APPENDIX C
MISCONDUCT IN PUBLIC OFFICE AND THE ECHR

C.1 Appendix C considers whether and to what extent the European Convention on Human Rights ("ECHR") affects the common law offence of misconduct in public office. This is relevant because the ECHR is incorporated into the domestic law of England and Wales by the Human Rights Act 1998. Accordingly, the law relating to misconduct in public office must be compatible with the rights protected under the ECHR.

C.2 Our consideration of the offence in Chapters 2 to 6 of the Issues Paper identifies a number of ways in which the articles of the ECHR impact upon the offence. We will look at the relationship between the misconduct offence and the ECHR from two perspectives and ask the following questions:

(1) Does the misconduct offence promote rights protected by the ECHR?

(2) Does the misconduct offence conflict with any rights protected by the ECHR?

DOES MISCONDUCT PROMOTE ECHR RIGHTS?

C.3 A reason for justifying retention of the offence may be that it can be seen as promoting specific key rights and interests.[1] As misconduct in public office is such a wide-ranging offence, we can conceive of situations where the holding to account of a public office holder for his or her misconduct might serve as protection for a number of the rights protected by the ECHR.

C.4 That is not to say that in every scenario the public office holder concerned would be prosecuted for misconduct. There may be more suitable specific criminal offences than misconduct to be prosecuted. Consequently, it is unlikely that a state's positive obligations under the ECHR mandate the retention of the offence in every case where its use could constitute protection of an ECHR right. That might be true only if there was no other offence that could be prosecuted and there in consequence a state lacked the capacity to uphold a person's Convention right, as for example with the types of conduct identified in Chapter 6.

C.5 The misconduct offence could protect ECHR rights in the following ways:

(1) Article 2 – right to life. For example, where a civilian working in a police custody suite neglects his or her of duty and that results in death to an individual. Where there was no obvious risk of death arising from the police officer's actions, gross negligence manslaughter is unavailable and the conduct can only be prosecuted for misconduct in a public office.

[1] For consideration of positive obligations and the ECHR see L Lazarus, "Human rights and positive obligations to create particular criminal offences", in Ashworth, *Positive Obligations in Criminal Law* (2013).

(2) Article 6 – right to a fair trial. For example, where a judge makes a decision for partisan reasons, which causes an individual to suffer harm as a result, and the misconduct in public office offence is the only available criminal charge.

(3) Article 8 – right to private and family life. For example, a probation officer who contacts vulnerable people through the probation service and begins a sexual relationship with them and the misconduct in public office offence is the only available criminal charge.

(4) Article 10 – right to freedom of expression. For example, where a local councillor hides submissions of opinion from the public rather than placing them before a planning committee meeting, because the opinion expressed is not one with which he agrees and the only available offence that can be charged is misconduct in public office.

DOES MISCONDUCT CONFLICT WITH ECHR RIGHTS?

C.6 As well as being a potential vehicle for the protection of the rights and interests of the public, however, the offence of misconduct in public office has a more complex relationship with two specific articles, 7 and 10. We discuss this relationship in Chapters 2, 4 and 5 and consider these articles here in more detail.

ARTICLE 7: NO PUNISHMENT WITHOUT LAW

C.7 In Chapter 2 we identify a number of aspects of the current law that illustrate how uncertain the law is. We also consider in Chapters 4 and 5 whether these uncertainties mean that the offence is susceptible to challenge under article 7 and conclude that they may.

C.8 Article 7 of the ECHR protects the right to "no punishment without law" in the following terms:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

C.9 Article 7 is an unqualified right and therefore at the pinnacle of the hierarchy of ECHR rights.

C.10 This provision is generally referred to as the "freedom from anti-retroactive conviction". It prohibits the retroactive application of criminal offences.

C.11 It has also been broadly construed by the European Court of Human Rights ("ECtHR") to include the principle that a criminal offence must be clearly defined in law, as in *Kokkinakis v Greece*.[2] That is, that the criminal law must abide by principles of clarity and certainty. If the application of the law cannot be foreseen or predicted it will be contrary to the prohibition against retroactivity.

General principles

C.12 Punishment must have "some basis in domestic law" for the conviction and punishment of the individual in order for it to be within the law. Common law and statute law are both compatible with article 7.[3] In *SW and CR v United Kingdom* the European Court of Human Rights ("ECtHR") stated:

> Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[4]

C.13 Where the common law adapts to reflect changing social circumstances it does not necessarily undermine the foreseeability of the law. This change may be gradual, or in certain circumstances, may be abrupt. Gradual change is demonstrated in *SW and CR v United Kingdom***,** where the ECtHR held that the removal by common law of the, then, marital rape exception was a foreseeable development. The ECtHR approved this House of Lords judgment, and stated that it:

> Did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife ... there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law. [5]

[2] (1994) 17 EHRR 397 (App No 14307/88) at [52].

[3] *Sunday Times v United Kingdom (No 1)*, (1979-80) 2 EHRR 245 at [48]. Although, see C Murphy, "The principle of legality in criminal law under the ECHR" (2010) 2 *European Human Rights Law Review* 192-207. Murphy argues that the reason no breach of art 7 was found in the majority of these cases is not because the common law offence was sufficiently clear, but because the courts do not take art 7 very seriously, which is a problem given its unqualified status.

[4] *SW and CR v United Kingdom* (1996) 21 EHRR 363 (App No 20166/92) at [36].

[5] Despite the apparent foreseeability, *SW and CR* has been the subject of criticism. Beddard notes that in the unlikely event that the applicants had sought legal advice prior to committing the acts, the advice would most likely be that while reform was imminent, the exception was still valid law in the UK. Furthermore, such a profound change in the law of criminal liability should arguably be the province of the legislature not the judiciary - R Beddard, "The rights of the 'criminal' under Article 7 ECHR" (1996) *European Law Review, Supplement (Human Rights Survey)* 3-13.

