Prescription and Limitation (Scotland) Act 1973 and took away the time bar for childhood abuse claims.[51] This applies to survivors who were abused under the age of 18. However, it does not apply to cases which took place before 26 September 1964. There is still discretion for claims to be halted where the court is satisfied that the defender would not obtain a fair hearing and where the court is also satisfied that the defender would be substantially prejudiced should the case proceed. [52]

D. Offences committed by service personnel and veterans

Another issue that has sparked intense debate in recent years has been whether there should be a statute of limitations for service personnel and veterans who are alleged to have committed offences in the course of overseas operations many years ago. The arguments for such a statute have led to a qualified statute of limitations for such persons in the form of a presumption against prosecution for alleged offences during overseas operations committed more than five years ago and time limits for bringing civil claims in connection with such operations.[53] Arguments can be made that prosecutions relating to historic offences committed during armed operations are often based on unsubstantiated allegations of the kind seen in historic sex offences and can give rise to significant legal and evidential challenges. The concerns about these prosecutions have related more, however, to the need to bring certainty and finality to those who are subjected to such allegations than to the need

[48] Ibid.
[49] See Apologies (Scotland) Act 2016 which came into force on 19 June 2017.
[50] Apologies (Scotland) Act 2016 s 3.
[51] The Act came into force in October 2017.
[52] Prescription and Limitation (Scotland) Act 1973 s17D.
[53] See Overseas Operations (Service Personnel and Veterans) Act 2021.

to prevent miscarriages of justice. Particular concerns have arisen about the impact that "an unending cycle of investigation and re-investigation" can have on a service person's or veteran's mental health and wellbeing and the knock-on effect this can have on morale within the armed forces.[54]

The main catalyst for such concerns would seem to have been the establishment of the Iraq Historical Allegations Team (IHAT) in 2010 which resulted in thousands of allegations of unlawful killings and ill-treatment being made in relation to the actions of British service personnel in Iraq between 2003-2009. The IHAT was intended to fulfil the UK's duty under the ECHR to investigate allegations of death and ill treatment, which was given added weight in the light of the decision of the ECtHR that the Convention could apply outside the territories of the Convention's member states.[55] The IHAT also fulfilled the UK's obligations under the Rome Statute to ensure that credible allegations of international crimes are properly investigated.[56] But when the vast majority of the allegations made against the British armed forces in Iraq were found to be spurious, the IHAT was closed down and the government announced its intention to legislate to prevent service personnel and veterans being subjected in the future to repeated investigations in respect of historical operations many years after the events in question.

The Overseas Operations (Service Personnel and Veterans) Act 2021 provides for what the Government has called a "'triple lock" to protect service personnel and veterans from alleged historic offences committed on overseas operations. First of all, there is a presumption that once five years have elapsed from the date of an incident, it is to be exceptional for a prosecutor to determine that a service person or veteran should be prosecuted.[57] Secondly, there is a requirement that when making a decision, a prosecutor must give particular weight to certain matters, including the public interest in finality where there has been a previous investigation and no compelling new evidence has become available.[58] Thirdly, where a prosecutor determines that a case should proceed to trial, notwithstanding the presumption and the circumstances of the case, then consent must be obtained from the Attorney General in England and Wales or the Advocate General in Northern Ireland.[59]

While campaigners for greater legal protection for armed service personnel and veterans have largely welcomed the Act, concerns were raised during its passage through Parliament that it would place armed service personnel above the law and contravene the UK's international obligations. According to Amnesty International, it is wrong to place soldiers above the law and doing so would have a devastating impact on the reputation of the UK armed forces. The solution, it said, to ensuring investigations are not repeated is to get them

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[54] See House of Commons Defence Committee, *Drawing a Line: Protecting Veterans by a Statute of Limitations* (2019) Seventeenth Report of Session 2017-19 HC 1224, para 13; Ministry of Defence, *Public Consultation on Legal Protection for Armed Forces Personnel and Veterans serving In Operations Outside the UK: Ministry of Defence Analysis and Response* (2020) 12.

