

## Waiting for the man: Should a limitation period be imposed on prosecutors of financial crimes?

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Shockwaves rippled through the legal community when the longest criminal trial in New Zealand's history was aborted earlier this year. Following nine months of trial, it was discovered that the Crown had failed to disclose to the defence 14,600 odd relevant documents and Justice Woolford ordered a mistrial. Then, last month, the High Court ordered that Paul Bublitz, Richard Blackwood and Bruce McKay be tried again, roughly five years after their arrests and nine years after the events to which the charges related. And this time around, the Crown would throw in seven new charges.

How can this happen? Limitation periods do not apply to regulators such as the Financial Markets Authority (FMA), the Serious Fraud Office (SFO) and prosecutors of financial crime. A civil claim must be laid within six years of the date of wrongdoing. However, there is no general statute of limitation for criminal proceedings.<sup>[1]</sup> Why?

There is a logic to having no limitation period for crimes such as sexual abuse or murder. Quite apart from the repugnant nature of the offence, it is not uncommon for it to take many years for witnesses to come forward and evidence to be located. The practicalities of pursuing a prosecution within a specified timeframe, coupled with a desire not to let such offenders off the hook, outweigh the justifications for the imposition of a limitation period.

But do the same considerations apply to white-collar offences being investigated by, for example, the SFO and the FMA? In an investigation into a company fraud, the witnesses are easily identifiable and the documents readily obtainable. It is far less likely that 'new' evidence will suddenly come to light many years down the track.

In favour of retaining the status quo, it may be argued that white-collar crimes dealt with by the likes of the SFO and FMA involve difficult and complex issues. They can also be time-consuming to investigate due to the vast amount of electronic data held by companies that must be reviewed for potentially relevant evidence. However, these issues apply equally to civil and commercial claims.

Further, dishonesty offences, such as fraud, are difficult to detect and arguably should not be constrained by limitation periods. However, civil cases can also involve elements of fraud or dishonesty and are still subject to limitation periods. Further, extreme circumstances can be readily addressed. Section 48 of the Limitation Act 2010, for example, provides for the postponement of a limitation period when an action has been concealed by fraud. There is no reason why similar exceptions could not apply to criminal actions.

The imposition of limitation periods for crime is not an outlandish idea. Most civil law jurisdictions have limitation periods that govern the time within which charges for criminal offences must be brought. Even the United States has limitation periods for all federal crimes excepting capital offences. Most white-collar offences in the US carry a limitation period of five years.<sup>[2]</sup>

While many may have little sympathy for the likes of *Bublitz* and the ex-directors of failed finance companies, there is good reason to hold prosecutors to a limitation period to bring charges for financial crime.

Witness testimony becomes inherently unreliable over time. Memories fade, key witnesses can die (as has happened in *Bublitz*) and evidence, even electronic, can be corrupted or destroyed. In the SFO prosecution of Ralph Love last year, the Court struggled greatly with Dr Love having to give evidence in relation to events that occurred ten years earlier and he had developed dementia in the interim. The fact is, the longer the delay between the events in question and the time of trial, the more difficult it will be to defend allegations and present a full defence. This can equally affect the viability of a prosecution.

Dragging criminal investigations and prosecutions on for years can leave both people and businesses under a cloud of suspicion and subject to ongoing adverse publicity by the media. This can have complex financial and commercial repercussions that affect business relationships, reputation and share prices. This is particularly relevant for publicly listed companies that have ongoing disclosure obligations. There is a public interest in legal certainty in private and business life.

Take the SFO investigation into Zespri which is now well into its fifth year. In October 2013, the SFO confirmed to the media that the single-desk kiwifruit exporter was under investigation, while Zespri was unaware that any investigation had been launched. Since that time, Zespri has spent millions in complying with the SFO investigation, which as at the date of publication, remains ongoing. Almost ten years have passed since the events under investigation occurred and even if charges were laid tomorrow, it would likely be several further years before the matter makes it to trial.

The SFO's former acting chief executive, Simon McArley, recently commented in a Sunday Star Times interview that "it was unacceptable the investigation, which had opened when he was at the SFO, had left Zespri under suspicion without any charges being laid or a decision not to prosecute."<sup>[1]</sup> And yet the investigation continues unabated with still no sign of closure. The limitation issue clearly is not just academic.

The Solicitor-General's prosecution guidelines provide that a prosecution should only be brought if there is a "reasonable prospect of conviction" and a "public interest" in the prosecution. Regarding the public interest, there is little purpose in pursuing individuals or companies who may have committed offences many years ago, but have remained law-abiding ever since. If such individuals or entities remain a threat to society, they will still be committing crimes and if those current crimes that they should be punished for.

However, these are just guidelines. Are there any protections in place to prevent prosecutors holding individuals and businesses to ransom with seemingly never-ending investigations and prosecutions? Section 25(b) of the New Zealand Bill of Rights Act 1990 protects the rights of defendants to be tried without "undue delay". The Court can also stay or strike out criminal proceedings for delay as part of its inherent power to prevent abuse of its processes.

However, to stay a prosecution "is 'an extreme step which is to be taken only in the clearest of cases'" and the defects must be "so gross, or so persistent, or so prejudicial or so irremediable" that a trial be disallowed to proceed (*Wilson v R* [2015] NZSC 189, [2016] NZLR 705). Generally, evidence of bad faith or improper motive or prosecutorial misconduct will be required. That the *Bublitz* case did not qualify speaks to how high this threshold is.

It seems that more is required to encourage the prompt enforcement of legislation, efficient criminal investigations and ensure that those who commit unlawful acts do not escape unpunished. Equally, the legal system has a duty to ensure that a potential defendant's fundamental rights are not denied. With these issues in mind, is it time to consider a limitation period for financial crimes? A limitation period would not save the *Bublitz* defendants being retried, but it would protect them against the additional seven charges being laid. It would also encourage prompt decision-making in longstanding investigations, like the Zespri one. The adage that 'justice delayed is justice denied' is true, not just for the subjects of criminal enquiries, but also society as a whole.

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[1] Crimes Act 1961 and Summary Proceedings Act 1957 set out limitation period for specific types of offences (between 6 months and ten years). Unless a specific provision about an offense, no limitation period applies.

[2] Congressional Research Service Report for Congress, Charles Doyle, *Statutes of Limitation in Federal Criminal Cases: An Overview*, 1 October 2012.

[3] Sunday Star Times, Hamish McNicol, *Serious Fraud Office's Zespri investigation facing tough decision: former boss*, 24 September 2017.

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