C.14 In *Baskaya v Turkey*[6] the ECtHR considered whether common law interpretation of a statutory criminal offence was compatible with article 7. It was held that as long as the interpretation by the national court did not go beyond what could be reasonably foreseen in the circumstances it would not violate article 7.[7]

C.15 In *Kokkinakis v Greece*[8] the ECtHR stated that, when deciding whether punishment had been administered in accordance with domestic law, consideration must be had to:

(1) whether there was a settled body of published and accessible case law; and

(2) whether the issue of ECHR compatibility of a particular law had been decided by a national court.[9]

The certainty requirement

C.16 The meaning of "law" under article 7 is the same as the meaning of "in accordance with law" (required by articles 5, 6 and 8) and "prescribed by law" (required by articles 9, 10 and 11).[10]

C.17 The case of *Sunday Times v United Kingdom (No 1)* concerned article 10, the right to freedom of expression, but the judgment enunciated numerous important general principles that provide a foundation for the understanding and requirements of the "law" for the purposes of the ECHR:

(1) In order for the law to be sufficiently precise it must meet the "quality of law" requirements. It must be:

(a) accessible; and

(b) foreseeable.

(2) The level of precision required should ensure that an individual is able to regulate his or her conduct in accordance with the law.

(3) These principles are not undermined if the law is 'vague' to the extent that it is necessary, to be able to understand the law, to seek:

(a) legal advice on it; and/or

6 (2001) 31 EHRR 10 (App Nos 23536/94 and 24408/94) at [40].

7 See also *Jorgic v Germany* [2008] 47 EHRR 6 (App No 74613/01) and *Korbely v Hungary* [2010] 50 EHRR 48 (App No 9174/02).

8 (1994) 17 EHRR 397 (App No 14307/88) at [40]

9 A separate issue, but interesting as an indication of the current approach of the ECtHR to deferring to national courts' decisions, is the recent ruling in *Hutchinson v UK* (2015) 61 EHRR 13 (App no 57592/08). Here the ECtHR stated that there was no violation of the ECHR because the Court of Appeal had specifically addressed the doubts expressed by the ECtHR in *Vinter v UK* (2012) 55 EHRR 34 (App Nos 66069/09 and 3896/10) by setting out an unequivocal statement of the legal position. The ECtHR stated that they "must accept the national court's interpretation of domestic law".

10 *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245 at [48].

(b) judicial interpretation of it.

(4) On the need for foreseeability, the law:

(a) need not be foreseeable with absolute certainty; and

(b) must be able to keep pace with changing circumstances.

C.18 In *X Ltd and Y v United Kingdom* the European Commission of Human Rights held that:

> Constituent elements of the offence [blasphemous libel] such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts.[11]

C.19 *Harman v United Kingdom*[12] concerned the common law of contempt and showed the potential for common law offences to be insufficiently certain for the purposes of the ECHR. The application to the ECtHR was made to review the decision of the House of Lords in *Harman v Home Office*[13] where the conviction for contempt of court was upheld as lawful. The applicant claimed that she was not liable for contempt of court as her obligation not to use documents obtained during court disclosure for any purpose other than the proper conduct of the litigation ended once they were read out in court. This question had never before received judicial consideration and the specific question of legal certainty did not arise in domestic proceedings.

C.20 The case settled before judgment under the ECHR could be given, but the European Commission of Human Rights had concluded the following claims were admissible:

(1) The applicant claimed that under the common law of contempt it was not considered to be an offence to show a journalist discovered documents after they had been read out in court. She submitted in essence that the courts had developed a new criminal offence in her case.

(2) Further, it was claimed that the common law of contempt was not "prescribed by law" as required by article 7 since she could not have predicted with reasonable certainty that her actions would be construed as contempt of court.

C.21 One further case to consider is *Wingrove v United Kingdom.*[14] There the ECtHR found that the applicant could “reasonably have foreseen with appropriate legal advice” that the relevant law would apply to him and so the offence (of blasphemy) satisfied requirements of law.[15]

[11] (1982) App No 8710/79 (Commission decision) at [9].

[12] (1985) 7 EHRR CD146, App No 10038/82 (Commission decision).

[13] [1983] 1 AC 280, [1982] 2 WLR 338.

[14] (1997) 24 EHRR 1 (App No 17419/90) at [43]

[15] As stated in *Cantoni v France* (1996) App no 17862/91.

C.22 Domestic courts have applied the principles arising to the operation of common law offences on a number of subsequent occasions.

C.23 In *Misra*[16] the Court of Appeal ruled that gross negligence manslaughter was sufficiently clear and did not offend the requirement of legal certainty imposed by article 7 or the common law. The criticism of gross negligence manslaughter is based on the fact that, where a jury has to consider whether the defendant's breach of duty was so serious such that it should be judged criminal, this results in a circular assessment of the breach. In other words, it is very serious, therefore it is criminal; it is criminal, therefore it is very serious. Additionally, if the jury is to decide what is criminal in these circumstances then it is they, not Parliament or the courts, who are deciding where the boundaries of the criminal law lie. This inevitably leads to uncertainty.

C.24 Lord Justice Judge, as he then was, held that submissions for the appellant under article 7 were based on the contention that the jury must be able to decide whether the defendant's conduct amounted to a crime or not.[17] The court determined:

> Although, to a limited extent…there was an element of circularity in the process by which the jury would arrive at its verdict, the element of circularity…does not…result in uncertainty which offends against Art 7, nor if we may say so, any principle of common law.[18]

C.25 In *Rimmington* the House of Lords found that the common law offence of public nuisance, as extended by some recent cases, did not satisfy common law and article 7 requirements of certainty.[19] Although it was an offence underpinned by the concept of harm to the public at large, its use in relation to:

> … injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused.[20]

C.26 As we discuss in Chapter 5, the House of Lords acknowledged that most instances of public nuisance are now covered by specific statutory offences, and that available statutory offences must be preferred unless there is good reason to circumvent them by using a common law offence.[21]

C.27 The House of Lords also noted that other common law offences:

[16] [2004] EWCA Crim 2375, [2005] 1 Cr App R 21.

[17] *Misra* at [59]. Confirming *G v France* [1995] 21 EHRR 288 (App No 15312/89) and confirmed in *Custers v Denmark* [2008] 47 EHRR 28 (App Nos 11843/03; 11847/03; 11849/03).

[18] *Misra* at [65].

[19] *Rimmington* [2005] UKHL 63, [2006] 1 AC 459.

[20] *Rimmington* at [37].

[21] *Rimmington* at [29] and [30].