[55] *Al-Skeini v UK* (2011) 53 EHRR 23.

[56] Rome Statute of the International Criminal Court, Preamble, 17 March 1998.

[57] Overseas Operations (Service Personnel and Veterans) Act 2021 s 2.

[58] Ibid s 3.

[59] Ibid s 5. The Act omits any reference to the Lord Advocate, the senior Scottish law officer, because all prosecution decisions in Scotland are already taken in the public interest by or on behalf of the Lord Advocate,

right the first time.[60] Particular concerns were raised by human rights groups that British soldiers could avoid prosecution for war crimes and by senior military figures that this could open up the armed forces to the jurisdiction of the International Criminal Court.[61] Unlike sexual offences which were originally excluded from the Bill, torture and war crimes were not excluded until the House of Lords voted to reverse this. Just before the bill was enacted the Government conceded that excluded offences would be expanded to include genocide, crimes against humanity and war crimes.[62]

Although this concession has allayed some concerns, it does not address the broader rule of law concern that certain persons are being placed in a different category from others when it comes to the prosecution of criminal offences. Another criticism of the legislation has been that it does not apply to soldiers who have served in Northern Ireland during the conflict there.[63] At the time the Bill was published, the Secretary of State for Northern Ireland published a written statement which said the Government wanted to ensure "equal treatment of Northern Ireland veterans and those who served overseas" within the context of legislation that would address the legacy of the past in Northern Ireland.[64] Successive UK governments have hitherto been opposed to an amnesty or limitation periods for crimes committed during the conflict and they were not advocated by any of the parties to the Stormont House Agreement which in 2016 proposed various mechanisms to address the legacy of the past in Northern in Northern Ireland.[65] Under the terms of the Good Friday Agreement which in 1998 brokered a peace process to end the conflict, legislation was put in place providing for the accelerated release of prisoners convicted of offences related to the conflict in Northern Ireland. The Sentences (NI) Act 1998 which enacted this legislation provides that anyone convicted of such offences before the Good Friday Agreement could be made to serve no more than two years in prison. At the time this was one of the most controversial aspects of the Good Friday Agreement. But the Act fell short of granting an amnesty for prisoners as some period of imprisonment must be served for conflict-related offences and release was made conditional on them not supporting paramilitary organisations not maintaining a ceasefire and on them not posing a danger to the public.[66]

At the time of writing, however, a shift of policy seems to have taken place as the UK Government appears to be moving in the direction of legislating for an amnesty for all those accused of violent crimes during the Northern Ireland conflict. Proposals set out in a recent command paper would, if implemented, mean introducing a statute of limitations to "apply equally to all Troubles-related incidents"[67]. The effect would be to prevent charges being

[60] Amnesty International press release, "'UK: military prosecutions bill will have devastating impact on reputation of armed forces"', 18 March 2020. See also M Clarke, "The UK's Overseas Operations Bill - good questions wrong answers", 7 October 2020 https://rusi.org/commentary/uks-overseas-operations-bill-good-questions-wrong-answers (claiming that British military procedures for battlefield investigations in Iraq and Afghanistan were 'sub-standard').

[61] See L Fisher, "Law to protect soldiers could leave them facing war crimes tribunal", *The Times*, 4 June 2020.

[62] Overseas Operations (Service Personnel and Veterans) Act 2021, sch 1, Pt 2.

[63] House of Commons Defence Committee, *Drawing a Line: Protecting Veterans by a Statute of Limitations* (2019) Seventeenth Report of Session 2017-19 HC 1224, para 106.

[64] See Written Statement HCWS 168, 18 March 2020 (Mr Brandon Lewis).

[65] See K McEvoy*, Amnesties, Prosecutions and the Rule of Law in Northern Ireland*, (QUB, 2017), briefing paper for the House of Commons Defence Committee, 7 March 2017.

[66] Sentences (NI) Act 1998 s 3.