Offences such as blasphemous libel (*X Ltd and Y v United Kingdom*), outraging public decency (*S and G v United Kingdom* (Application No 17634/91) and blasphemy (*Wingrove v United Kingdom*) had withstood scrutiny at Strasbourg.[22]

Article 7 and misconduct in public office

C.28 Misconduct in public office is defined in the case of *AGs Reference.*[23] There are many difficulties in the current law and we identify two primary issues that may leave the offence susceptible to challenge under article 7 as a result of uncertainty:

(1) the definition of public office; and

(2) the "seriousness" test.

Definition of public office

C.29 Chapter 2 of the Issues Paper describes in detail the lack of clear definition of public office in the current law. In our view, this lack of clarity means that it is hard to foresee who is susceptible to prosecution for the offence of misconduct in public office. As a result, it is difficult for an individual to regulate his or her conduct in accordance with the law, for lawyers to provide advice or for the courts to apply the offence. Therefore, the current law may be incompatible with article 7.

C.30 The lack of certainty as to who is in public office has been made very clear in three recent decisions –

(1) *Cosford* – concerning a nurse working in a prison who was found to be in public office.[24]

(2) *Mitchell* – concerning an NHS paramedic who was found not to be in public office.[25]

(3) *Ball* – concerning the former Bishop of Gloucester who was found to be in public office.[26]

C.31 We are not aware of any legal rulings as to whether misconduct contradicts article 7, but we do know that such arguments have been raised. The argument was raised in the case of *Mitchell,* but the Court of Appeal did not rule on the issue as the appeal was allowed on other grounds.[27]

[22] *Rimmington* at [36].

[23] [2004] EWCA Crim 868. See Chapter 2 for a full analysis of the current law.

[24] *Cosford.* [2013] EWCA Crim 466, [2014] QB 81.

[25] *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

[26] *Ball* (8 September 2015) (unreported, Central Criminal Court).

[27] *Mitchell* [21].

The court's development of the concept of public office, particularly in *Cosford, Mitchell* and *Ball,* may have gone beyond "gradual clarification" allowed by the ECtHR.

The seriousness test

C.32 A further requirement under the current law is that the defendant's conduct must be so serious as to amount to an abuse of the public's trust in the office holder. We call this the "seriousness test". In Chapter 2 we explain how difficult it is to apply this threshold in practice, and this makes it difficult to foresee what types of conduct may be susceptible to prosecution for the offence. Accordingly, this is a second element of the offence that may leave it open to challenge under article 7.

C.33 This question was the main focus of the recent Court of Appeal decision in *Chapman.*[28] Here, the seriousness test was compared to the test in gross negligence manslaughter, which also has difficulties in terms of circularity and uncertainty.[29] The court felt that it is not helpful for a jury to be told that the breach of duty *must be so serious as to amount to a criminal act* and sought to solve this difficulty by applying another method of determining whether the conduct was "so serious". It held that the jury must be referred to the requirement that the misconduct must be judged by them as having the effect of harming the public interest.[30] Unfortunately, the concept of "public interest" is not one with consensus as to its meaning and therefore may not be a much clearer basis for the test.[31]

C.34 Although the compatibility of misconduct in public office with article 10 has not been tested by the courts, the similar test under gross negligence manslaughter has. As this was not found to violate article 10, it is arguable that a successful challenge to this element of misconduct is unlikely to succeed.

However, the seriousness test for misconduct in public office may, in our view, be distinguished from that of gross negligence manslaughter. The difficulty in applying the test for misconduct is compounded by the fact that a jury in a trial for this offence is being asked to do so without any clear indication of what *could* amount to serious, and therefore criminal, misconduct. This is in addition to the circular nature of the question for the jury.

Conclusion on article 7

C.35 We conclude that "public office" and the "seriousness test" are ill-defined and vague. As these are core elements of the misconduct offence, the law may be incompatible with article 7 of the ECHR. In our view, without clearer general guidance as to who can be prosecuted, and for what conduct, the difficulties currently experienced are unlikely to disappear.

[28] *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

[29] See para C.23 above.

[30] *Chapman* at [36].

[31] See further discussion in Chapter 2 of the Issues Paper.

ARTICLE 10: FREEDOM OF EXPRESSION

C.36 The arrest of civil servant Christopher Galley and Damian Green MP in 2009 brought the issue of a public office holder disclosing confidential material to the media to public attention. The focus of the discussions that followed in the media was whether such actions could be justified in the public interest and whether the prospect of a prosecution being brought for misconduct in public office interfered with article 10 rights to freedom of expression and the associated concept of freedom of the press.

C.37 Article 10 protects the right to freedom of expression in the following terms:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[32]

C.38 Article 10 has been held to be "an essential foundation of a democratic society" and provides "one of the basic conditions for its progress".[33]

Scope of article 10 in relation to criminal law

C.39 Article 10 is a qualified right. Article 10(1) is the basic right and article 10(2) provides the conditions which apply in order for a restriction of the right to be justified, and therefore lawful. The right to freedom of expression can be restricted so long as the restriction:

(1) is prescribed by law;

(2) is necessary and proportionate in a democratic society;

(3) pursues a legitimate aim; namely:

(a) the protection of the public interest: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals;

[32] For a full discussion of the European Court of Human Right's approach and jurisprudence under article 10 see Council of Europe, *Freedom of Expression in Europe,* Human Rights files no 18 [2007].

[33] *Handyside v UK* (1979-80) 1 EHRR 737 at [49].

(b) the protection of the rights of others: reputation or the disclosure of information received in confidence; or

(c) maintaining the authority and impartiality of the judiciary.

C.40 Criminal proceedings (arrest, prosecution, conviction and the imposition of a penalty) can amount to an interference with the right to freedom of expression by a public authority for the purposes of article 10(1). Such proceedings may still be compatible with the right where they satisfy the requirements of article 10(2).[34]

C.41 In *Handyside* the applicant was prosecuted under the Obscene Publication Acts. No violation of article 10 was found because the Strasbourg court deemed the restriction to be:

(1) Prescribed by law – the basis of law was the measures in the Obscene Publication Acts. It was not contested that these had been applied correctly.

(2) In pursuance of a legitimate aim – the protection of morals in a democratic society.

(3) Necessary in a democratic society in the pursuance of that aim. The court held that there is a margin of appreciation to be accorded in the consideration of whether a restriction is necessary. The word "necessary" was not synonymous with "indispensable", neither had it the flexibility of such expressions as "admissible", "ordinary", "useful" and "reasonable", but it implied the existence of a pressing social need.[35]

C.42 Likewise in *Maguire v United Kingdom*, where the applicant's rights under article 10 were interfered with by his arrest and conviction for wearing a t-shirt with provocative slogans concerning matters of general public interest, his application to the ECtHR was disallowed on the basis of the UK's justification for the measure.[36]

C.43 Further, in *Gough v Untied Kingdom*, the applicant known as "the naked rambler" had his application under article 10 dismissed on the basis of justification under article 10(2) notwithstanding a finding that his article 10 rights had been interfered with as a result of his arrest, prosecution, conviction and detention.[37] The ECtHR stated:

> The Court is prepared to accept that the extent to which, and the circumstances in which, public nudity is acceptable in a modern society is a matter of public interest. The fact that the applicant's views on public nudity are shared by very few people is not, of itself, conclusive of the issue now before the Court. As an individual intent on achieving greater acceptance of public nudity, the applicant is

[34] *Handyside* at [44].

[35] *Handyside* at [44] [46] [48].

[36] (2015) 60 EHRR SE12 (App No.58060/13) at [46] and [57].

[37] (2015) 61 EHRR 8 (App No.49327/11) at [150] and [176]. Mr Gough's application for referral of the judgment to the Grand Chamber was rejected on 23 March 2015.

> entitled to seek to initiate such a debate and there is a public interest in allowing him to do so. However, the issue of public nudity also raises moral and public-order considerations.[38]

C.44 The court has held that there is little scope under article 10(2) for restrictions on political speech or on debate of matters of public interest[39] but that there is a distinction to be made with tawdry allegations about an individual's private life.[40] In the latter, a narrower interpretation of article 10 is applied.

C.45 Usually therefore consideration of whether there has been an interference with a right under article 10, and whether that can be justified or not, involves a balancing act between either (1) the public interest and the rights of those affected by the expression concerned or (2) competing public interests.

C.46 Public interest is not specifically defined but the ECtHR has said that:

> The free press […] has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of government services, including possible illegal activities.[41]

C.47 Article 10 may also conflict with other rights under the ECHR. Most commonly article 8, the right to private and family life[42] and article 6, the right to a fair trial.[43]

Definition of terminology in article 10 and its relevance to misconduct in public office

C.48 The phrase "everyone" includes all natural and legal persons. One of the most important categories of expression protected in practice is expression by the media and writers, editors, journalists and media corporations.[44] However, article 10 can also be relied upon by public office holders such as civil servants, the police, members of the judiciary and members of the armed forces.[45]

C.49 "Expression" has been interpreted broadly to include communications of any kind and subject matter. In general, no form of expression is excluded from the protection of article 10 on the basis of content.[46] For example, the ECtHR has

38 *Gough* at [172].

39 See *Wingrove v UK* (1997) 24 EHRR 1 (App No 17419/90) at [58]; *EK v Turkey* (2002) 35 EHRR 41 (App No 28496/95) at [70].

40 *Armoniene v Lithuania* (2009) 48 EHRR 53 (App no 36919/02); *Von Hannover v Germany* (2005) 40 EHRR 1 (App No 59320/00) at [66].

41 *Sunday Times v UK (No 2)* (1992) 14 EHRR 229 (App No 13166/87) at [71].

42 *Armoniene* at [39].

43 *Channel Four v UK* (1988) 10 EHRR CD503 (App Nos. 11553/85 and 11658/85) (Commission decision); *Associated Newspapers and others v UK* (1994) App No 24770/94 (Commission decision).

44 R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed, 2009) at [15.238] ("Clayton and Tomlinson"); *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245.

45 Clayton and Tomlinson at [15.238]; *Ahmed v UK* (2000) 29 EHRR 1 (App No 22954/93) - local government officers; *Rekvenyi v Hungary* (2000) 30 EHRR 519 (App No 25390/94); *Wille v Lichtenstein* (2000) 30 EHRR 558 (App No 28396/95).

46 Clayton and Tomlinson at [15.242] and [15.243].

held that a conviction of a journalist for aiding and abetting racist insults on a television programme was disproportionate to the need to protect the person insulted.[47] However, the nature of the expression may be relevant as to whether interference with it is justified. For example, interference with political expression will rarely if ever be justified.[48]

C.50 Expression is also not limited to statements of fact, but includes "information and ideas" encompassing opinions, criticism and speculation whether or not they are objectively true.[49]

C.51 The rights to "impart" and to "receive" information are separate and can be enforced separately by the giver and the audience.[50] However, article 10 does not give a corresponding right of access to information, or place any obligation on the state to provide it. Where the ECtHR has accepted a right of access to information this has been done under article 8 instead.[51] Although, where the information is otherwise available the state must not obstruct access to it.[52]

C.52 "Interference" with the right includes any action that impedes, sanctions, restricts or deters expression.[53] It includes prior restraint, post-expression sanctions and other interferences such as the confiscation of items intended for use in an exercise of expression.[54]

C.53 "Duties and responsibilities" are not defined in article 10(2) but the phrase has been used to restrict freedom of expression, for example where the state has a duty and responsibility to protect children.[55] It has also been used to encourage it, for example where a journalist was held to have duties to impart information on political issues.[56] It has also been used to justify interference with the right freedom of expression on the grounds of an individual's position. For example, civil servants, soldiers and teachers have all been held to have duties and responsibilities that justify restriction of their article 10 rights.[57]

Press freedom

C.54 Clayton and Tomlinson advise that the majority of cases brought under article 10 involve the media. The ECHR provides a safeguard to journalists who report on

47 *Jersild v Denmark* [1995] 19 EHRR 1.

48 *Animal Defenders International v UK* [2013] 57 EHRR 21.