[67] Northern Ireland Office, *Addressing the Legacy of Northern Ireland's Past* (2021) CP 498, 9.

brought against former paramilitaries and security forces personnel who were active during the decades of strife before the Good Friday Agreement, with only a few exceptions such as genocide or torture.[68] The command paper draws attention to the difficulties in managing successful criminal prosecutions and considers that prosecutions should be replaced by an information recovery programme enabling individuals and family members to "seek and receive information about Troubles-related deaths and injuries".[69] It concludes that "after long and careful reflection the UK Government is increasingly of the view that any process that focuses on the lengthy pursuit of retributive justice will severely hold back the successful delivery of a way forward focused on information recovery, mediation and reconciliation that could provide a sense of restorative justice for many more families than is currently achieved through the criminal justice system."[70] It is not possible in this article to evaluate fully the advantages and disadvantages of such a policy but at the very least it should comply with the UK's international human rights obligations. In relation to non-derogable rights under the ECHR, it would seem that the Strasbourg bodies make a distinction between Article 2 violations (relating to the right to life) where an amnesty may be permitted if it is necessary to fulfil legitimate aims such as the peaceful resolution of conflict and Article 3 violations (the right not to be subjected to torture, inhuman or degrading treatment) where the ECtHR has ruled that an amnesty or pardon should not be permitted for state agents charged with such violations.[71]

E. Youth cases

Youth cases are another category in which it has been argued that there should be time limits imposed on bringing offenders to trial. Various human rights instruments draw attention to the importance of youth cases being handled expeditiously without any unnecessary delay.[72] It would also seem that the domestic UK courts have accepted that the reasonable time requirement in Article 6 of the ECHR requires a more rigorous standard in respect of youth cases than adult cases.[73] Delays can seriously impact on the quality of evidence in youth cases and on a child's ability to participate effectively in their trial. But as well as prejudicing a fair trial, the courts have accepted that delays can have a detrimental effect on the lives of both child defendants and victims at a crucial stage of their education and development.[74]

At the end of the last century a number of attempts were made in England and Wales to bring young offenders to justice more speedily.[75] These included providing for the introduction of statutory time limits in youth cases from the point of arrest to sentence. The time limits could

[68] J Pickard and L Noonan, "Dublin and Belfast react angrily to UK plan to end Troubles prosecutions", *Financial Times* 6 May 2021.
[69] Northern Ireland Office (n 67) 9.
[70] Ibid.
[71] Cf *Tarbuk v Croatia*, 11 December 2012 (concerning violations of Art 2 ECHR) and *Abdülsamet Yaman v Turkey*, 2 November 2004 (concerning violations of Art 3 ECHR). See further McEvoy (n 65) 15-17.
[72] See UN Convention on the Rights of the Child 19889 Art 40(2)(b) and UN Minimum Rules for the Administration of Juvenile Justice (1985) r 20 (known as the Beijing Rules).
[73] J Jackson, J Johnstone and J Shapland, "Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases" [2003] *Criminal Law Review* 510.
[74] See *Dyer v Watson and Burrows* 2002 SC (PC) 89, *HM Advocate v P* 2001 SLT 924.
[75] See eg M Narey, *Review of Delay in the Criminal Justice System* (1997) which recommended managerial reasons and targets.

not be extended unless the prosecution could show good and sufficient cause for an extension and unless there had been due diligence and expedition on the part of the prosecution.[76] A pilot evaluation in 2000-2001 which tracked whether these time limits were speeding up youth cases recommended that they be rolled out nationally on the ground that they were an effective means of meeting the requirement that young people should be brought to trial as expeditiously as possible.[77] The prosecution had the power to reinstate proceedings after they were stayed when the overall time limits were breached and the pilot considered that to safeguard the right of victims, the prosecuting authorities should have such a power provided proceedings were brought within a reasonable period of time.[78]