49 Clayton and Tomlinson at [15.247]; *Thorgeirson v Iceland* [1992] 14 EHRR 843 (App No 13778/88).

50 Clayton and Tomlinson at [15.248]; *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245.

51 Clayton and Tomlinson at [15.249]; *Gaskin v UK* [1989] 12 EHRR 36 (App No 10454/83).

52 Clayton and Tomlinson at [15.252]; *Autronic v Switzerland* [1990] 12 EHRR 485 (App No 12726/87).

53 Clayton and Tomlinson at [15.267].

54 Clayton and Tomlinson at [15.272]; *Foka v Turkey* (2008) App No 28940/95.

55 *Handyside v UK* (1979-80) 1 EHRR 737; *A and others v UK* (1997) 25 EHRR CD159 (App Nos 32712/96; 32818/96) (Commission decision).

56 *Lingens v Austria* (1986) 8 EHRR 407 (App No 9815/82).

57 *Engel v Netherlands (No 1)* (1979-80) 1 EHRR 647; *B v UK* (1985) App No 10293/83 (Commission decision); *X v UK* (1979) App No 8010/77 (Commission decision).

issues of general interest and act in good faith in order to provide accurate and reliable information in line with journalistic ethical principles.[58] If the subject matter of the publication is factual then the media must be permitted to demonstrate its truth.[59] The ECtHR has stated:

> These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the 'interests of national security' or for 'maintaining the authority of the judiciary', it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[60]

C.55 More recently, the importance of the freedom of the press has been reiterated:

> Freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest.[61]

C.56 As a result the ECtHR has stated:

> Where […] measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.[62]

C.57 However, as stated, freedom of expression also carries with it corresponding duties. These are of particular significance where the media attacks the reputation of a named person:[63]

> Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression even in respect of coverage by the press of matters of serious public concern. […] regard must be had to the fair balance which has to be struck between the competing interests at stake.[64]

C.58 Other duties and responsibilities that impinge on the media's rights under article 10, arise from the legitimate aims for restriction set out in article 10(2). These will be discussed further below.

[58] *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125 (App No 21980/93).

[59] *Castells v Spain* (1992) 14 EHRR 445 (App No 11798/85).

[60] *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245 at [50]; *Observer v UK* (1992) 14 EHRR 153 (App No 13585/88); *Goodwin v UK* (1996) 22 EHRR 123 (App No 17488/90).

[61] *Centro Europa v Italy* (2012) (App no 38433/09) at [131].

[62] *Bergens Tidende v Norway* (2001) 31 EHRR 16 (App No 26132/95) at [48].

[63] *Lindon and others v France* (2008) 46 EHRR 35 (App Nos 21279/02; 36448/02).

[64] *Flux v Moldova (No 6)* (2010) 50 EHRR 34 (App No 28702/03).

C.59 The question in each case (of whether the restriction is not only in pursuance of a legitimate aim, but also whether it is necessary in a democratic society) will be decided on a case by case basis, depending on the individual facts. Relevant factors will include:

(1) The nature of the expression involved (including whether the publication contains reported allegations).

(2) The identity of the person (if any) being criticised.

(3) Whether the publication consists of value judgements or factual assertions.

(4) If factual, whether those facts can be proved true.

(5) If factual and false, whether the journalist acted in good faith, in order to provide accurate and reliable information, in accordance with journalist ethics.

(6) The nature and severity of the penalty imposed.[65]

Protection of journalistic sources

C.60 The ECtHR has stated that the protection of journalistic sources is important in the context of article 10:

> The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[66]

C.61 The Court has stated that measures requiring the revelation of journalistic sources "ha[ve] a potential chilling effect on the readiness of people to give information to journalists".[67]

C.62 The extent to which a journalist can be required to prove the truth of factual assertions does not include a duty to name sources.[68]

[65] Clayton and Tomlinson at [15.314].

[66] *Roemen and Schmit v Luxembourg* (2003) (App No 51772/99).

[67] *Goodwin v UK* (1996) 22 EHRR 123 (App No 17488/90) at [48].

[68] *Cumpana and Mazare v Romania* (2005) 41 EHRR 14 (App No 33348/96).

Article 10 and misconduct in public office

Recent concerns

C.63 Following referral of the case of Damian Green MP and Christopher Galley to the Crown Prosecution Service ("CPS"), Keir Starmer QC, then Director of Public Prosecutions, announced that no charges of misconduct in public office would be brought against either Damian Green MP or Christopher Galley. In his statement the DPP expressly stated that consideration of article 10 had impacted on this decision.[69]

C.64 Although there is no specific defence of acting in the "public interest" to misconduct in public office he clarified that in this case the CPS had assessed the misconduct alleged as insufficiently serious to merit prosecution. However he also stated that this did not mean that "restricted and/or confidential information cannot ever be protected by the imposition of criminal sanctions in cases of unauthorised disclosure".

C.65 This decision had been preceded by the collapse of a prosecution brought against journalist Sally Muller in November 2009. She had been arrested for conspiracy to commit misconduct in public office after a police officer allegedly leaked confidential information to her. In court it was revealed that a surveillance warrant had been authorised without the judge being aware of the journalistic context of the case. The trial judge consequently held this to be a breach of article 10 of the ECHR and that the evidence obtained as a result of the warrant was inadmissible.

C.66 In response, the National Union of Journalists stated:

> Let's be clear, this was an attempt to make a criminal out of a journalist for receiving information that the state didn't want to get out. It was a misguided prosecution that sought to punish Sally for simply doing her job.
>
> This judgment sends a clear message to the authorities: they must recognise the importance of free and open journalism. Hard questions must now be asked of the police and CPS as to why these costly proceedings were allowed to get so far.[70]

C.67 The following month the Telegraph published material leaked by a source in the Parliamentary fees office. The Metropolitan Police declined to investigate the leak, specifically referring to the DPP's decision in the Galley and Green case.

[69] CPS, "Decision on Prosecution – Mr Chirstopher Galey and Mr Damian Green MP" (CPS 16 March 2009) http://www.cps.gov.uk/news/articles/decision_on_prosecution_-_mr_christopher_galley_and_mr_damian_green_mp/ last visited 8 January 2016.

[70] Leigh Holmwood and Agencies, "Thames Valley Police Leak Case against Sally Murrer Thrown Out" (The Guardian 28 November 2008) http://www.theguardian.com/media/2008/nov/28/pressandpublishing-medialaw last visited 8 January 2016.

They also cited "the public interest defence" available to charges of misconduct in public office as the reason for their decision.[71]

C.68 The issues surrounding the disclosure of information by journalists from public office holders have again been subject to scrutiny during the recent Operation Elveden prosecutions. These have generally resulted in convictions of the public office holder concerned for misconduct in public office and acquittals of the journalists charged with either conspiracy to commit, or aiding and abetting, misconduct. Additionally, following the decision in *Chapman*,[72] a CPS review resulted in the discontinuance of most of the remaining prosecutions of the journalists yet to be tried.

C.69 This has led the press to refer to the prosecutions as a "witch hunt"[73] and to criticise the offence of misconduct in a public office:

> Thank God for the jury system. Four Sun journalists have been acquitted at the Old Bailey of a series of trumped-up, politically motivated charges which should never have been brought to court. Even the judge admitted he found it difficult to explain what this extraordinary trial was all about. I could have told him in a nutshell. This was a show trial, designed to remind us who runs Britain and demonstrate that they will resort to any measure to crush dissent. And that includes criminalising our Free Press.[74]

C.70 The Society of Editors has also commented on the serious implications of journalistic sources being revealed and prosecuted for misconduct in public office. They stated that "the betrayal of newspaper sources jailed under Operation Elveden casts a shadow over our industry."[75]

C.71 In light of these recent concerns regarding press freedom and the misconduct offence, we identify in Chapters 2 and 5 that article 10 has implications for the current formulation of the offence of misconduct in public office where a prosecution relates to disclosure of information by a public officer to a journalist.

(1) Can a prosecution for misconduct in public office ever be justified under the legitimate aims set out in article 10(2)?

[71] Metropolitan Police, "MPS will not Investigate MPs Expenses Leak" (Metropolitan Police 19 May 2009) http://content.met.police.uk/News/MPS-will-not-investigate-MPs-expenses-leak/1260267539886/1257246745756 last visited 8 January 2016.

[72] [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

[73] Press Association, "Operation Elveden Branded 'Witch Hunt' by Journalists Cleared of Paying Officials" (The Huffington Post 27 April 2015) http://www.huffingtonpost.co.uk/2015/04/27/operation-elveden-journalists-cleared_n_7150834.html last visited 8 January 2016.

[74] Richard LittleJohn, "Let's put Hyphen-Howe and the CPS in the Dock for Trying to Criminalise our Free Press" (Mail Online 24 March 2015) http://www.dailymail.co.uk/debate/article-3008672/Let-s-Hyphen-Howe-CPS-dock-trying-criminalise-Free-Press-writes-RICHARD-LITTLEJOHN.html#ixzz3VJSQ0DoS last visited 8 January 2016.

[75] Dominic Ponsford, "The Betrayal of Newspaper Sources Jailed under operation Elveden Casts a Shadow over our Industry" http://www.pressgazette.co.uk/content/betrayal-newspaper-sources-jailed-under-operation-elveden-casts-shadow-over-our-industry last visited 8 January 2016.

(2) Are article 10 rights sufficiently protected by the mechanisms currently relied upon as filters to prevent prosecutions and convictions in situations where the "public interest" in the material disclosed outweighs the wrong and/or harm committed? Namely:

(a) The criminal justice process.

(b) The requirement that a conviction for misconduct should only occur where the misconduct committed is "serious".

(c) The need for the current offence to be committed without reasonable excuse or justification for the purpose of the offence.

(1) When can a prosecution be justified under Article 10(2)

C.72 In general terms, a number of the legitimate aims set out in article 10(2) could apply to justify a prosecution under misconduct in public office where that prosecution interferes with either a public office holder or a journalist's right to freedom of expression. Four appear particularly relevant.

(1) National security.

(2) Prevention of crime and disorder.

(3) Protecting the reputation or rights of others.

(4) Preventing the disclosure of information received in confidence.

C.73 In national security cases the ECtHR has often accorded a wide margin of appreciation to national authorities. Where serious damage can be caused to national security by the disclosure of information, interference with article 10 rights is likely to be justified.[76] Cases of this kind might for example involve the leaking of information relating to terrorist activities by members of the armed forces or by the police.

C.74 Prevention of crime and disorder cases could include both situations where public disorder would be caused by the publication of material and situations where publication would encourage the commission of specific crimes.[77] However, restrictions on political expression may be difficult to justify.[78]

C.75 Restrictions on freedom of expression in order to protect the reputation and rights of others could curtail the leaking of information from many types of sources. A civil servant might leak information about a politician's perceived hypocrisy.[79] A prison officer might leak information about a newsworthy prisoner's new found

[76] *Observer v UK* (1992) 14 EHRR 153 (App No 13585/88); *Sunday Times v UK (No 2)* (1992) 14 EHRR 229 (App No 13166/87).

[77] *Chorherr v Austria* (1994) 17 EHRR 358 (App No 13308/87); *Marlow v UK* (2000) App No 42015/98.

[78] *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94).

[79] Where it involves criticism of politicians and/or the Government the bounds of permissible criticism are wide: *Lingens v Austria* (1986) 8 EHRR 407 (App No 9815/82).

religion.[80] A police officer may leak information criticising the police force.[81] Whether the restrictions are legitimate will depend on the nature and content of the publication.

C.76 The issues surrounding receipt of confidential information apply in all of the above examples. However, despite this overlap, the prevention of disclosure of confidential information is a stand alone justification for restricting article 10 rights. This aim may be relevant to government information that does not affect either national security or threaten the prevention of crime.[82]

C.77 In general, therefore, there are circumstances where prosecutions for misconduct in public office for the disclosure of information will not infringe article 10, since they will fall within article 10(2).

Are article 10 rights sufficiently protected by the mechanisms currently relied upon?

CRIMINAL JUSTICE PROCESSES

C.78 Prior to the Operation Elveden prosecutions, the issue of prosecuting journalists for criminal offences arising from acts committed in the course of their journalistic work was considered by the Leveson inquiry *"Culture, practice and ethics of the press"*. In the report Lord Justice Leveson identified a number of factors that are relevant to the question of how far a prosecution may restrict the right to freedom of expression:

> There are a number of mechanisms in place to prevent or inhibit the prosecution of crime which might be described (in non-technical language) as abusive. These revolve around the decision of the prosecutor to prosecute; the control that any criminal court exercises over abuse of its process; the 'rights' of the jury';[83] and the ultimate discretion of a sentencing judge.[84]

C.79 The report also added:

> Provided appropriate attention is paid to the importance of a free press and the duty of the press to hold power to account, there is no reason why journalists should not be subject to exactly the same

[80] The European Court has held that where the religious beliefs of others are offended, interference with freedom of expression may be justified. *Wingrove v UK* 1997) 24 EHRR 1 (App No 17419/90).