In the event, statutory time limits were not implemented but there continues to be a recognition of the importance of treating youth cases differently from adult cases. Current debates on the youth justice system argue for a rights-based approach or 'Child First' approach. In a recent report Case and Browning draw upon various legal instruments setting out the rights and minimum standards for children in criminal proceedings, along with research, to promote a 'Child First' strategy that should underpin the youth justice system in England and Wales.[79] The Child First strategy encompasses four different tenets – "seeing children as children", "developing a pro-social identity for positive child outcomes", "collaboration with children", "promoting diversion".[80] It envisages "a childhood removed from the justice system, using pre-emptive prevention, diversion and minimal intervention. All work minimises criminogenic stigma from contact with the system.".[81] Case and Browning point towards other studies which have shown the lasting impact of formal proceedings leading to harmful, stigmatising, criminogenic and potentially the most influential risk factor for reoffending.[82] The more prolonged the contact with the formal youth justice system the more likely the negative impact on the life of that young person. The literature is very much

[76] The Statutory Limit Pilots were given effect by the Prosecution of Offences (Youth Court Time Limits) Regulations 1999 (SI 1999/2743) on the back of the power given to the Secretary of State under the Prosecution of Offences Act 1985 s22 to introduce time limits. The s22 power allowed the creation of an overall time limit (OTL) for the prosecution to complete the preliminary stages of the proceedings. In 1998 the initial time limit (ITL) and sentencing time limit (STL) were added. The initial time limit covered the time between the initial arrest and first court listing – this was 36 days. The OTL covered the date from first court appearance until trial and was 99 days. The STL covered the time from conviction to sentence (29 days). Breaching the ITL and OTL resulted in a stay of proceedings if an extension had not been granted by the Court. The pilots commenced on 1st November 1999.

[77] J Shapland et al, *Evaluation of Statutory Time Limit Pilots in the Youth Court – Final Report* (2003) RDS OLR 21/03; Jackson at al (n 73).

[78] Shapland et al ibid xii.

[79] S Case and A Browning, *Child First Justice: the research evidence-base* (2021). Loughborough University. Report. https://hdl.handle.net/2134/14152040.v1

[80] Ibid 79 and at https://www.lboro.ac.uk/schools/social-sciences-humanities/news/2021/child-first-approach-justice/

[81] Ibid 67.

[82] Ibid 82. See L McAra and S McVie, "Transformations in youth crime and justice across Europe: Evidencing the case for diversion" in B Goldson (ed), *Juvenile Justice in Europe: Past, Present and Future* (Routledge, 2018) and at https://www.edinstudy.law.ed.ac.uk/publications/; L Forde, "Realising the Right of the Child to Participate in the Criminal Process" (2018) 18 *Youth Justice* 265; U Kilkelly et al, *Children's Rights in Northern Ireland* (2005) Northern Ireland Commissioner for Children and Young People at https://dera.ioe.ac.uk/9165/1/22323%20Final.pdf; L Lundy, "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927.

geared towards a diversionary approach away from the courts and towards the need for early decision making in the 'best interests' of the child. A recent review by Charles Taylor recommended the need for early decisions regarding diversion – this in the best interests of the child to ensure that the police make diversionary choices that will secure access to appropriate services and safeguarding for young people.[83]

A rights-based approach also has to confront the question whether there are certain cases which should be terminated after there have been long delay either between the alleged commission of the offence and the commencement of proceedings or during the proceedings themselves. We have seen above that a difference of approach has been taken between England and Scotland on the question whether the right to have cases brought to trial within a reasonable time includes a right not to be tried after this period has expired. We have argued that there are a number of situations especially in youth cases where a stay may be justified after undue delay without taking the position that a stay must always be granted after an unreasonable delay.[84] Apart from the damage that may be done to the quality of the evidence, we questioned whether it is fair to hold children to account for "events that took place some years ago as they have evolved into very different persons in terms of growth and development from the persons they were at the time of the event'.[85] This could impact on the child or young person being able to effectively participate in proceedings which is now recognised to be an essential condition of a fair trial.[86] A recent analysis of international standards, guidance and practices suggests that children's meaningful participation requires adaptation of procedures throughout all justice processes.[87] Statutory time limits from the commencement of proceedings until disposal of the case could provide this adaptation in youth cases to ensure that proceedings take place swiftly. Apart from this, the courts need to be alive to the question whether the young person can associate the proceedings with the offence that is alleged to have been committed. This does not necessarily mean that statutory limitation periods need to be introduced but it does mean that in individual cases it may be necessary on human rights grounds to abort proceedings on the ground that the young person is unable to participate meaningfully in them.