[81] The European Court has provided protection for law enforcement officials against slander. *Janowski v Poland* [2000] 29 EHRR 705 (App No 25716/94).

[82] *X v Germany* [1970] App No 4274/69 (Commission decision); *Guja v Moldova* (2011) 53 EHRR 16 (App No 14277/04).

[83] This point, the inquiry states later is "mentioned as a matter of constitutional reality. There are examples, littered throughout history, in which juries are properly directed as to the law and, in particular, the ingredients of a specific offence, who then take the view that, irrespective of the law, they are not prepared to convict for what they perceive to be good reasons." Vol IV, part J at [8.2].

[84] The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press* (November 2012) vol IV, part J at [7.1].

checks and balances that every other member of society has to endure should they seek to exercise some right or privilege.[85]

C.80 The criminal justice processes referred to by Lord Justice Leveson are:

(1) prosecutorial discretion;

(2) abuse of process applications;

(3) jury trial; and

(4) sentencing discretion.

C.81 Out of these four factors we consider (1) and (3) to be the primary protections against unmerited prosecution and conviction in misconduct cases.[86] Our research suggests that abuse of process applications are rarely, if ever, run in misconduct cases, although the doctrine of abuse of process is wide enough to accommodate arguments that refer to articles of the ECHR. We are only aware of applications to dismiss cases on grounds of insufficient evidence, article 7/general uncertainty and/or breach of article 10. Further, sentencing procedures are only relevant once a conviction actually has been obtained and in any event no sentencing guidelines have been issued in relation to the offence. Therefore we will only discuss (1) and (3) below.

Prosecutorial discretion

C.82 In Chapter 4 we discuss in detail the difficulties that may face prosecutors making decisions about how the offence of misconduct in public office should apply in individual cases.[87]

C.83 The CPS Code for Crown Prosecutors[88] sets out a two stage test ("the Code test") to be used when making decisions whether or not to prosecute:

(1) Is there sufficient evidence to provide a realistic prospect of conviction?

(2) Is a prosecution required in the public interest?

The CPS also provides guidance on how the test should be applied in cases alleging misconduct in public office.

C.84 In addition, and in recognition of the importance of the right to freedom of expression, the CPS provides further specific guidance for prosecutors on assessing the public interest in cases affecting the media ("the Media

[85] The Leveson Inquiry, part J at [8.7].

[86] Although, as well as prosecutions being brought by a prosecution authority, private prosecutions may be brought by individuals. However the Director of Public Prosecutions can apply to take over any one of these private prosecutions where it appears necessary to do so.

[87] See Chapter 4.

[88] CPS, *Code for Crown Prosecutors* (7th ed 2013).

Guidance").[89] This was initially formulated in response to investigations conducted for the Leveson Inquiry[90] and was updated following the review of prosecutions resulting from Operation Elveden.

C.85 Although the current law does not provide an express public interest defence to misconduct in public office, under the evidential stage of the Code test prosecutors must consider whether the misconduct in question would normally have fallen so far below the standards accepted as to amount to an abuse of the public's trust in the office holder.

C.86 Meanwhile, the public interest element of the Code test lists within it a number of factors to be considered and weighed up in making the decision to prosecute.

C.87 The Media Guidance provides that the Code test applies equally to journalists and those who interact with them and that "every case must be considered on its own individual facts and merits. No prospective immunity from criminal prosecution can ever be given". The Media Guidance is likely to be relevant when prosecutors are considering whether to charge journalists who may have committed a criminal offence in the course of their work (or those whose interaction with journalists may have involved the commission of a criminal offence).

C.88 In addition the Media Guidance requires prosecutors to distinguish between:

(1) the public interest served by freedom of expression and the right to receive and impart information; and

(2) the separate question of whether a prosecution is in the public interest, which is the second stage of the Code test.

C.89 In relation to (1) it states that that the requirements of article 10(2) must be considered carefully in every case[91] while emphasising the importance of considering implications for a victim's right to privacy under article 8 of the ECHR.[92]

C.90 At the public interest stage of the Code test the Media Guidance requires prosecutors to specifically consider "whether the public interest served by the conduct in question outweighs the overall criminality" by following a three stage process:

(1) assessing the public interest served by the conduct in question;

(2) assessing the overall criminality; and

(3) weighing these two considerations.

[89] Director of Public Prosecutions, "Guidelines for prosecutors on assessing the public interest in cases affecting the media" (CPS 13 September 2012) http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/ last visited 08 January 2016.

[90] The Leveson Inquiry, part J at [7.4].

[91] CPS Media Guidance at [16].

[92] CPS Media Guidance at [34].

C.91 However, while there is in place a detailed process to be followed by prosecutors making decisions, which refers to both "public interest" considerations in general and article 10 in particular, we are not persuaded that in practice the Code test and the CPS guidance can always operate to adequately protect those acting in the public interest from prosecution.

C.92 We discussed in Chapter 4 that the difficulties in defining "an abuse of public trust", or the level of seriousness required before the misconduct can be considered criminal, mean that the law lacks clarity as to where "disciplinary" misconduct ends and "criminal" misconduct begins. This may cause confusion and risks inconsistent decision making. Likewise we consider that the lack of definition may result in inconsistent assessments of when a prosecution should not be brought either because the act itself complained of was in the public interest, or where the prosecution would not be.

C.93 Considering the recent high-profile prosecution decisions referred to above it is difficult to categorically assess the effectiveness of prosecution decision making. The decisions in both the Galley and Green case[93] and the MPs expense scandal were not to prosecute on grounds of public interest. The decisions in the Murrer case and in Operation Elveden were to proceed with prosecutions that ultimately, for the most part, failed. However it might be suggested that, particularly following the CPS's discontinuance of the majority of outstanding Elveden cases, in this specific context given the type of speech under consideration it has not proven to be as robust a safeguard as an important right, like article 10, requires.

Jury trial

C.94 The successful operation of the trial by jury system in England Wales relies to a great extent on clarity in the law. This enables the trial judge to explain how the law applies to the evidence heard in a manner that can be easily understood and so that the jury can apply it in the way directed to the facts of the case.

C.95 We discuss at length in Chapters 2 to 6 the uncertainties within the current law of misconduct in public office and we know from our research, and from the appeals brought in cases where misconduct convictions are obtained, that both the judiciary and juries struggle with these. For example, *Mitchell* was convicted but had his conviction overturned. The fact that judges and juries often require help when dealing with cases of misconduct in public office was highlighted in *Chapman*.[94] This might suggest that the jury system is not adequate to deal with the law in its current state and that this risks that one of the key protections against article 10 infringements is ineffective.

C.96 On the other hand the current swathe of acquittals, and a much reduced conviction rate, highlighted since Operation Elveden, has led many in the media to laud the jury system as an extremely effective protector of journalistic and press freedom.

[93] The decision of Keir Starmer QC was criticised at the time by at least one academic who commented that it appeared to demonstrate that the CPS were not fully aware of the fine distinctions between the elements of the offence. See D Lusty, "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 *Criminal Law Journal* 337 (Australia).

[94] [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

C.97 The Leveson inquiry also identified the ultimate "right" of the jury to acquit as a specific safeguard:

> The second protective mechanism must be mentioned as a matter of constitutional reality. There are examples, littered throughout history, in which juries are properly directed as to the law and, in particular, the ingredients of a specific offence, who then take the view that, irrespective of the law, they are not prepared to convict for what they perceive to be good reasons. The best (and oft-cited) example is the acquittal of Clive Ponting, a senior civil servant, of offences contrary to s 2 of the Official Secrets Act 1911, following his disclosure to Tam Dalyell MP of documents relating to the sinking of the General Belgrano during the Falklands War in 1982. No reliance could be placed on the prospect of a jury taking this course in relation to a journalist but no analysis of the position would be accurate without it being mentioned.[95]

C.98 This right of acquittal does not necessarily depend on the law being clear or precise, it relies on the jury acting as a barometer of what the public feels is the acceptable operation of the criminal law.[96] However, although this is an important feature of the jury system, in our view it would not be appropriate to rely on this alone as a protection for rights under the ECHR, relying as it does on the subjective opinions of individual jurors and obliging them to ignore judicial direction.

C.99 We have identified above the concern that jury trial alone is not a sufficient protection of Convention rights as, by its nature, it has the potential to lead to inconsistent results, including on occasion "perverse" verdicts contrary to the evidence.

THE SERIOUSNESS ELEMENT OF MISCONDUCT IN PUBLIC OFFICE

C.100 We have seen in Chapter 2 that without a specific defence of "acting in the public interest", the issue will fall at trial to be considered within the question of whether the conduct is serious enough to amount to a criminal offence.

C.101 The rationale is that if no harm to the public interest is likely to arise from the conduct then it will not amount to an abuse of the public's trust. This was clarified in *Chapman*.[97]

C.102 However, we discuss in Chapter 4 the fact that even following *Chapman* there would appear to be a lack of consensus and guidance as to what harm to the public interest consists of.

C.103 Additionally, there is a concern that dealing with an issue such as public interest, that can serve to protect important rights such as freedom of expression, within

[95] The Leveson Inquiry, part J at [8.2].

[96] See Lord Devlin, *Trial by Jury* [1957] who stated that "the jury is lamp that shows that freedom lives" and T A Green, *Verdict according to conscience* [1985].

[97] [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

an existing element of the offence prevents the issue from being fully scrutinised at trial. Effectively it is not given the weight and consideration it deserves.

C.104 However, this could be contradicted by the fact that during the Operation Elveden prosecutions numerous journalists were acquitted of the charges they faced, where they raised defences based on public interest and the jury were directed to take account of this as part of the assessment of seriousness.

C.105 We can conceive of situations where a breach may occur that is very serious, but at the same time there exists a strong public interest that may justify it. Consequently it is questionable in our view whether the seriousness element of misconduct in public office alone can protect article 10 rights effectively.

THE REASONABLE EXCUSE OR JUSTIFICATION OF MISCONDUCT IN PUBLIC OFFICE

C.106 In theory the situation in paragraph C.105 above is covered by the inclusion in misconduct in public office of the requirement that, in addition to being serious, the misconduct committed must also be without lawful justification or reasonable excuse.

C.107 However, we have seen in Chapters 2 and 4 that in practice this element of the offence is rarely, if ever, separated from seriousness and the other elements of the offence. In any event, it does not operate as a true defence to the common law offence.

C.108 Counter-terrorism legislation that interferes with article 10 rights often includes a defence of "reasonable excuse". As such, the courts have discussed a number of times whether the consideration of article 10 within such a provision is sufficient to protect freedom of expression. It has been said, however, that the court's approach is a cautious one.[98]

C.109 *Brown*[99] was a case involving an offence under section 58 of the Terrorism Act 2000, of collecting information that might be useful to someone committing or preparing for a terrorist act. Here, the Court of Appeal ruled that the question of whether the act done was reasonable as an act of free expression was one that could be left to the jury decide depending on the facts of the individual case.

C.110 Our conclusion therefore is that whilst this requirement of the offence has the potential to provide protection in cases where freedom of expression and public interest are significant considerations, the operation of the offence and its present lack of clarity may mean in reality that it is not a fully effective protection.

Conclusion on article 10

C.111 We consider that there are presently a number of valid concerns as to whether article 10 rights can be adequately protected by the mechanisms currently relied upon in misconduct in public office prosecutions as filters to prevent prosecutions

[98] A Reed and M Bohlander, *General Defences in Criminal Law: Domestic and Comparative Perspectives* (2014).

[99] [2011] EWCA Crim 2751, [2012] 2 Cr App R (S) 10.

and convictions in situations where the “public interest” in the material disclosed outweighs the wrong and/or harm committed.

C.112 These concerns will be given appropriate weight in the development of our law reform options for the offence in our second paper, exploring law reform options.