Conclusion

We began this article by noting that the discretion given to common law prosecutors and courts to stop proceedings which may result in an unfair trial has obviated the need for statutory limitation periods. We have seen that except for summary cases, the UK has not

[83] C Taylor, *Review of the Youth Justice System in England and Wales* (2016) Ministry of Justice Cm 9298 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf

[84] J Jackson and J Johnstone, "The Reasonable Time Requirement: an Independent and Meaningful Right?" (2005) *Criminal Law Review* 3.

[85] Ibid 20.

[86] A Owusu-Bempah, "The Interpretation and Application of the Right to Effective Participation" (2018) 22 *International Journal of Evidence and Proof* 321.

[87] Case and Browning (n 79), Forde (n 82).

generally resorted to statutes of limitation, although custody time limits apply in England and Scotland to persons awaiting trial in England and Scotland. Limitation periods may be justified in summary cases in order to prevent authorities committing time, effort and resources to prosecuting minor offences that were committed some time ago. But serious cases should otherwise be pursued no matter how long ago they occurred. Although arguments for limitation periods are often based on the need to provide finality and certainty to those who may be accused of criminal offences, limitation periods do not help to bring closure to victims. One of us has argued that the primary function of the trial is to provide a forum in which to bring about closure in a manner that is acceptable to the community, the victim and the accused.[88] While there should be compensation for defendants who have been prejudiced by undue delays, aborting the proceedings fails to achieve satisfactory closure for all the parties concerned.

We have discussed three kinds of cases where limitation periods have been debated in the UK but it is questionable whether any of these cases justify their use. Although there may be a danger of miscarriages of justice in child abuse cases, it is no longer considered acceptable for there to be limitation periods in these cases, especially as it is now realised that it can be many years before survivors feel able to speak out about such crimes. There has been considerable pressure for limitations periods to be introduced in cases involved the armed forces and there is now a statutory presumption against prosecution after 5 years. It may seem unfair on service personnel who have risked their lives to defend their country to have the threat of prosecution for offences allegedly committed whilst on armed operations hanging over their heads for many years. But where evidence of offences comes to light, this needs to be offset against the lack of closure for victims when decisions are taken not to prosecute because they run up against a limitation period. The same consideration holds true to the idea of an amnesty for all crimes connected with the conflict in Northern Ireland. There are also human rights implications where limitation periods prevent the investigation and prosecution of violations of Articles 2 and 3 of the ECHR. We have seen that delays in youth cases can have particularly deleterious consequences for young people. We have argued that statutory time limits provide a means of addressing such delays but it may be questioned whether these should prevent the prosecution of the most serious cases.

All this is not to say that the courts should not be prepared to stay proceedings where the prospect of a fair trial bringing closure to cases cannot be achieved. It can be argued that prosecutors and courts need to be more alive to the question whether the parties can meaningfully participate in the proceedings. This applies to victims as well as defendants. It also does not mean there should not be more active steps taken to pursue alternative approaches to formal proceedings that may achieve closure by other means. Restorative justice approaches have the potential to improve outcomes for victims and defendants in child abuse cases and youth cases. We have seen that in Northern Ireland the government is proposing a truth recovery programme to help victims to come to terms with the loss of their loved ones. But these alternatives should not be at the expense of formal criminal

[88] J Jackson, "Managing Uncertainty and Finality: the Function of the Criminal Trial in Legal Inquiry" in A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial: Truth and Due Process* (Hart Publishing, 2004).

proceedings where there is a public interest in prosecuting the most serious offences or of formal civil proceedings enabling victims to pursue claims for compensation.